COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review was granted in the following cases during the months of March and April 2011:

Secretary of Labor, MSHA v. Emerald Coal Resources, LP, Docket No. PENN 2009-697. (Judge Andrews, February 18. 2011)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket N o. SE 2009-881, et al. (Judge Melick, February 3, 2011)

Secretary of Labor, MSHA v. Big Ridge, Inc., Docket Nos. LAKE 2009-490, et al. (Judge Miller, March 1, 2011)

Review was denied in the following cases during the months of March and April, 2011:

Secretary of Labor, MSHA v. Mainline Rock and Ballast, Inc., Docket Nos. CENT 2009-588-M, et al., (Judge Moran, January 28, 2011)

Secretary of Labor, MSHA v. Highland Mining Company, LLC., Docket Nos. KENT 2009-755, et al. (Judge Moran, March 1, 2011)

Secretary of Labor, MSHA v. Shamokin Filler Company, Inc., Docket Nos. PENN 2009-775, et al. (Judge Lewis, Order dated March 11, 2011 - not final)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 11, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-194-M
v.	:	A.C. No. 41-02241-227463
CENTEX MATERIALS, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 18, 2010, the Commission received from Centex Materials, LLC ("Centex") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On August 4, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000227463 to Centex, proposing civil penalties for six citations. In its letter seeking reopening, the operator asserts that it timely mailed payment for three penalties, along with the contest form for the remaining penalties to MSHA's St. Louis office.[1]

The Secretary states that she does not oppose reopening, but notes that MSHA has no record of receipt of the operator's contest either in the Arlington, Virginia office, where it should have been sent, or in the St. Louis, Missouri office.

[1] The Secretary confirms that payment was timely received in MSHA's St. Louis office, but that there were no instructions as to which citations the payment was to be applied. Consequently, MSHA applied the payment to a penalty the operator intended to contest. Pursuant to this order, the Secretary shall reallocate the payment consistent with the operator's penalty contest form.

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

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 11, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-609
v.	:	A.C. No. 36-09224-210949-02
PARKWOOD RESOURCES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 1, 2010, the Commission received from the Secretary of Labor a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary indicates that the operator does not oppose the request to reopen the assessment.

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

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

Having reviewed the facts and circumstances of this case and the Secretary's request, we hereby reopen this matter. Accordingly, the Secretary shall issue a new proposed penalty assessment form to the operator. *See* 29 C.F.R. § 2700.25. The operator shall have 30 days from the date of its receipt of the proposed assessment to file its contest. *See* 29 C.F.R. § 2700.26.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 11, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2010-1486-M A.C. No. 45-00359-201499 A
DARRELL LAMBERT, Employed by LVI ENVIRONMENTAL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 8, 2010, the Commission received from Darrell Lambert ("Lambert") a motion by counsel seeking to reopen a penalty assessment against Lambert under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In his motion, Lambert states that he did not receive MSHA's proposed penalty assessment, which was sent in October 2009 via Federal Express to the company's Seattle, Washington address. Lambert explains that he was laid off from his position in February 2009, that the company closed its Seattle office in April 2009, and that Lambert relocated to a new position within the company in New Jersey in July 2009. Lambert states that he informed the U.S. Postal Service of his change of address and had his mail forwarded. He asserts that he discovered the penalty assessed against him on or around June 25, 2010, when he received a letter forwarded by the U.S. Postal Service from the U.S. Department of Treasury informing him of the delinquency. Lambert further states that his counsel obtained a copy of the proposed

assessment from MSHA on June 30, 2010 and shortly filed this request to reopen. Lambert asserts that he wishes to contest the penalties proposed against him.

The Secretary states that she does not oppose Lambert's request to reopen the penalty assessment.

Here, Lambert never received notification of the proposed penalty assessment as required under Commission Rule 25.[1] Under the circumstances of this case, we conclude that Lambert was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until at least June 25, 2010, when he received a copy of the assessment from MSHA. Under the circumstances of this case, we conclude that Lambert timely contested the proposed penalty, once he had actual notice of the proposed assessment. *See John R. Hurley*, 31 FMSHRC 1331, 1332 (Dec. 2009); *Michael Cline*, 31 FMSHRC 354, 355-56 (Mar. 2009); *Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005) (all concluding that the proposed assessment was not final because the agent did not properly receive the proposed assessment and construing the agents' submission as a timely contest).

[1] Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or *any other person against whom a penalty is proposed* of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25 (emphasis added).

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 11, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2011-193-M
v.	:	A.C. No. 05-00037-223549 8UJ
ARSI CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 9, 2010, the Commission received from Arsi Corporation a motion through counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 8, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 11, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2011-200-M
v.	:	A.C. No. 02-00150-229976 EDN
ACE PIPE CLEANING	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 12, 2010, the Commission received from Ace Pipe Cleaning a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 17, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-820-M
v.	:	A.C. No. 54-00001-216737
CEMEX de PUERTO RICO	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 1, 2010, the Commission received from Cemex de Puerto Rico ("Cemex") a request reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On April 13, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000216737 to Cemex, proposing penalties for 11 citations issued to the operator. By a letter dated May 25, 2010, Cemex requests reopening so that it can contest two of the penalties. Cemex states that the company official to whom the assessment was directed was "out the company." The Secretary originally opposed reopening on the ground that Cemex's explanation was unclear regarding whether the official was out temporarily or permanently and did not address why another individual could not have filed the contest on a timely basis.

After seeking and obtaining Commission permission to file a late reply addressing the Secretary's concerns, Cemex explained that the assessment was received by Cemex and put on the official's desk in its unopened envelope because he was expected back soon from a business trip. He did not return as expected, however, as he instead took an unscheduled vacation and thus did not return until near the end of the 30-day period. His assistant did not realize that the envelope containing the assessment was of a time sensitive nature. Consequently, the assessment was not acted upon until after the official's return, at which point Cemex promptly filed its motion to reopen. In light of this explanation, the Secretary no longer opposes reopening of the assessment as to the two penalties.

Having reviewed Cemex's request and the Secretary's responses, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-908-M
v.	:	A.C. No. 09-01020-212332 C5A
DBS, INC.	:	

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

ORDER

BY THE COMMISSION:

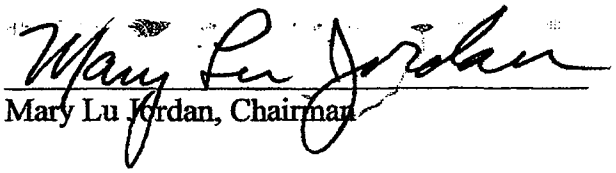
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 2, 2010, the Commission received from DBS, Inc., a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On July 15, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

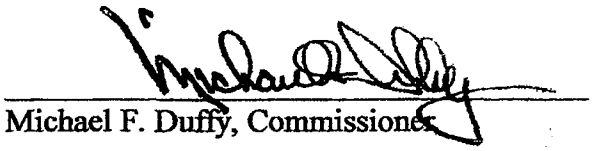
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

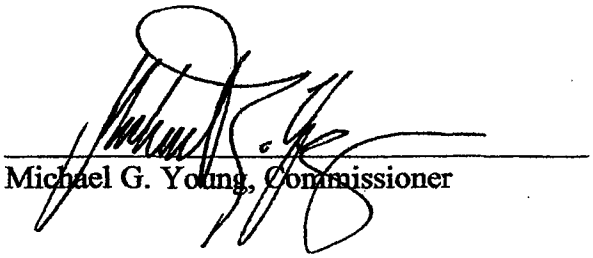
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



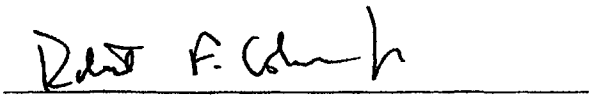
Mary Lu Jordan, Chairman



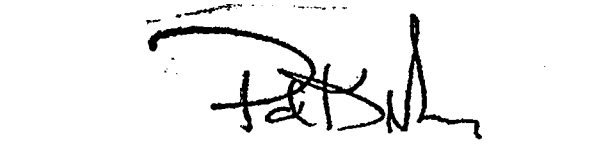
Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1466
v.	:	A.C. No. 05-02962-215776
COLOWYO COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 7, 2010, the Commission received from Colowyo Coal Company a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On July 21, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

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Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 2010-239-M
ADMINISTRATION (MSHA)	:	A.C. No. 30-02994-206555
	:	
v.	:	
	:	Docket No. YORK 2010-240-M
BROWN EXCAVATION COMPANY, INC.	:	A.C. No. 30-02994-211798

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On May 4, 2010, the Commission received from Brown Excavation Company ("Brown") a letter seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] On May 26, 2010, the Secretary of Labor filed oppositions to the operator's request to reopen.

On January 6, 2011, we issued an order directing Brown to show cause within 30 days of the date of the order why its request to reopen should not be denied as moot. We noted that a review of the Data Retrieval System maintained by the Department of Labor's Mine Safety and Health Administration ("MSHA") revealed that the operator has paid the civil penalties that are the subject of its request to reopen.

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

Brown has filed no response to the show cause order. Accordingly, we deny Brown's request to reopen as moot.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 16, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-469-M
v.	:	A.C. No. 09-00188-198565
C-E MINERALS	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 1, 2010, the Commission received from C-E Minerals ("C-E") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On September 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198565 to Mullite Company of America, proposing a civil penalty for one citation. In its letter seeking reopening, C-E states that the "citation was contested and appears in [MSHA's] Mine Data Retrieval System as contested[,] but apparently was not received within the 30 day allowed time frame." The operator further provides its defense of the violation. C-E does not explain the relationship between it and Mullite Company of America.

On March 18, 2010, the Commission received a response from the Secretary of Labor stating that she opposes the operator's request to reopen the assessment. The Secretary states that the proposed assessment was delivered to, and signed for by, the operator on October 6, 2009. Attached to the Secretary's opposition is a copy of MSHA's delinquency notice dated December 23, 2009. The Secretary states that the operator did not mail its contest until December 29, 2009, and fails to explain why it did not contest the assessment within 30 days.

Having reviewed C-E's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. C-E's statement that it contested the citation is inconsistent with the record. According to the Secretary, C-E's contest was filed more than a month and a half after the proposed assessment became a final order. In addition, C-E's failure to explain why it did not contest the proposed assessment on time does not provide the Commission with an adequate basis to reopen. Furthermore, C-E has failed to explain why it delayed approximately two months in responding to the delinquency notice sent by MSHA.[1] Accordingly, we hereby deny without prejudice C-E's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

[1] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

The words "without prejudice" mean C-E may submit another request to reopen this case so that it can contest the penalty assessment.[2] Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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[2] If C-E submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. C-E should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. C-E should also submit copies of supporting documents with its request to reopen. C-E should further explain in similar detail why it delayed in responding to MSHA's delinquency notice. In addition, C-E should explain the relationship between it and Mullite Company of America. Finally, C-E should discuss whether it has already paid the penalty proposed by the Secretary.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 17, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2011- 171
	:	A.C. No. 15-19297-215828
	:	
v.	:	Docket No. KENT 2011- 172
	:	A.C. No. 15-02057-215805
SAPPHIRE COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 3, 2010, the Commission received motions by counsel to reopen penalty assessments issued to Sapphire Coal Company ("Sapphire") that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2011-171 and KENT 2011-172, both captioned *Sapphire Coal Company*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On April 6, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000215828 and 000215805 to Sapphire. On June 30, 2010, MSHA issued delinquency letters in both cases. Sapphire asserts that it timely faxed contest forms to MSHA's Civil Penalty Compliance Office on April 14, 2010 – six business days after issuance of the proposed assessment. As support, Sapphire submits, in part, copies of the documents allegedly filed, including the proposed assessment forms, and a facsimile confirmation page.[2] Sapphire paid the remaining uncontested citations on May 10, 2010.

Although the Secretary states that MSHA has no record of receiving penalty contest forms for the referenced cases, she does not dispute Sapphire's assertions. The Secretary nevertheless opposes Sapphire's request to reopen on the grounds that Sapphire has failed to explain why it waited four months after MSHA issued the delinquency letters to file its motions to reopen.

Having reviewed Sapphire's request to reopen and the Secretary's response thereto, we conclude that Sapphire has failed to explain why it delayed approximately four months in responding to the delinquency notice sent by MSHA.[3] Therefore, the operator has failed to provide an adequate basis for the Commission to reopen the penalty assessments. Accordingly, we hereby deny without prejudice Sapphire's requests to reopen. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Sapphire may submit another request to reopen Assessment Nos.

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[2] Although the facsimile confirmation page demonstrates that something was faxed to MSHA's Civil Penalty Compliance Office, the confirmation fails to indicate what was being faxed or the specific case numbers involved.

[3] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining* Co., 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

000215828 and 000215805.[4] Any amended or renewed request by the operator to reopen this assessment must be filed within 30 days of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[4] We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008). Accordingly, where the Secretary raises the issue of the delay between receipt of a delinquency letter and filing of the request to reopen, an operator who does not explain why it took as long as it did to request reopening, after it was informed of a delinquency, does so at its peril. Sapphire should also submit copies of supporting documents with its request to reopen.

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March 21, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-570-M
v.	:	A.C. No. 34-00353-198933
BONHAM CONCRETE, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 29, 2010, the Commission received from Bonham Concrete, Inc. ("Bonham Concrete") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On September 30, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198933 to Bonham Concrete, proposing civil penalties for 12 citations. In its letter seeking reopening, Bonham Concrete states that it did not request a hearing at the time it received the proposed assessment because it thought that the penalty was an "automatic fine" and "did not know [it] could ask for a reduction" of the penalty.

On April 7, 2010, the Commission received a response from the Secretary of Labor stating that she opposes the operator's request to reopen the assessment. The Secretary states that ignorance of the law and inability to pay are not permissible grounds for reopening. She notes that the proposed assessment itself, the Commission's procedural rules and MSHA's rules make it clear that the operator has 30 days to file a contest. She also notes that the operator has been in business since 1974, has successfully contested proposed assessments in the past, and has two pending Commission proceedings, Docket Nos. CENT 2008-550 and 551-M.

Having reviewed Bonham Concrete's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Bonham Concrete's statement that it did not know it could ask for a reduction in the penalty does not provide the Commission with an adequate basis to reopen. Specifically, Bonham has failed to explain why it failed to file a contest of the proposed assessment at issue in this proceeding, when it previously has successfully contested proposed assessments in Docket Nos. CENT 2008-550 and 551-M. Furthermore, Bonham Concrete has failed to explain why it delayed approximately three months in responding to the delinquency notice sent by MSHA.[1] Accordingly, we hereby deny without prejudice Bonham Concrete's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).

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[1] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

The words "without prejudice" mean Bonham Concrete may submit another request to reopen this case so that it can contest the penalty assessment.[2] Any such request must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

---

[2] If Bonham Concrete submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Bonham Concrete should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Bonham Concrete should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting. Bonham Concrete should further explain in similar detail why it delayed in responding to MSHA's delinquency notice.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 21, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2010-468-M A.C. No. 40-02036-0201293 E24
AUSTIN POWDER COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 1, 2010, the Commission received from Austin Powder Company ("Austin Powder") a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On October 22, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000201293 to Austin Powder for two citations that MSHA had issued to the operator. Austin Powder states that it sent an email to its counsel to an inactive account, resulting in the late filing of its contest. Austin Powder contends that it became aware of its mistake when MSHA notified it of the delinquency.[1]

On March 23, 2010, the Commission received a response from the Secretary indicating that she does not oppose the operator's motion. However, she notes that the operator should have been alerted at the time that it sent the email to its counsel that the email did not properly transmit and warns that she may oppose future requests involving similar facts.

[1] In its motion, the operator refers to attachments relating to the email correspondence and the delinquency notice, but did not initially attach those documents to its motion. We caution counsel to ensure that its filings to the Commission are accurate and complete.

Having reviewed Austin Powder's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 21, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-477
v.	:	A.C. No. 01-02901-198781
DRUMMOND COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 3, 2010, the Commission received from Drummond Company, Inc., a letter by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On April 1, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that the motion filed by Drummond Company is sufficient to reopen a penalty assessment that has become final under section 105(a) in this case.

I conclude that Drummond has failed to provide a sufficient explanation for its failure to timely contest the proposed penalty assessment. In the letter, Drummond's counsel's explained that on the day that company management directed him to contest the citations in the proposed assessment, he was with his wife, who was in the hospital undergoing surgery. Over the next several days, counsel cared for his wife as she recovered. He then states, "[d]uring that time, the email eluded my notice, and, as a result, I was unaware of its existence and did not file the notice of contest in a timely manner."

MSHA issued the Proposed Assessment in this case on September 30, 2009. Drummond filed its motion to reopen on March 2, 2010. Presumably during those five months, MSHA sent Drummond the usual delinquency notice informing the company that the proposed assessment had become a final order of the Commission. Although neither Drummond nor the Secretary has furnished us the delinquency notice in this case, I would assume from experience that it would have been sent around the middle of December 2009.

Although counsel's losing track of management's email to him as he was caring for his wife is both understandable and excusable, it does not account for the five-month delay between the issuance of the proposed assessment, nor does it account for Drummond's inaction upon receiving the delinquency notice from MSHA. Hence, I conclude that grounds for reopening have not been established. *See C.S.A. Mining, Inc.*, 31 FMSHRC 773, 775 (July 2009); *Higgins Stone Co.*, 32 FMSHRC 33, 34-35 (Jan. 2010). The Commission should deny this motion without prejudice.

R.F.C.

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 25, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of MARK GRAY	:	Docket No. KENT 2009-1429-D
	:	
v.	:	
	:	
NORTH FORK COAL CORPORATION	:	

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

ORDER ON PETITION FOR RECONSIDERATION
AND APPLICATION FOR STAY PENDING APPEAL

BY: Jordan, Chairman; Duffy, Young, and Nakamura, Commissioners

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). On January 7, 2011, the Commission issued a decision ("*Decision*") reversing an administrative law judge's order which had dissolved his previous order implementing the temporary economic reinstatement of miner Mark Gray with North Fork Coal Corporation ("North Fork"). 33 FMSHRC 27 (Jan. 2011). On January 18, 2011, North Fork, pursuant to Commission Procedural Rule 78(a), 29 C.F.R. § 2700.78(a), timely petitioned the Commission to reconsider the *Decision*. On January 21, 2011, North Fork also applied to the Commission to stay the *Decision* pending federal court review. On February 1, 2011, the Secretary of Labor filed a response in opposition to the stay request. On February 4, 2011, Gray filed responses in opposition to North Fork's petition for reconsideration and its application for stay.

For the reasons that follow, we (1) grant the petition for reconsideration in part and (2) deny the application for stay pending appeal.

I.

Factual and Procedural Background

The background of Gray's discrimination claims, brought under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), are set forth in the Commission's decision reversing the judge. *See Decision* at 1-3. Pursuant to section 105(c)(2), upon the application of the Secretary, on September 8, 2009, Administrative Law Judge Gary Melick ordered Gray temporarily reinstated to his position at North Fork after he had been discharged by the operator. 31 FMSHRC 1143, 1146 (Sept. 2009) (ALJ). The three parties – the Secretary of Labor, Gray, and North Fork – each represented by separate counsel, agreed that instead of returning to work at North Fork, Gray should be economically reinstated. Consequently, on September 17, 2009, the judge issued a supplemental order setting forth the terms of the economic reinstatement to which the parties had indicated that they had agreed, which was to be effective as of September 14, 2009. 31 FMSHRC 1167, 1168 (Sept. 2009) (ALJ).

On November 23, 2009, the Secretary informed the judge that she had notified Gray that, as a result of her investigation of his complaint, she had decided not to file a complaint pursuant to section 105(c)(2) with the Commission on Gray's behalf. 31 FMSHRC 1420 (Dec. 2009) (ALJ). On December 2, 2009, the judge held that under the circumstances the order of temporary reinstatement must be dissolved and the temporary reinstatement proceeding dismissed. *Id.* On December 30, 2009, Gray, through his own counsel, filed an action on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3).[1]

Both the Secretary and Gray petitioned the Commission to review the judge's order dissolving the temporary reinstatement order in light of Gray's section 105(c)(3) action. The Commission granted the petitions, and in the *Decision,* a Commission majority reversed the judge's decision to dissolve reinstatement. The majority held that a miner's right to temporary reinstatement continues until the Commission issues a final order on the merits of the miner's allegations of discrimination, whether that order be issued under section 105(c)(2) or section 105(c)(3) of the Mine Act. *See Decision* at 7-16 (opinion of Chairman Jordan and Comm'r Nakamura), 19-26 (opinion of Comm'r Cohen).

In reversing the judge, the Commission majority ordered that Gray be economically reinstated retroactive to September 14, 2009. *Id.* at 18, 19. That date was the date specified in the judge's supplemental order as the first date of economic reinstatement. The Commission majority also stated that reinstatement was to be at Gray's former rate of pay, including any pay increases, bonuses, and other benefits. *Id.* at 18, 19. This was based on the judge's supplemental order. *See* 31 FMSHRC at 1167-68.

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[1] A hearing in the case, docketed with the Commission at No. KENT 2010-0430-D, was recently held before another Commission administrative law judge. The issuance of her decision is currently pending.

II.

Disposition

A. The Petition for Reconsideration

North Fork requests that the Commission reconsider its *Decision* and modify the economic reinstatement it ordered both retroactively and going forward. North Fork learned during the discrimination case on the merits that Gray had been working at another mining job. NF Pet. at 3 n.1. North Fork contends that it first became aware of Gray's employment in August 2010 when he answered interrogatories that had been served during the previous January. *Id.* At the December 2010 hearing on the merits of his discrimination claim, Gray testified that he had been continuously employed by one or more mining companies since June 2009, the month after he had been terminated from his position at North Fork. *Id.* at 3 & Ex. A at 223 (KENT 2010-430-D hearing transcript). North Fork submits that to provide full economic reinstatement to the miner in these circumstances is contrary to the intent of the temporary reinstatement provisions of the Mine Act, and that, accordingly, the *Decision* should be modified so that North Fork's obligation is only to put Gray in the same economic position he would have been in had North Fork not terminated his employment. *Id.* at 4-6.

In his response, Gray urges the Commission to deny the petition for reconsideration. Gray first contends that the issue could have been raised by North Fork prior to the Commission's issuance of the *Decision*, and because it was not, the Commission does not have jurisdiction to consider the issue. G. Resp. at 7-9. Gray further contends that the Commission can order nothing but full adherence to the judge's temporary economic reinstatement order, because the order was the product of an agreement between the parties that has contractual effect. *Id.* at 9-11. Gray reports that he has earned significantly less in the other positions than he would have had while working at North Fork, and that he did not receive health insurance at those positions as he did when he worked for North Fork – a major difference given that Gray has two young children and his wife suffers from a serious ailment. *Id.* at 4.

The Secretary, in her response in opposition to the stay request, stated that she "has not taken a position" on the petition for reconsideration. S. Resp. at 4 n.2. The Secretary has filed nothing further regarding the petition.

Pursuant to section 105(c)(2), the judge's original September 8, 2009 order of reinstatement established that Gray had the right to return to his position at North Fork while his discrimination claim was pending, and that during that time North Fork was obligated to permit him to work at that position as if his termination had never occurred and to pay him accordingly. The parties subsequently agreed that Gray's physical presence at the mine would not be required, but that North Fork would still compensate him as if he was working at the mine. This type of economic reinstatement is not unusual. *See, e.g., Sec'y on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001).

The parties, consistent with the Commission's procedural rules and the judge's continuing jurisdiction over the matter, submitted their agreement to the judge and moved that it be entered as an order in the case. *See* 29 C.F.R. § 2700.10 (a) ("[a]n application for an order shall be by motion . . . and shall set forth the relief or order sought") and § 2700.45(e)(4) (except during appellate review of an order temporarily reinstating a miner, a judge retains jurisdiction over the reinstatement proceeding even after he has issued his order). Because the economic reinstatement agreement was subsumed in the judge's order, and described how the parties proposed to implement relief ordered by the judge pursuant to the Mine Act, we do not believe we can ignore that statute in determining the construction, application, and effect of the agreement. Consequently, we reject Gray's argument that the issue raised in North Fork's petition should be decided solely by reference to contract law.

North Fork argues that under the Mine Act, Gray's earnings while he is employed elsewhere during his economic reinstatement should be used to offset the amounts he is owed by North Fork. NF Pet. at 4-5. North Fork confuses the legal principles that apply to back pay awards if and when the miner succeeds in his discrimination complaint on the merits, with the legal principles governing the wholly separate temporary reinstatement proceeding.

With regard to the former, the Commission has noted that the provision for back pay and other remedies in section 105(c) awarded once it has been established that a miner was discriminated against, is modeled after the remedial provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c). *Sec'y on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 n.4 (Jan. 1982). Under that statute, concepts of offset and the duty to mitigate damages are routinely applied to back pay awards, and the Commission has incorporated those concepts in computing back pay awards under section 105(c). *See, e.g., Sec'y on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142-44 (Feb. 1982). We have recognized that back pay is designed to make the miner as nearly whole as possible for the losses he or she has suffered between the time the miner was discriminated against and the time his or her claim of discrimination was upheld. *Id.* at 143. If the miner does not prevail, the miner is due no award.

In contrast, as is explained at length in the *Decision*, the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. *Decision* at 14-15 (Chairman Jordan and Comm'r Nakamura), 25-26 (Comm'r Cohen). The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her.[2]

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[2] A claim by the miner for compensation for the time between his or her termination and a return to work under a reinstatement order could be heard later, as part of the discrimination case on the merits. Should the miner prevail, the relief would be crafted with the intention of

Conversely, if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.

Consequently, we reject the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before us. Unlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements. The agreement which formed the basis of the judge's order was arrived at after negotiations between the parties. Moreover, we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge.

The basis for the objection which North Fork raises in its petition is that, from the outset of his economic reinstatement, Gray was working at other mines, and therefore to require payment of full wages and benefits to Gray results in a windfall to him. NF Pet. at 4. However, it was North Fork that proposed economic reinstatement and nothing would have prevented North Fork in September 2009, from negotiating an agreement that adjusted payments to Gray in the event he obtained alternative employment during the period of temporary relief.[3]

Our analysis of the amounts due to Gray involves three separate periods of time. The first time frame extends from September 14, 2009, until December 2, 2009, the point at which, presumably, North Fork stopped making payments because the judge had dissolved the order of temporary reinstatement.[4] North Fork states that it has fully compensated Gray, in accordance with the terms of the economic reinstatement order, for that period of time. NF Pet. at 3. This

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making the miner whole, with back pay for the entire period he or she was out of work, less appropriate offsets. *See Kentucky Carbon*, 4 FMSHRC at 1-2; *Northern Coal*, 4 FMSHRC at 144.

[3] We note that Gray testified at the September 2, 2009 temporary reinstatement hearing and was cross-examined at length by counsel for North Fork, but the subject of what, if any, work Gray had done since being terminated by North Fork four months earlier was never raised. Tr. 60-90. After the judge ordered temporary reinstatement on September 8, 2009, the counsel for North Fork contacted the counsel for Gray and raised the issue of temporary reinstatement because "North Fork did not want Mr. Gray back at the mine." G. Resp., Aff. of Tony Oppegard at 1.

[4] We reject Gray's argument that the Commission lacks jurisdiction to consider the petition for reconsideration because North Fork could have raised the same argument earlier in the proceeding. After the judge dissolved the temporary reinstatement order, North Fork ceased making payments and, therefore, had no reason to seek a forum in which to argue that any payments owed to Gray under the economic reinstatement agreement should be offset by his earnings from alternate employment.

contention has not been disputed by Gray. Assuming that is the case, our *Decision* should not be read to require any further payment by North Fork; however, neither has North Fork the right to recover or "clawback" some of what it paid Gray, based on earnings he received elsewhere, for that period of time.

The second time period runs from December 2, 2009 (the point at which North Fork stopped making payments because the order of temporary reinstatement had been dissolved) until January 7, 2011 (when we reversed the judge's order dissolving temporary reinstatement) – hereinafter "the Interim Period." While our decision awarded relief retroactively, under the facts of this case, as now further explained by the parties, we conclude it would be inequitable to blindly apply the terms of the economic reinstatement order during this Interim Period, which largely encompasses the time during which the Commission was considering Gray's appeal. The Commission has recognized that "so long as our remedial orders effectuate the purposes of the Mine Act . . . we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances." *Northern Coal*, 4 FMSHRC at 142.

In the context of discrimination remedies, retroactive relief is generally awarded only to the extent that it is appropriate, and the equitable nature of the remedies ordered are considered in determining which remedies should apply retroactively. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 718-23 (1978) (vacating order granting retroactive relief under Title VII). Generally, a ruling granting temporary economic relief does not engender a large retroactive pay award. This is because most temporary reinstatement cases are resolved quickly, due to the strict deadlines in the Commission's procedural rules.[5] Although we determined it was appropriate to apply our *Decision* retroactively, we appreciate that this presents the unusual situation of imposing significant retroactive liability in a context where parties would not normally have anticipated such a result.

Moreover, it is understandable that North Fork did not seek to modify the economic reinstatement order when it learned of Gray's other employment in August 2010. At that time, it was not liable for any economic reinstatement payments, as the judge's order had been dissolved.

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[5] For example, 29 C.F.R.§ 2700.45(c) and (e), requires that a hearing on an application for temporary reinstatement must be requested within 10 calendar days following receipt of the Secretary's application for temporary reinstatement, the hearing must be held within 10 calendar days following receipt of the request, and the judge must issue a written order within 7 calendar days following the close of the hearing. A party seeking review of such an order must petition the Commission within 5 business days following receipt of the order; briefing is expedited; and the Commission's decision must generally be rendered within 10 calendar days of the close of the briefing period. 29 C.F.R. § 2700.45(f). This appeal did not fall under this procedural rule because it did not involve review of an order "granting or denying an application for temporary reinstatement," but instead concerned the Secretary's petition for discretionary review of the judge's action in dissolving the order of economic temporary reinstatement and dismissing the temporary reinstatement proceeding.

There was no need to request a modification. Indeed, it is not even clear whether such a modification request could have been successful, because due to the dissolution of the order, objections regarding standing and mootness might have been raised.[6] Consequently, we conclude that offsetting the temporary reinstatement award by the amount of wages Gray earned during this period of time is appropriate.

We view the third time period as commencing when the *Decision* was issued on January 7, 2011, reversing the judge's order dissolving temporary reinstatement. From that date, going forward, we conclude that the judge's earlier supplemental order incorporating the parties' agreement should be applied, with no offset. The obligation to comply with the terms of that order as written, with no offset, will continue unless and until the parties negotiate a new agreement and it is entered as a superceding order by the judge, or either party invokes the judge's continuing jurisdiction and the judge modifies or rescinds the existing order. In the event a motion is submitted to modify or rescind the previously entered consent order, the judge is required to examine all the relevant circumstances, in accordance with section 105(c) of the Mine Act, and not just whether the miner or operator still consents to it.

Accordingly, we grant North Fork's petition in part and modify the *Decision* as follows:

1. For the period beginning September 14, 2009 (the date the judge's order of economic reinstatement took effect), until the date of the judge's dissolution of the economic reinstatement order on December 2, 2009, North Fork was obligated to pay Gray pursuant to the terms of the judge's order of economic reinstatement. If it did so, it has no additional monetary liability to Gray for that period of time. North Fork has no right to recover from Gray any money based on earnings he received elsewhere during this period.

2. For the period beginning December 2, 2009, until January 7, 2011, the date of the *Decision* (the period we have characterized as "the Interim Period"), North Fork shall pay Gray pursuant to the terms of the judge's order, offset by his compensation and benefits from employment during that period. Because the record in this case does not reflect the amount of compensation and benefits Gray earned from December 2, 2009, until January 7, 2011, we are remanding this matter to the judge for the computation of the net amount Gray is owed for the Interim Period.

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[6] Commissioner Cohen postulates that if the judge had not dissolved the order of economic reinstatement, Gray would have received economic reinstatement in accordance with the agreement of the parties, with no offset for any other work he may have been doing "at least through the date" of the decision of the judge who is hearing the case on the merits. Slip op. at 12. We question whether North Fork, if it was still under the order to pay Gray, would have taken no steps to modify that economic reinstatement order once it discovered in August 2010 that Gray was working at a second job.

3. For the period from January 7, 2011, through the end of Gray's temporary economic reinstatement, North Fork shall pay Gray pursuant to the terms of the judge's September 8, 2009 order (unless that order is modified upon motion of a party) with no offset from Gray's other employment.

This case is remanded to Judge Melick. Without waiting to hear from the judge, the parties should begin negotiating the amounts Gray is owed by North Fork consistent with the *Decision* as modified. These amounts would be payments pursuant to the terms of the economic reinstatement agreement (including for any benefits which Gray was or is being deprived of while he foregoes working at North Fork), as offset by his compensation (including the value of benefits received) from employment during the Interim Period only. In the event that the parties are unable to come to an agreement regarding those amounts within 20 days of the date of this order, they shall report so to the judge, who should expeditiously resolve any dispute and order the implementation of the *Decision* as modified.[7]

B. The Application for Stay Pending Appeal

We read North Fork's application for a stay as totally independent of its petition for reconsideration. Regardless of the result of its petition for reconsideration, North Fork is urging the Commission to stay the effect of the *Decision* in its entirety while North Fork pursues its appeal rights under the Mine Act.

Rule 18 of the Federal Rules of Appellate Procedure provides that "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." In *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987), the Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958): (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Id.* at 925. The court also made clear that a stay constitutes

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[7] Any petition for federal court review of the *Decision* pursuant to section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), must generally await resolution of the remand to the judge, a further petition for discretionary review to the Commission, and disposition by the Commission of the petition. Even then, the court of appeals does not have exclusive jurisdiction in the proceeding until such time as the record before the Commission is filed with the court. *See Sec'y on behalf of Smith v. The Helen Mining Co.*, 14 FMSHRC 1993, 1994 (Dec. 1992). Under Rule 17(a) of the Federal Rules of Appellate Procedure, the record is generally due in the court within 40 days of service upon the Commission of the petition for review. Thus, under the judge's continuing jurisdiction pursuant to Commission Procedural Rule 45(e)(4), the parties should have ample time to address the issue of the reinstatement going forward, should it be raised as discussed *supra*.

"extraordinary relief." *Id.*; *see also W.S. Frey Co.*, 16 FMSHRC 1591 (Aug. 1994). The burden is on the movant to provide "sufficient substantiation" of the requirements for the stay. *Stillwater Mining Co.*, 18 FMSHRC 1756, 1757 (Oct. 1996).

1. Whether It is Likely That North Fork Will Prevail on the Merits of its Appeal

North Fork contends that there is a substantial likelihood it will prevail on appeal, describing the *Decision* as having reversed 30 years of Commission precedent. NF Appl. at 3. The Secretary responds by correctly pointing out that the issue of whether an order of temporary reinstatement obtained by the Secretary under section 105(c)(2) of the Mine Act remains in effect while a miner pursues his own discrimination complaint under section 105(c)(3) had never before been decided by a Commission majority. S. Resp. at 11-12 n.5; *see Decision* at 3. We are not persuaded that there is a substantial likelihood that North Fork will succeed in overturning the *Decision*. *See Decision* at 9-16, 20-23, 24-26.

2. Whether North Fork Will Suffer Irreparable Harm Should a Stay Not Issue

North Fork alleges that it will be irreparably harmed by being required to pay Gray all that he is owed under the economic reinstatement agreement until such time as the miner's section 105(c)(3) case is heard and decided, because North Fork would be unlikely to recover the payments should the company succeed on appeal. Appl. at 3. North Fork's argument is one that, if accepted, would effectively nullify the temporary reinstatement provisions of the Mine Act. Reinstated miners often are not ultimately successful on the merits of their discrimination claims, even when their claim is brought by the Secretary pursuant to section 105(c)(2). There is nothing in the Mine Act which contemplates that such miners would be expected to repay the amounts paid them pursuant to their reinstatement orders; indeed, that would run counter to the very spirit of the provision, which is to provide immediate relief to complaining miners while they wait for their cases to be decided. *See Decision* at 14-15, 25-26. That it is the miner, instead of the Secretary, who ultimately brings the case is irrelevant to this principle.

In any event, "[i]t is also well-settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Virginia Petroleum*, 259 F.2d at 925. Consequently, we disagree with North Fork that not staying the *Decision* will lead to it suffering irreparable harm; it will merely be in the same position it would have been had the judge not erred by dissolving the economic reinstatement order.

3. Whether Other Interested Parties Would be Adversely Affected by a Stay

North Fork also asserts that Gray will suffer little or no harm from a stay pending appeal. Appl. at 3. Gray and the Secretary disagree. G. Opp'n at 3-4; S. Resp. at 15-16. As was discussed previously, the purpose of the temporary reinstatement provisions is to put the miner, during the time he pursues his discrimination claim, in no worse a position than he was while

working for the operator. Because Gray is receiving significantly less in pay and benefits at present than he would be if he were working at North Fork, it is clear that Gray would be adversely affected by a stay pending appeal.

4. Whether a Stay Would Serve the Public Interest

North Fork contends that a stay would serve the public interest by preventing the inequitable result of payment of back pay and benefits to a miner whose termination may later be determined to be entirely lawful. Appl. at 3. North Fork ignores the beneficial effect of the Commission's decision upon the miner and his ability to pursue his discrimination claim. Accordingly, while a stay would serve the private interest of North Fork, we fail to see how a stay would serve the public interest, as set forth by Congress in the Mine Act's temporary reinstatement provisions.

Finally, we note that this issue has already been addressed in the companion to this case. On February 15, the Commission denied the operator's request in *Baird v. PCS Phosphate Co.*, Docket No. SE 2010-74-DM, to stay the Commission's earlier decision. 33 FMSHRC 127 (Feb. 2011) (denying motion to stay *Baird v. PCS Phosphate Co.*, 33 FMSHRC 5 (Jan. 2011)). A federal appeals court subsequently also summarily denied the operator's request for stay pending appeal to that court. *See PCS Phosphate Co. v. FMSHRC* (4th Cir. No. 11-1102, Mar. 4, 2011).[8]

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[8] Commissioners Duffy and Young would grant North Fork's application and stay the effect of the Commission's January 7, 2011, decision pending appeal, because that decision constituted a substantial departure from the Commission's past practice with regard to the question at issue. *See Decision* at 27 (Commissioners Duffy and Young, dissenting). However, although they dissented from the decision of a majority of Commissioners to interpret the Mine Act to permit a reinstated miner's right to reinstatement to extend through the course of the section 105(c)(3) proceeding, that decision having been issued, they agree with the Chairman and Commissioner Nakamura as to the disposition of the operator's petition for reconsideration.

III.

Conclusion

For the foregoing reasons, (1) North Fork's petition for reconsideration is granted in part, and our decision of January 7, 2011, is modified and remanded to the judge as described herein; and (2) North Fork's application for stay pending appeal is denied.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Cohen, concurring in part and dissenting in part:

I concur with the majority's Order, except for its conclusion to abrogate the parties' agreement, subsumed in Judge Melick's September 17, 2009 supplemental order, so as to impose an offset for the period from December 2, 2009 to January 7, 2011 ("the Interim Period").

The majority's opinion establishes that the principles applicable to temporary reinstatement are different from an award of back pay. The majority opinion also makes clear that temporary economic reinstatement results from agreement among the parties, as in this case, in situations when the operator does not want the complainant-miner back at work. As the majority states, the Commission judge approved the economic reinstatement agreement subsequent to a hearing where Gray testified and where the operator could have questioned him about what, if any, work he had performed since his termination by North Fork. Slip op. at 5 n.3. Based on these principles, I do not see grounds for imposing an offset against Gray's economic reinstatement based on his earnings.

The majority's first basis for imposing an offset is that the Interim Period "largely encompasses the time during which the Commission was considering Gray's appeal." Slip op. at 6. Gray's appeal was from Judge Melick's December 2, 2009 order, which erroneously terminated Gray's temporary economic reinstatement. Another judge, Priscilla Rae, held a hearing on the merits of Gray's underlying section 105(c)(3) discrimination complaint on December 15, 2010, has just received the parties' briefs, and has not yet issued a decision. If Gray's temporary economic reinstatement had not been erroneously terminated, he would still be receiving it, and would continue to receive it at least through the date of Judge Rae's decision. Thus, the fact that the Commission was considering Gray's appeal on the termination of temporary reinstatement between December 2, 2009 and January 7, 2011, is irrelevant.

A second basis for the majority's imposition of an offset during the Interim Period is that the Commission's January 7, 2011 Decision imposed "significant retroactive liability in a context where parties would not normally have anticipated such a result." Slip op. at 6. In referring to "parties," presumably the majority is speaking of North Fork. Whether or not North Fork "anticipated" significant retroactive liability must be viewed in the context of the facts that (1) North Fork, which did not want Gray back at its mine after the judge initially ordered temporary reinstatement on September 8, 2009, initiated the discussions which led to the temporary economic reinstatement,[1] (2) North Fork agreed to pay Gray the full amount he would have been paid for working at its mine, but for his firing, (3) in a lengthy cross-examination of Gray at the hearing on temporary reinstatement on September 2, 2009, four months after his firing, at which time Gray was already working at another mine, North Fork's counsel failed to inquire about any other work which Gray might have been doing,[2] (4) North Fork could not have

[1] *See* slip op. at 5 n.3. The Affidavit of Tony Oppegard in this regard is uncontradicted.

[2] *See* slip op. at 5 n.3.

been relying on settled Commission law because the previous decision addressing the issue of temporary reinstatement in the context of a miner's discrimination complaint under section 105(c)(3) of the Mine Act, *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009), had been a two-to-two split among the then-four Commissioners, and (5) since the decision in *Phillips*, a fifth Commissioner had joined the Commission, and would presumably break the tie. These facts call into question the reasonableness of North Fork's non-anticipation of significant retroactive liability.

Moreover, the liability was retroactive only because the Secretary chose not to file a discrimination complaint on Gray's behalf under section 105(c)(2) of the Mine Act. Whether or not the Secretary would file a 105(c)(2) complaint was not known to North Fork when it initiated discussions and agreed to pay Gray what he would have earned as its employee, regardless of any work he might perform during the period of temporary economic reinstatement. If the Secretary had chosen to file a section 105(c)(2) complaint, North Fork would have had the same liability, only it would have had to make the payments as they accrued. The majority is imposing a significant offset on Gray based on the circumstance of the Secretary's decision not to file a section 105(c)(2) complaint.

Additionally, the majority's reliance on the parties' "anticipation" ignores Gray's anticipation. When Gray negotiated the agreement for temporary economic reinstatement, he was already working at the other mine. The Secretary had not yet made a decision as to whether to file a section 105(c)(2) complaint. Presumably, Gray's "anticipation" was that he would receive his full North Fork salary and benefits (for his forbearance from returning to work at North Fork's mine), together with the money from his work at the other mine, for whatever time it took for the Commission to resolve his discrimination complaint. He certainly did not anticipate that his work at the other mine would be for the ultimate economic benefit of North Fork , the result of the majority's decision.

I understand that the approach of not imposing an offset during the Interim Period puts Gray in a position that one could call "double dipping," in that he would be receiving money from North Fork for not working there at the same time as he receives wages from another employer. Yet this is precisely what North Fork bargained for. In exchange for Gray not returning to work at its mine while his discrimination case was pending before the Commission, North Fork agreed to pay him what he would have earned had he been working. Understood in these terms, North Fork is receiving a windfall because of the majority decision to impose an offset during the "Interim Period."

Robert F. Cohen, Jr., Commissioner

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March 30, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1496
v.	:	A.C. No. 15-18861-221400
CONSHOR MINING LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 23, 2010, the Commission received from Conshor Mining LLC ("Conshor") a request seeking to reopen a penalty assessment that has become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 23, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

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

In the case before us, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment for case No. 000221400 on June 3, 2010. In its motion to reopen, Conshor states that it had intended to contest ten of the citations listed in the proposed assessment, but failed to do so within 30 days of service because it had ceased active mining operations. The proposed assessment therefore became a final order of the Commission, pursuant to section 105(a) of the Mine Act, on July 18, 2010. Conshor submitted its notice of contest to MSHA two weeks late, on August 2, 2010.

The Secretary does not oppose Conshor's motion to reopen, "in light of the explanation offered in support of the motion." Sec'y Resp. However, the Secretary urges the operator to take all steps necessary to ensure timely responses in the future and further notes that Conshor is delinquent in payment of $115,134 in penalties, including the $48,220 at issue in this case. The Secretary states that she will take into account the failure to address these delinquencies in deciding whether to oppose future motions to reopen.

Conshor asserts that it failed to timely contest the penalties at issue because it had ceased active mining operations. The operator discovered the error and submitted the notice of contest for ten citations two weeks late.[1] The Secretary expressly cited the operator's explanation as grounds for not opposing the motion to reopen. While the Secretary noted that the considerable penalties due in this case are part of a total delinquency of more than $115,000 owed by the operator, she decided to afford the operator an opportunity to contest the citations at issue and to defer the delinquency issue.[2]

---

[1] This case is clearly distinguishable from *Elk Run*, cited by our dissenting colleague. In that case, the mine's mail was allowed to accumulate over a period of three months. *Elk Run Coal Co.*, 32 FMSHRC 1587, 1588 (Apr. 2009). There the assessment was issued in April 2009, and we did not receive the motion to reopen until July 28, 2009. *Id.* A cessation of active mining operations is not an ordinary circumstance. In *Elk Run*, however, the failure to make any provision for receiving and responding to mail for several months was not explained, and due to the duration, was not excusable as a mere oversight. By contrast, the operator here must have made some effort to address the issue of mail delivered to the idled mine, on its own, within a brief period of time. This is, therefore, not a similar case of patent neglect.

[2] Contrary to our dissenting colleague, we decline to address the issue of whether the operator's delinquent penalties amount to bad faith.

Having reviewed the facts and circumstances of this case, Conshor's request, and the Secretary's response, we agree with the Secretary's tacit acknowledgment of the operator's reasonable excuse under the circumstances and hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I cannot agree with my colleagues' determination that the motion filed by Conshor Mining LLC is sufficient to reopen a penalty assessment that has become final under section 105(a) of the Mine Act. The only information provided in the motion is that at the time of the proposed assessment "Conshor had already ceased active mining operations."

The Commission has made it clear that when a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established inadvertence, mistake or excusable neglect so as to justify reopening a final assessment. *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *see Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987). In particular, in *Elk Run Coal Co.*, 32 FMSHRC 1587-1589 (Dec. 2010), the Commission recently held that failure to open and deal with incoming mail when the mine was idled does not constitute inadvertence or excusable neglect.

Nor does the closure or movement of a plant office justify failure to respond to a proposed assessment. *Harvey Trucking Inc.*, 32 FMSHRC 1245 (Oct. 2010) (holding that operator's argument that it did not receive the proposed assessment because its office was closed due to illness was not a sufficiently detailed explanation for its failure to contest the proposed penalty assessment.); *B&W Res., Inc.*, 32 FMSHRC 1627 (Dec. 2010) (holding that operator's argument that it moved its office and hired new personnel is insufficient to establish grounds for reopening the assessment).

In the motion to reopen the penalty assessment, Conshor's counsel stated only that it "had already ceased active mining operations." It appears that Conshor's internal procedure was insufficient to timely respond to a penalty assessment. Conshor fails to explain how and why ceasing "active mining operations" affected the normal processing of penalty assessments. It does not explain how penalty assessments were processed after the mine "ceased active mining" and whether and in what form the office procedures continued. If Conshor had simply walked away from its responsibilities after ceasing active mining operations, it would certainly not be entitled to reopening of the penalty assessment.[1]

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[1] Conshor also failed to respond to the Secretary's assertion that it is currently delinquent with respect to approximately $115,134 in penalties. In *B & W*, 32 FMSHRC at 1628, the Commission denied a reopening motion without prejudice, *inter alia,* because the operator had not responded to the Secretary's assertion of delinquent penalties at this mine in the amount of $95,984. The Commission has recognized in a case involving a request for relief from a final Commission decision that "[t]he absence of bad faith on the part of the defaulting party is also a relevant concern." *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986). In the present case, the existence of approximately $115,134 in delinquent penalties may show bad faith on the part of the operator.

In the absence of any explanation beyond the cessation of active mining operations, I conclude that Conshor has failed to carry its burden of justifying reopening.

Robert F. Cohen, Jr., Commissioner

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March 30, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2010-941-M A.C. No. 20-00985-219861
O-N MINERALS (MICHIGAN) COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 30, 2010, the Commission received from the O-N Minerals (Michigan) Company a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 23, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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March 30, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-1453
v.	:	A.C. No. 46-07908-218088
PINE RIDGE COAL COMPANY, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 5, 2010, the Commission received from Pine Ridge Coal Company, LLC a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On August 26, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-567
v.	:	A.C. No. 46-01537-237057
LONG BRANCH ENERGY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 15, 2010, the Commission received from Long Branch Energy a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 20, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

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April 8, 2011

SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-114
	:	A.C. No. 33-04565-217111
	:	
v.	:	Docket No. LAKE 2011-115
	:	A.C. No. 33-04565-219905
MOUNTAIN SPRING COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 9, 2010, the Commission received from Mountain Spring Coal Company ("Mountain Spring") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 14, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Mountain Spring maintains that it did not receive the proposed penalty assessments until after the time to contest had passed. On March 31, 2010, Mountain Spring sent written notification to the MSHA District Four office that the new operator for the 10-7 Mine in Bergholz, Ohio, would be Rosebud Mining Company effective April 1, 2010, and that any correspondence, "including assessments," should be forwarded to Mountain Spring's Danville, West Virginia address. The operator also filed a change of address with the U.S. Postal Service. On April 15 and May 13, 2010, MSHA issued Proposed Assessment Nos. 000217111 and 000219905, respectively, to Mountain Spring. The assessments were sent via Federal Express to the operator's previous Bergholz address where they were signed for by persons at the mine. After checking MSHA's data retrieval system and discovering that one assessment had become a final order and the other was delinquent, the operator contacted MSHA and eventually obtained email copies of the assessments on August 3, 2010. The operator sent in its contest the same day, and again notified MSHA of its correct address. Seven days later, Mountain Spring sent payment for the remaining uncontested citations. The operator subsequently received a delinquency letter for each assessment and a letter dated August 13, 2010, denying its contest as untimely. MSHA sent the letters to the operator's former Bergholz address. The Secretary does not oppose Mountain Spring's motion, and confirms that the Legal ID Report for the mine, reflects the current operator as Rosebud Mining as of April 1, 2010.

The proposed assessments were Federal Expressed to an address no longer utilized by Mountain Spring. On March 31, 2010, 15 days prior to issuance of Assessment No. 000217111 and a month and half prior to issuance of Assessment No. 000219905, the operator notified MSHA of its new address as required by 30 C.F.R. § 41.12. After several email exchanges with MSHA, Mountain Spring received copies of the assessments on August 3, 2010, and returned its contests of the assessments to MSHA the same day. Based on the foregoing, we conclude that Mountain Spring did not "receive" the penalty assessments within the meaning of section 105(a) of the Mine Act until August 3, 2010. Because Mountain Spring filed its notice of contest on the same day, well within the 30-day statutory period, we conclude that it timely notified the Secretary of its intent to contest the proposed penalty assessments. *See The Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994); *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998).

Accordingly, the proposed penalty assessments are not final orders of the Commission, and these cases are remanded to the Chief Administrative Law Judge for assignment. The matters shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

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Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 8, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2010-1116-M A.C. No. 09-01095-221080A
MARK CUNNINGHAM, EMPLOYED BY TRI-STAR USA, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 24, 2010, the Commission received from Mark Cunningham a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 20, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

Under section 105(a) of the Mine Act and the Commission's Procedural Rules, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable

by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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April 8, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2010-1721-M A.C. No. 48-00611-226100
v.	:	Docket No. WEST 2010-1722-M A.C. No. 48-00974-226101
WYO-BEN, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 25, 2010, the Commission received motions by counsel from Wyo-Ben, Inc., requesting to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] On September 16, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1721-M and WEST 2010-1722-M, both captioned *Wyo-Ben, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's requests, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-621-M
v.	:	A.C. No. 36-00190-218250
ESSROC CEMENT CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 6, 2010, the Commission received from Essroc Cement Corporation a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On July 22, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2011-172
v.	:	A.C. No. 36-08346-241752
CARLINE COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 25, 2011, the Commission received from Carline Coal Company, Inc., a letter from the company's president seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 8, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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April 14, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-309-M
v.	:	A.C. No. 17-00692-201858
P & K SAND & GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 26, 2010, the Commission received from P & K Sand & Gravel, Inc. ("P & K") a letter from the company's president seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On November 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000201858 to P & K. P & K contends that it did not understand its contest rights and the significance of an unwarrantable failure designation at the time of the inspection and that the inspector had not explained MSHA's contest procedures. It asserts that it is a small, family-owned business and thought it had done what was necessary to contest the penalty. P & K provided the following timeline of events in support of its request to reopen: On December 7, 2009, shortly after receiving the proposed assessment, it sent a letter to MSHA's District Office in Warrendale, Pennsylvania, raising concerns about its ability to pay. In early February 2010, shortly after receiving MSHA's delinquency notice in late January, it sent a letter to MSHA's Civil Penalty payment office in St. Louis with a copy of the letter it sent to MSHA's District Office. In early June 2010, shortly after receiving an invoice from the Treasury Department in late May, it responded to the Treasury Department and provided copies of its correspondences to MSHA. In late June 2010, it sent a letter to the Department of Labor's Regional Solicitor in Boston. It appears that this letter was forwarded to the Appellate Counsel for Mine Safety and Health in the Solicitor's Office, who responded in mid-July. The operator subsequently filed its request to reopen about two weeks later.

The Secretary of Labor states that she does not oppose the request to reopen the assessment. She notes that P & K's February 2010 correspondence to MSHA was sent to its St. Louis office, and not its Civil Penalty Compliance Office in Arlington, Virginia. She also states that the proposed assessment form provides clear instructions to the operator on how to file a contest of the assessment.

Although P & K failed to follow the instructions on the proposed penalty assessment form and did not file a contest of the proposed assessment with MSHA's Civil Penalty Compliance Office in Arlington, VA, the operator did send timely correspondence to MSHA. Moreover, after receiving guidance from the Solicitor's Office, P & K promptly filed a request to reopen. Given the operator's numerous attempts to challenge the proposed assessment and its apparent inexperience with Commission procedures, we conclude that under the circumstances in this case, the operator has established good cause for reopening.

Having reviewed the facts and circumstances of this case, P & K's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 28, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-576-M
v.	:	A.C. No. 26-00827-216609
CORTEZ JOINT VENTURE	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 2, 2011, the Commission received from Cortez Joint Venture ("Cortez") a letter by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The Secretary submits that, upon reviewing the records in this proceeding, she has discovered that the proposed penalty was timely contested.

Having reviewed Cortez's request and the Secretary's response, we find the request to reopen to be moot. Cortez has properly contested the proposed penalty assessment and, therefore, it did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 28, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-1101
v.	:	A.C. No. 46-08553-147762
ELK RUN COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 4, 2009, Chief Judge Lesnick issued to Elk Run Coal Company, Inc. ("Elk Run"), an Order to Show Cause for not answering the Secretary's June 30, 2008 Petition for Assessment of Civil Penalty and ordered it to file its answer within 30 days of his order. On August 13, 2010, Judge Lesnick issued an Order of Default to Elk Run for failing to comply with his show cause order.

On November 10, 2010, the Commission received a motion by counsel to reopen the penalty assessment proceeding and relieve Elk Run from the order of default entered against it. The operator states that on December 2, 2009, via counsel, in response to the Order to Show Cause, it filed its answer to the Secretary's Petition contesting 11 citations. Elk Run's Answer was received by the assigned Solicitor but not by the Commission. The parties immediately began discovery and settlement negotiations. Elk Run explains that the default order was mailed to Elk Run's president, Craig Boggs. The operator states that although Boggs received the order, not understanding what it meant and knowing that settlement negotiations were ongoing, he assumed it was a courtesy copy and did not forward it to counsel. Counsel learned of the default order on November 2, 2010, after receiving the Mine Safety and Health Administration's (MSHA) delinquency letter from Elk Run. It immediately contacted the Commission to investigate, and subsequently filed its motion to reopen on November 9, 2010. Elk Run indicates in its motion that the Secretary does not oppose its request to reopen.

The judge's jurisdiction in this matter terminated when his decision was issued on August 13, 2010. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The judge's order became a final decision of the Commission on September 22, 2010.

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

Upon review of the record, it appears that Elk Run timely filed its answer to the Secretary's Petition for Assessment of Civil Penalty in response to the Chief Judge's Order to Show Cause. The Answer contains a certificate of service certifying that it was served by counsel on the representative for the Secretary on December 2, 2009, within 30 days of the show cause order. Additionally, the Secretary has not opposed the motion.

In the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. This case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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April 29, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-746-M
v.	:	A.C. No. 54-00299-139019
MASTER PRODUCTS CORPORATION	:	

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

ORDER

BY: Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 28, 2009, the Commission received from Master Products Corporation ("Master Products") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000139019 to Master Products. This proposed assessment listed five citations issued on December 26 and 27, 2007, with a total proposed penalty of $5,208.

Before Master Products received the proposed assessment, on or about January 4, 2008, it sent a letter by facsimile to Melody Wesson, a Conference and Litigation Representative in MSHA's Birmingham, Alabama office, requesting a "safety and health conference" on the five citations issued on December 26 and 27, 2007. When Master Products did not receive a response to this letter, on January 24, 2008, the company sent a copy of it to Luis Valentin in MSHA's Guaynabo, Puerto Rico field office. The company did not receive a response to this letter.

On February 19, 2008, Master Products sent a letter by certified mail to the MSHA Birmingham office requesting assistance "to contest and have a formal hearing on all violations listed in proposed assessment case # 000139019." Attached to this letter was a copy of the proposed assessment indicating Master Products wanted "to contest and have a formal hearing on all violations listed in the Proposed Assessment(s)." On March 11, 2008, Master Products received a phone call from an MSHA employee indicating that the company's February 19 certified letter had been received.

Although at this point, Master Products assumed the case "was under review," on or about May 7, 2008, MSHA sent a delinquency notice stating that the assessment had become final, and that the civil penalty was now delinquent. On May 19, 2008, Master Products sent a facsimile to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, attaching copies of its correspondence with MSHA and inquiring about its request for a formal hearing on the violations. The facsimile stated:

> I have a concern related with all delinquent civil penalties and all the catastrophic consequences mentioned in your letters. I diligently and on time sent to your office a request for a Safety and Health Conference. Attached please find all the information that has been sent to you.
>
> On March 11, 2008 I received a call from Melody Wesson and she explained to me that MSHA has received the documents I've sent. I understand that MSHA have has (sic) a large backlog of documents to review and I should wait for a conference date.
>
> I have not received a date for a formal hearing on all violations; however I continue receiving letters related with civil penalties and payment requests.
>
> I would appreciate your help in this matter.

Master Products did not receive a response to this letter.

On September 22, 2008, the company received a collection notice from Progressive Financial Services on behalf of the U.S. Department of the Treasury demanding payment of $6,935.10. Master Products responded to the notice in a letter dated September 24, 2008, explaining its efforts to obtain a formal hearing.

In a letter to the Commission dated July 22, 2009, the company submitted its request to reopen the proposed assessment, although it had not "received any notification, answer or phone calls regarding" the proposed assessment. Master Products fully documented its contentions in this letter.

On August 12, 2009, the Commission received the Secretary's response opposing Master Products' request to reopen. She states that the penalty assessment became a final Commission order on March 22, 2008, and attached the delinquency notice dated May 7, 2008. The Secretary states that Master Products filed its request more than one year after the assessment became a final order and therefore that the request should be denied. The Secretary did not address, or dispute, any of the representations made by Master Products concerning the company's efforts to communicate with MSHA to contest Proposed Assessment No. 000139019.

On August 31, 2009, Master Products again wrote to the Commission in reply to the Secretary's response. The company said that the Secretary's opposition to its motion to reopen "was the first response that we have received to our many efforts."

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

Usually, when the Commission considers a request to reopen a proposed assessment which has become final by virtue of section 105(a), it does so in accordance with Rule 60(b)(1), under which a final judgment against a party may be relieved on the basis of "mistake, inadvertence, surprise, or excusable neglect." *See, e.g., Kenamerican Res., Inc.*, 20 FMSHRC 199, 199-200 (Mar. 1998) (illness of safety director and lack of coordination between safety director and accounting department found to be inadvertence or mistake); *Austin Powder Co.*, 33 FMSHRC ___, slip op. at 2-3, No. SE 2010-468 (Mar. 21, 2011) (operator's email to counsel requesting filing of contest inadvertently sent to inactive email account). However, pursuant to Rule 60(c)(1), a motion under Rule 60(b) "must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Hence, in cases seeking reopening of a penalty which has become final by virtue of section 105(a), where the basis for the request is mistake, inadvertence, surprise, or excusable neglect, and the request is made more than one year after the order became final, the Commission has denied relief. *See, e.g., Newmont USA Ltd*, 31 FMSHRC 808 (July 2009); *J.S. Sand & Gravel, Inc.*, 26 FMSHRC 795 (Oct. 2004).

On past and very infrequent occasions, the Commission has been guided by Rule 60(b)(6), which provides that relief from a judgment or order may be granted for "any other reason that justifies relief." Under Rule 60(b)(6), a motion seeking relief need not be filed within one year from entry of the judgment or order, although it must be filed within a "reasonable

time." Fed. R. Civ. P. 60(c)(1). The Commission has considered reopening penalties which had become final pursuant to section 105(a), relying on Rule 60(b)(6), even though the motion had been made more than one year after the penalty has become final. *See, e.g., Brian D. Forbes*, 20 FMSHRC 99 (Feb. 1998) (remanding to judge where individual respondent claimed that he had no actual knowledge of the citation issued against him); *Contractors Sand & Gravel*, 23 FMSHRC 570 (June 2001) (remanding to judge to consider whether "extraordinary circumstances" exist where operator claims that it understood that assessments were included in separate settlement agreement).

Federal court jurisprudence on Rule 60(b)(6) begins with the Supreme Court's seminal decision in *Klaprott v. United States,* 335 U.S. 601 (1949), in which the Court set aside a default judgment entered by a district court many years earlier in a case involving the revocation of the petitioner's certificate of naturalization and American citizenship. The Court held that the language of Rule 60(b)(6) – "any other reason justifying relief from the operation of the judgment" – "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 613-15.[1] The Court stated in *Klaprott* that the use of Rule 60(b)(6) is reserved for an "extraordinary situation," and is not to be used in situations covered by the five specified reasons set forth in Rule 60(b)(1) through (5). *Id.* at 613; *see also Ackermann v. United States,* 340 U.S. 193 (1950); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380 (1993). In *Pioneer Investment Services*, the Court quoted with approval the partial dissent of Justice Frankfurter in *Klaprott*:

> Justice Frankfurter, although dissenting on other grounds, agreed that Klaprott's allegations of *inability* to comply with earlier deadlines took his case outside the scope of "excusable neglect" because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action.

Id. at 394 (citation omitted) (emphasis in orignial).

The present view of Rule 60(b)(6) by federal courts is summarized in 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2010) in the following manner:

> Although it is not easy to fit the later cases into a consistent pattern, in general they seem to follow the flexible approach of the

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[1] We note that the current language of Rule 60(b)(6) – "any other reason justifying relief" – is slightly different, but substantively the same. More significantly, the Commission quoted the Court's language, "such action is appropriate to accomplish justice," with approval in *Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 (Apr. 1990) so as to grant relief under Rule 60(b)(6) in a discrimination case.

> Karahalias case.[2] The courts have echoed, as they must in the light of Ackermann, the view that clause (6) is reserved for cases involving extraordinary circumstances, and they have said that that clause and the other clauses of the rule are mutually exclusive. At the same time they have acted on the premise that cases of extreme hardship or injustice may be brought within a more liberal dispensation than a literal reading of the rule would allow.

A case in point is *Lowe v. McGraw-Hill Cos., Inc.*, 361 F.3d 335 (7th Cir. 2004). In *Lowe,* the district court had set aside an unjust May, 2001 default order, but had done so under Rule 60(a) as a "clerical error" more than a year after the default order was entered. Writing for the Seventh Circuit, Judge Posner recognized that the judgment was not a clerical error, but rather a mistake, and Rule 60(b)(1) allows relief from a mistaken judgment only within a year of its entry. However, Judge Posner stated, "[w]ith the Rule 60(a) door thus shut, however, the law would be exposed as indeed 'a ass - a idiot,' as Mr. Bumble called it in *Oliver Twist*, if the district judge's mistake could not be corrected under Rule 60(b)." *Id.* at 341. Judge Posner recognized that the "catch-all or safety-valve provision" of Rule 60(b)(6) "mustn't be allowed to override the one-year limitation in Rules 60(b)(1), (2) and (3). *Id.* at 342 (citations omitted). However, he went on to state:

> What then is its scope? The first five subsections seem to cover the waterfront. The only work for (6) to do is to allow judgments to be set aside, without limitation of time, when the circumstances of its invocation are "extraordinary." This is fuzzy, and in tension with the cases that say that Rules 60(b)(1) and 60(b)(6) are mutually exclusive. But the purpose of a catch-all provision, as the term implies, is to avoid tying one's hands in advance, which a rule would do and only a loose standard would securely avoid doing.

Id. Although the default judgment was a "mistake," the Seventh Circuit set it aside under Rule 60(b)(6).

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[2] *United States v. Karahalias,* 205 F.2d 331 (2nd Cir. 1953) involved the petition of a naturalized American citizen to vacate a default judgment cancelling his certificate of naturalization. The petition was brought 17 years after the court action. In remanding the case for further proceedings, Judge Learned Hand first characterized the actions of the petitioner as "excusable neglect," and stated that under Rule 60(b)(6), the court had authority to dispense with the one year limitation period "for situations of extreme hardship." *Id.* at 333. On petition for rehearing by the government, which pointed out that *Klaprott* held that a reason provided under Rule 60(b)(1) could not be the basis for the court to invoke Rule 60(b)(6), Judge Hand retracted his characterization of the petitioner's conduct as "neglect." Judge Hand concluded that the petitioner's conduct should be termed "inaction," and again remanded the case to the district court for further proceedings. *Id.* at 335.

We conclude that this is a case of "extraordinary circumstances" where reopening is warranted under Rule 60(b)(6). Here, Master Products timely submitted its contest of the proposed assessment on February 19, 2008, albeit to the wrong MSHA office.[3] In some circumstances, delivery of a notice of contest of a proposed penalty assessment to another address within MSHA may operate to explain a failure to respond to MSHA's Civil Penalty Compliance Office in Arlington, Virginia.[4] Those circumstances may include situations where the agency acts as though it has received a timely notice of contest.

All of the events subsequent to the operator's timely submission led it to reasonably believe that it had properly requested a hearing. Master Products asserts, without contradiction, that MSHA communicated with it on March 11, 2008, concerning the company's February 19, 2008 letter (which included a copy of the proposed assessment marked properly to indicate the company's intent to contest all the penalties contained in the assessment). The operator exercised diligence in pursuing its contest by making several attempts to contact MSHA and inquire as to the status of its case and responding to each correspondence it received from the agency. Shortly after its receipt of the delinquency notice in May 2008, Master Products faxed to the Civil Penalty Compliance Office its prior correspondence with MSHA's Regional Offices and a copy of the marked-up assessment form. As quoted *supra*, the operator raised significant questions in this facsimile,[5] and specifically asked MSHA for help. The government never responded. Master Products also promptly acted when it received the collection notice in September 2008 – writing to the collection agency within two days to explain that it had contested the citation at issue. This is wholly consistent with its understanding of the posture of

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[3] Commissioners Cohen and Nakamura would find that Master Products' submission of the timely contest to MSHA's District Office in Birmingham, Alabama constituted an effective contest of the proposed assessment, and thus the assessment never became final under section 105(a) of the Mine Act. *Palmer Coking Coal Co.*, 30 FMSHRC 1076 (Dec. 2008); *DS Mine & Development, LLC*, 28 FMSHRC 462 (July 2006). However, we need not reach that issue.

[4] In *Service Transport, LLC*, the operator sent a contest of a proposed penalty to an office of the Solicitor of Labor and to the Commission. 27 FMSHRC 614, 614-15 (Sept. 2005). The Commission held that Service Transport's contest "constituted timely notification of the Secretary under section 105(a) of the Mine Act of its intention to contest the proposed penalty." *Id.* at 615. The Commission noted in particular that the instructions on the cover sheet accompanying the proposed assessment could be seen as misleading. *Id.* Similarly, the operator in the present case had received a direct communication from MSHA's conference and litigation representative, confirming that the materials – which included a contest of the proposed assessment – had been received. Thus, the operator believed that the case was under review.

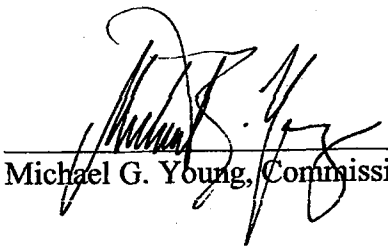
[5] Master Products stated, for example, that it understood that the long delay in addressing the citation was a result of the backlog at the Commission. *See* Master Products facsimile cover sheet, fax from Luis Correa to MSHA Civil Penalty Compliance Office, May 19, 2008.

the case. Nothing in the record indicates that MSHA took any action to correct the operator's clearly-expressed understanding of the circumstances. In relying on the agency's silence and its earlier representations, Master Products failed to take further action within one year of the order becoming final because it reasonably believed that no further action was necessary.

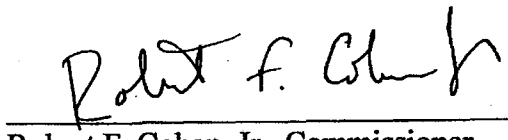
Finally, we address the fact that Master Products did not seek relief before the Commission for 16 months (March 22, 2008 to July 22, 2009) after the proposed assessment became final. For nearly half of this period, the operator was sending correspondence to the MSHA Civil Penalty Compliance Office and to the collection agency for the Treasury Department. Throughout the period, as shown by the operator's August 31, 2009 letter to the Commission, Master Products had received no response to its inquiries from MSHA despite clear articulations of its understanding of the situation and express requests. In this context, we note that when a party seeks relief from a final judgment or order under the Federal Rules of Civil Procedure, it files a motion with the same court which entered the judgment. In contrast, when an operator seeks reopening of an assessment which has become final under section 105(a) of the Mine Act, it must petition a separate federal agency – the Commission – from the agency which issued the proposed assessment. Although in some situations (e.g., where a contest is filed late), MSHA routinely notifies an operator that it must petition the Commission for relief, no such notification was provided to Master Products. On the contrary, Master Products' misapprehension of the situation arose from silence or communication by the agency which would lead a reasonable person to conclude that the case had been properly contested and was being held up by bureaucratic delays. Moreover, Master Products was unrepresented by counsel, and some of its correspondence in the record is in Spanish.[6] Under the circumstances, we conclude that the operator's request for relief was made within a reasonable time pursuant to Rule 60(c)(1).

[6] Master Products is located in Puerto Rico.

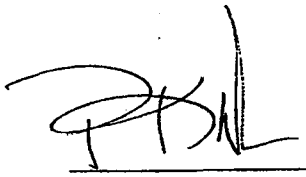
Therefore, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Duffy, dissenting:

Master Products delayed more than 16 months before it sent a letter to the Commission seeking to reopen a penalty assessment that had become a final order. Because the operator waited over a year before asking for relief from that final order, we would, consistent with longstanding Commission precedent, deny its request.

As the majority correctly states, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure when evaluating requests to reopen final orders. Slip op. at 3. Our colleagues also correctly note that the Commission has held that a Rule 60(b) motion must be made within a reasonable time, and, under most circumstances not more than one year after the judgment, order or proceeding was entered or taken.[1] *Id.*; *see also Lakeview Rock Prods.*, 19 FMSHRC 26, 28-29 (Jan. 1997).

Here, the proposed assessment became final in March 2008. The operator received a delinquency notice from MSHA in May 2008, and a notice from a collection agency in September 2008. It delayed 10 months after receiving the collection notice before asking the Commission for relief from the final order. It did not seek relief from the Commission until July 2009, well over a year after the proposed assessment became final.

Nonetheless, the majority grants relief and reopens this case, holding, as it must in order to achieve this result, that the operator's actions do not fall under Rule 60(b)(1) ("inadvertence or mistake"). Instead, according to our colleagues, "this is a case of 'extraordinary circumstances' where reopening is warranted under Rule 60(b)(6)." Slip op. at 6. Although we sympathize with our colleagues' compassion for this operator, their effort to transform this case from an ordinary 60(b)(1) proceeding into an "extraordinary" case under 60(b)(6) is unavailing.

Indeed, the majority's decision is completely inconsistent with the Commission's unanimous decision in *Newmont USA Ltd.*, 31 FMSHRC 808 (July 2009). In that case, the operator mistakenly sent its penalty contest form to the incorrect MSHA office within the 30-day contest period. The operator did not ask the Commission for relief until 13 months after the proposed penalties had become a final order. The Commission held that the operator's mistake about where to send the contest form "falls squarely within the ambit of Rule 60(b)(1)" and that because it waited more than a year to seek relief, its motion was untimely. *Id.* at 810.

The Commission has held unequivocally that the "one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be

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[1] Rule 60(c) provides that "[a] motion under Rule 60(b) must be made within a reasonable time - and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c). As we discuss below, this case falls under Rule 60(b)(1) (under which relief may be granted relief on the grounds of "mistake, inadvertence, surprise, or excusable neglect").

circumvented by utilization of subsections (4) through (6) of Rule 60(b)." *Lakeview Rock Prods.*, 19 FMSHRC at 28. Unfortunately, that is precisely what the majority is doing here.

It has been recognized that generally, cases brought pursuant to clause (6) are attempts to avoid either the one-year time limit in the remaining clauses of Rule 60(b) or time deadlines for other types of relief. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2010). Rule 60(b)(1) and (b)(6) are mutually exclusive, *Pioneer Investment Serv. Co. v. Brunswick Ass. Ltd. P'ship,* 507 U.S. 380, 393 (1993), and (b)(6) only applies when there is justification for relief *other* than those set out in the more specific clauses of Rule 60(b). The time limit under 60(b) would be meaningless if the same type of conduct could justify a later motion under Rule 60(b)(6). 12 James Wm. Moore Et Al., Moore's Federal Practice ¶ 60.48[1]-[2] (3d ed. 2010). Thus the majority's efforts to characterize the operator's error in sending its contest to the wrong MSHA office as "extraordinary circumstances" instead of as a "mistake" under 60(b)(1) are well intentioned but misguided.

A final reason why we decline to try to fit this round peg of a 60(b)(1) case into the (b)(6) a square hole is that the operator here is not faultless. In most cases holding that extraordinary circumstances do exist so as to justify relief, the moving party is totally without fault and "almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." Moore's ¶ 60.48[3][b]. As the Supreme Court has recognized, "[i]f a party is partly to blame for the delay [in not taking timely action], relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Pioneer*, 507 U.S. at 393.

Granting relief and reopening this case after this significant delay contravenes years of well-settled Commission case law. *See, e.g., Newmont USA Ltd.*, 31 FMSHRC at 810; *Celite Corp.*, 28 FMSHRC 105, 107 (Apr. 2006); *J.S. Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004), *Lakeview*, 19 FMSHRC at 28-29. The majority's reliance on the assertion that the operator "reasonably believed that it had timely contested the penalties at issue," does not suffice to overturn years of Commission precedent barring claims such as Master Products' that are filed one year after an order becomes final. Although the operator's confusion regarding the contest procedures is regrettable, we are reluctant to change our longstanding approach in order to accommodate the particular facts of this case. Consequently, we respectfully dissent.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2009-755
Petitioner	:	A.C. No. 15-02709-176578-01
v.	:	
	:	Docket No. KENT 2009-756
	:	A.C. No. 15-02709-176578-02
HIGHLAND MINING COMPANY, LLC,	:	
Respondent	:	Highland 9 Mine

DECISION

Before: Judge William B. Moran

Appearances: Neil A. Morholt, Esq. on behalf of the Secretary of Labor
Michael T. Cimino, Esq., Jackson Kelly, PLLC, on behalf of Highland Mining Company, LLC

As noted in the caption, this decision involves two dockets. Docket KENT 2009 0755 alleges two violations at the Respondent Highland Mining Company's ("Highland" or Respondent), Highland 9 Mine. The first, a section 104(d)(2) order, **Order Number 8489815**, alleges a failure to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1). That Order, issued on December 3, 2008, alleged that the violation was significant and substantial, involved a high degree of negligence, was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty.
The proposed assessment was $15,971.00.

The second violation contained within this docket was also a section 104(d)(2) order, **Order Number 8492281**. Issued on December 9, 2008, it cited the mine for accumulations of combustible material in the 5B belt conveyor entry, alleging that it constituted a violation of 30 CFR §75.400. The gravity and negligence were designated with the same evaluation given for the roof control violation described next above. Thus, the order was marked as significant and substantial, with high negligence, that it was reasonably likely to occur and would result in lost workdays or restricted duty. The issuing inspector also considered the violation to be an unwarrantable failure. The proposed assessment was $32,810.00.

For Docket Number KENT 2009 0756, one out of some 33 alleged violations remained in dispute. This was a 104(a) citation issued on December 9, 2008, for operation of the 5 B belt conveyor not being maintained in safe operating condition. Marked as significant and substantial, the citation, **Citation Number 8492282**, also listed the gravity as "reasonably likely" for an injury to occur, that it could reasonably be expected to result in lost workdays or restricted duty and that the negligence was considered to be high and the proposed assessment set at $14,373.00.[1]

For the reasons which follow, the Court affirms the violations, and each of the special findings contained in the citation and orders.[2] It also adopts each of the proposed penalties, and therefor the total civil penalty to be imposed for the three violations is $64,752.00.[3]

In order to set the stage for understanding the Court's summary and view of the testimony presented, the following overview is presented.

The section 104(d)(2) order, **Order Number 8489815**, alleged a failure to follow the approved roof control plan in that there were nine (9) rows of roof bolts where the spacing between the bolts was too wide. Highland does not dispute the excessive widths existed. Instead it contends that as the roof was in relatively good condition and as the condition was difficult to detect, the order should be reduced to a 104(a) citation, deemed non S&S, and as unlikely to result in an injury.

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[1]The Court's original decision in this case incorrectly listed the proposed assessment as $15,971.00.

[2]The Court fully considered the post-hearing briefs. Any contention not expressly discussed in this decision means that it was rejected by the Court.

[3] The parties stipulated that the proposed penalties will not affect the Respondent's ability to continue in business, that the Respondent is engaged in mining and that it affects interstate commerce, that it is subject to the 1977 Mine Act, that the Court has jurisdiction to hear the dockets, that all citations/orders issued in connection with these dockets were properly served upon the Respondent, that the Respondent demonstrated good faith in abating the violations, that the proposed data sheet as well as the contested assessment sheets for these dockets, as contained within Exhibit A, and the R 17 Assessment History Report, may be admitted into evidence. Tr. 11. Also, the parties have stipulated that there was not a clean inspection as of the last D order immediately prior, which would have been August 29, 2008. That is, there was not a clean inspection prior to the issuance of the two orders involved in this case. Tr. 11. The Petitioner asserts that the predicate citation was an August 28th Order. Respondent's Counsel agreed that between August 29, 2008 and December 3, 2008, with the latter date being the first of the two D orders in this case, there was no clean inspection. Thus, Respondent concedes that the December 3, 2008 order was correctly classified as a D 2 Order, but does not concede that there was no clean inspection between August 2007 and August 2008. Tr. 12.

For **Order Number 8492281,** a section 104(d)(2) Order, Highland was cited for accumulations of combustible material in the 5B belt conveyor entry, in violation of 30 CFR §75.400. Highland disputes both that the violation was unwarrantable and the significant and substantial designation. Included among a host of defenses asserted by Highland are that the condition was attended to in a timely and appropriate manner, that the problems were not as serious nor as extensive as MSHA claimed, and that Highland had no prior notice that this type of accumulations problem was of concern to MSHA.

Last, a 104(a) citation was issued for the 5 B belt conveyor not being maintained in safe operating condition. It was issued in conjunction with the issuance of the D Order, No. 8492281. Marked as significant and substantial, the citation, **Citation Number 8492282,** was also listed as involving "high negligence" on Highland's part. Respondent disputes not only both of those special findings, but also the conditions MSHA claimed to exist with the belt in that it disputes that the belt was cutting or rubbing the belt structure. MSHA believes that, together, the Citation and the Order increased the likelihood of a reasonably serious incident occurring underground, namely a fire or an explosion, which would have affected the 18 miners working inby.

FINDINGS OF FACT

The testimony involving the allegation that Highland failed to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1), pertaining to Docket KENT 2009 0755 began with MSHA inspector Tony Fazzolare. That inspector issued a section 104(d)(2) Order on December 3, 2008, alleging that the violation was significant and substantial, involved a high degree of negligence, was reasonably likely to occur and could reasonably be expected to result in lost workdays or restricted duty. **Order No. 8489815**, Gov. Ex P 13, the roof control plan in effect at the time, P 14, Fazzolare's notes and P 15. Tr. 425.

Inspector Fazzolare has a long history of employment in mines and as a mine inspector. Tr. 426-427. Fazzolare stated that a flexible conveyor train or flexible belt, described as an FCT unit, differs in the entry width in that a belt entry can be 21 feet wide, as opposed to the usual belt entry maximum of 20 feet. Tr. 431. An FCT unit cuts at angles. That is, crosscuts are cut on angles to allow the FCT unit to move from entry to entry more easily becausw such FCT units can't make a 90 degree turn. Tr. 431. On the day in question Fazzolare was at the mine to do a respirable dust survey for the Number 4 unit, which is an FCT unit. Tr. 432. Fazzolare began by looking for any imminent dangers in the No. 9 entry. However when he continued upon reaching the No. 5 entry he noticed a row of bolts going down the middle that were crooked. With the miners' representative, Mr. Alby, he measured the distance between the bolts, finding nine rows, continuous rows, that were wider than permitted under the roof bolt plan. The No. 5 entry is a belt entry, which has a 21 foot width. Tr. 436. Fazzolare used a standard map of a typical room and pillar arrangement so that he could record what he observed about the bolt placements. Tr. 437. Exhibit P 14. Thus, Fazzolare recorded on the map to show the nine continuous rows that were wider than 5 feet. Tr. 437- 438. Specifically, Fazzolare found four rows with spacing

approximately 5 feet 7 inches, two rows with 5 feet 11/2 inches, and three rows with spacing of 5 feet 5 inches. Tr. 438.

Fazzolare found this at the first row inby the last open crosscut. Tr. 439. Typically, the miner operator, the FCT operator and the miner helper will be in the entry. Tr. 439. While that entry was an active one, they were not removing coal at the time Fazzolare spotted the problem. Tr. 439. Fazzolare's notes also indicated that he marked the surveyor tag where he found the problem. This was at approximately tag 10 plus 40. Tr. 440. The inspector knew when the area had been bolted because the preshift examiner had walked under it and placed his initials on the left rib. Thus he knew it was bolted prior to 1:45 in the afternoon because the preshift examiner's initials were inby the area and the examiner wouldn't have gone in the area unless it had been bolted.. Tr. 441.

Fazzolare noted that on his map he marked areas of concern with the roof in that area. These consisted of a "moderate slip in the top." This is sometimes described as a cutter or runner, and involves conditions where draw rock has been breaking and falling. Tr. 442. Fazzolare remained concerned about those "slips" because, while the area at tag 9 plus 52 had been taken of, he was concerned that the slip problem could continue inby. Tr. 443. Thus, this condition caused Fazzolare to have greater concern about the roof bolt spacing issue. Tr. 445. The reference he made to "draw rock" was part of the slip issue. At any rate, upon issuing the D Order, the unit was shut down and the bolts installed. Tr. 448. Order Number 8489815 was issued by Fazzolare on December 3, 2008 for failing to follow the approved roof control plan, in that there was wide bolt spacing in the Number 5 entry. Tr. 451.

While the Plan requires that roof bolts be *no wider* than 5 feet, he found 9 continuous rows that were in excess of the 5 foot limit. Tr. 451. The standard cited was 75.220(a)(1), the requirement to submit and follow an approved roof control plan. Tr. 452. Fazzolare was concerned that with the slip outby, the slip would continue in the wide bolt spacing inby and that part of the roof could fall. Tr. 452. The inspector considered it "reasonably likely" an injury would occur, as there had already had part of the roof fall on the previous crosscut outby. Tr. 452. If hit, he believed a miner would suffer lost work days or restricted duty. Tr. 453. However, at the hearing, he believed that one person was a more realistic number of the number exposed, not ten as he originally listed. Tr. 453. In terms of negligence, which he considered to be "high," the inspector noted that the preshift examiner, who was also the previous face boss, missed this violation of the plan. Tr. 453. It was an obvious condition, Fazzolare believed, because of the wavy way the row went in. That is to say, because the bolts were not in a straight line, he was able to 'eyeball' the problem, spotting it right away. Tr. 453. The condition had existed for at least one shift, because it had been bolted on the day shift. Tr. 454. Fazzolare was sure the problem was not outby the last open crosscut because he used a map sketch to record his observation. Tr. 455.

Although Counsel for Highland suggested that perhaps there is no need to record problems in a preshift exam if the problem will be corrected immediately, Fazzolare did not

agree with such a hypothetical practice. Tr. 462. The inspector noted that he cited Highland for failing to recognize the obvious hazard, not for ignoring a condition that it knew about. Fazzolare also believed that the second shift foreman should have seen the problem as well. Tr. 464.

The Respondent's main defense for this violation appears to be that it was not a knowing violation on the part of those that should have seen the spacing problem. Tr. 460- 465. Although Fazzolare agreed that Highland addressed the slip in No. 5 entry by "spotting up" roof bolts, this occurred after the draw rock had fallen out. Tr. 470. Although Respondent noted that the draw rock had already fallen out, the inspector's concern was that the slip would continue towards the face and therefore to the rows that were too wide. Tr. 472. While an attempt was made to have the inspector appear to be too rigid, by asking him if roof bolts had to be "perfectly spot[ted] exactly 5 feet apart from each other," he aptly noted that one can always space those bolts at *less* than the maximum allowable width. Tr. 473. When asked, Fazzolare stated that he *did* believe that the 9 rows of improperly spaced roof bolts affected the integrity of the roof support. Tr. 476. Although he was presented with a MSHA procedure instruction letter that allowed for intermittent roof bolt spacing exceedances of less than 6 inches, Fazzolare did not believe that applied here because the letter only allows for "occasional variences," not 9 continuous rows of spacing problems. Tr. 479.

Highland called Slade Kuykendall who was a section foreman for the second shift at the mine on the day in issue. Tr. 483-484. Kuykendall stated that the first shift pre-shifter called out his report to him that day but there was no mention of any roof bolting spacing issue mentioned. Tr. 485. No miner advised him of the bolt spacing problem nor did he note the issue. Tr. 485-486. Had he observed the problem he would have corrected it immediately. Tr. 486. He believed that the area had been bolted on the previous, that is the day, shift. Tr. 487. He did not agree with Fazzolare's opinion that the slip[4] was running towards the face. Rather he believed it was running into the crosscut. Tr. 490. Although Kuykendall stated the improper bolt spacing was not obvious, he noted that he had been no closer than 50 feet to the condition and that, at that distance, it was hard to see such a spacing issue. Tr. 491.

Jeffrey Wilkins was also called by Highland. He was employed by the mine as a section foreman on the day shift on December 3, 2008. Tr. 500. His duties include performing preshift exams and roof bolts are part of that. Tr. 501. No one informed him of the roof bolt spacing problem and he offered that the bolters would not tell him if they bolted with spacing too wide. Tr. 503-504. He also expressed that he would not be able to note a bolt discrepancy of 7 inches; he would need a tape measure to tell. Tr. 505. Despite 36 years of mining experience, he has

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[4] Kuykendall referred to the condition as a "cutter," while Fazzolare called it a "slip." Whatever term is applied, it refers to a roof condition. In Kuykendall's opinion this condition is not a problem unless the roof is "working," that is, making noise. One can hear the pressure. Tr. 489.

never visually observed during a preshift exam an area where the bolts are spaced too wide. Tr. 507.

Government witness Felix Caudill, an MSHA ventilation specialist in the Madisonville office, District 10, has long experience in mining, both with MSHA and in private employment.[5] His experience includes being a belt examiner. Tr. 59. Caudill is familiar with the Highland # 9 ventilation system. That system employs a single exhaust fan. Such an exhaust system creates a negative pressure because it pulls air out of the mines. Tr. 64. Caudill was at the Respondent's mine on December 9, 2008, along with his supervisor, Inspector David West. He was there to go to the number 5 unit. That unit is a split air unit, meaning that intake air comes up the middle entries and then splits at the face, from which it exits, to a return on each side.[6] Tr. 69. West and Caudill traveled to the number 5 unit at which point West decided to walk the 5 B belt while

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[5] The Government's first witness was MSHA coal mine inspector Archie Coburn. His testimony is placed in a footnote because the court's determinations here are not dependent upon that testimony. However, the information in this footnote still constitutes findings of fact. Coburn is quite familiar with the Highland 9 mine. On September 19, 2008 during the closeout meeting at the mine, MSHA advised that it would have to step up its enforcement due to the number of section 75.400 accumulations violations. Tr. 38. Coburn asserted that Highland official Mr. Milburn acknowledged that the mine had a problem with accumulation on the belt lines and that he was planning to hire more belt cleaners to keep the spills cleaned up. Tr. 39-40. MSHA inspector Charlie Jones notified Highland at that time that its negligence would go up if any more 75.400 violations were issued. Tr. 43. MSHA Inspector West, who issued the citation and order for two of the three violations addressed in this decision, *was not* present when Charlie Jones put Highland on notice in September 2008 that 75.400 violations were not excusable and that its negligence would increase and he stated that his determinations regarding the violations addressed in this decision were was not based on Jones' warning. Tr. 248-249. Although the Court has determined that the circumstances surrounding the order and citation issued here are sufficient to make the needed determinations without it, and while West's determinations as to unwarrantability were not based on the earlier warning about the mine's accumulations problems, nevertheless it is fair to consider that factor *as an independent additional* basis for the Court's findings in that regard. Highland's Scotty Maynard admitted in his testimony that the mine was advised about the 51 accumulations violations issued to it during the fourth quarter of 2008. Tr. 405-406. The contention that the majority of those accumulations violations did not involve belts is, in the Court's view, a distinction without meaningful difference, because they did pertain to the problem of accumulations, wherever they happened to occur.

[6] In that arrangement the primary escapeway is in the main intake. The secondary escapeway is in the entries that are the belt entry and the supply road entry. They are separated from the return and the primary by a solid concrete block stopping which is built in the crosscuts between those entries. Tr. 70.

Caudill went to the 5A tail.[7] Caudill found an accumulations problem at the 5A belt[8] then proceeded one crosscut over, to the supply road and from there started traveling towards the No. 5 unit until he met up with Inspector West at crosscut 14. Tr. 77. Caudill then walked the distance between the supply road and the belt entry, at crosscut 15. At that time West told him he had some 20 bottom rollers turning in coal. Because of that, West had him start at the tail of that belt (i.e. the area closest to the unit) and walk outby to meet him. Tr. 78.

Caudill then found loose coal at crosscut 63, along with coal loading up on one side of the belt, causing the belt to run up on the structure from the tail to crosscut 54, a total of 15 crosscuts. Tr. 79. Caudill noted that finding rollers running in loose coal at crosscut 63 is the same problem he observed at the tail of 5A. Tr. 80. In sum, Caudill found bottom rollers running in loose coal at crosscut 63 and misalignment running a distance of 15 crosscuts.[9] Tr. 81. He then met Inspector West at crosscut 63. At that point, West told Caudill to continue with

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[7] The 5 B head drive dumps on to the 5 A tail; that is, coal coming off the 5 B dumps on to the 5 A. Accordingly, the 5 A tail is closer to the portal and as one goes inby the 5 B belt is next. Tr. 72. At the 5 A tail, Caudill found the last 4 bottom rollers to be turning in loose coal and coal fines. This problem had been "cleaned halfway across," but the job had not been completed. Tr. 72. The accumulations were 3 feet long, a foot wide and 8 to 10 inches deep and he noted that the accumulations were cupped around the bottom rollers. Tr. 73. These were accumulations of coal and a bottom roller was turning in direct contact with the accumulations, at least half-way across. Significantly, the mine was running coal at that time and a bottom roller running in coal creates the hazard of a frictional point. That is, such coal provides the fuel and the friction provides the heat. As there was also air, that completes the "triangle" for a fire to occur because one has heat, fuel and air. Tr. 73-74. Caudill stated that Respondent's employee, Troy Cowan, who was with him at that time then contacted the belt cleaners to come there and start cleaning those belts. Tr. 74.

[8] Although the Respondent objected to the introduction GX P 5, involving the 5A belt, as this case involves alleged problems with the 5B belt, the exhibit was admitted because the 5A belt is essentially continuous with the 5 B belt. The 5 B belt is adjacent, that is, one crosscut over to the supply road. The Court concluded that, given the proximity to the 5B belt and that the problem was detected at essentially the same time that the problems on the 5B were found, and that the same class of problems was involved, coal accumulations, the 5A finding is useful, contextually, to evaluating the problems alleged along the 5B and it is also pertinent to assessing the credibility of the conditions claimed by the inspectors.

[9] Caudill found rollers turning in coal at crosscut 63 but no other rollers turning in coal. Tr. 96. He could not say if those rollers were warm or hot to the touch. Tr. 97. He also observed that the metal frame was shiny from the belt having rubbed against it, although his notes did not include that finding. Highland did not dispute that there could be shiny frames. Instead it argued that such conditions were old, having occurred from the belt frames' use in prior locations. Tr. 98.

his ventilation review.[10]

A primary defense of the Respondent is that it was diligently addressing the accumulations issue and it points to the belt clean-up work being performed by miner Cavanaugh at the time West identified them. In this regard Respondent tried to have Inspector Caudill concede that Cavanaugh must have been doing his job, addressing the 5B belt accumulations. However Caudill did not oblige with that view, responding that if West came behind Cavanaugh and still found 20 bottom rollers turning in coal from crosscut 1 to crosscut 15, and Cavanaugh had already been there, then that miner "evidently [ ] hadn't done what he was supposed to do." Tr. 104.
Further, when it was asserted that Caudill must not have been claiming that West found 20 rollers running in coal from crosscut 3 to crosscut 15, Caudill maintained that in fact *was* his assertion and that it was reflected in his notes. Tr. 104-105. Those notes reflect that he met West at crosscut 14 and that there were "[t]wenty bottom rollers in coal." Tr. 105. While Respondent's counsel suggested that *the location* of those 20 rollers wasn't explicitly stated in his notes, Caudill advised they could only be between crosscut 3 and 15 because West had started at crosscut 1 and Caudill had met him at 14. Tr. 105.

MSHA Inspector David West, who has a bachelor of science degree from the University of Kentucky in mining engineering and some twenty years of underground mining experience in private industry before starting work with MSHA in 2003 is presently the ventilation specialist supervisor in the Madisonville district office. Tr. 128-130. As noted, Felix Caudill is one of the two ventilation specialists that work for him. Tr. 131. West, like Caudill, is familiar with the Highland # 9 mining ventilation system. Tr. 132. In this regard, he noted that the mine uses a main exhaust fan in its negative pressure arrangement. In the negative or "exhaust" system normally belt air and the supply road air will be travelling inby and dumped into the return air

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[10] In proceeding with his ventilation review, Caudill took air intake readings and in doing that he learned that there was belt air traveling to the face. Tr. 85. One is not permitted to use belt and supply road air to ventilate the faces. Tr. 85. As there was more air going out than was coming in, Caudill knew there was belt air going to the face. Tr. 86. A smoke tube employed by Caudill confirmed that the air was going inby, through the airlocks and straight to the intake. Tr. 86-87 and GX P 6, the citation he issued for belt air going to the face of the No. 5 unit. Although the Respondent objected to this information, as the ventilation violation is not in issue here, the Court concludes that it is relevant, contextually, as it shows the close interrelationship which can occur between belt and ventilation issues and hence it speaks to the importance of addressing coal accumulations. Caudill listed 18 persons affected because that is the number of miners on that unit. Tr. 89. He also issued a violation for an airlock constructed using nails and spads, as opposed to framed on wooden frames or hilti nails. The mine's use of that arrangement allowed air from the belt to enter the intake air at that unit. Tr. 91.

course *before* it gets to the units. Tr. 133.

West testified about the events of December 9, 2008 at the Highland Mine.[11] Upon arriving at the mine at 7:10 a.m., among other tasks, he looked at the preshift books. This included the belt examination book entry for 12/8/08 on second shift which listed that the 5A tail was wet and dirty and the 5B header to crosscut 15 was black and that the header and tail at crosscut 41 to 60 was "dirty"[12] and bottom roller 19 and a half, 22 and a half." Tr. 139. A reference to black means that there is a good possibility that there is float coal dust or coal dust in the area. This is dangerous because if ignited or put in suspension and ignited, one could have a fire or explosion. If coal dust is in direct contact with a frictional or heat source, a fire can occur. Tr. 139-140.

West also noted that the belt examiner listed "5A cleaned spill at head and tail area. 5B cleaned head 41 to 46, 58 to 60." Those were listed as corrections, reflecting what had been cleaned. Tr. 140. Those corrections were written on the second shift on December 8, 2008 or the shift prior. Tr. 141. West agreed that it is possible that second shift corrections are actually to correct the conditions that are listed during the day shift. Tr. 141. As to any corrections being made during the third shift on December 9, 2008, West explained that when he arrived at the mine, the third shift was still in the mine, that is, they had not come out yet. Tr. 141. Therefore if that third shift had done any corrections, they likely had not put them in the belt books at that time.

After reviewing the books, West, accompanied by company representative Troy Cowan and others, entered the mine. As there were some hazards listed in the record book,[13] West stated that it was his intention to go to the 5B belt first, to be sure that the area had in fact been cleaned up and rock dusted. Tr. 154. [14] West's inspection of the 5 B belt started at the drive and proceeded inby, that is, heading towards the No. 5 Unit. Tr. 153. At this time West was checking to see if the hazards, as listed in the book outside, such as the note that crosscut 3 to 15 was black

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[11] GX P 8 reflects the notes on that date.

[12] In West's experience, a reference that the header and tail at crosscut 41 to 60 are "dirty" means that the belt needs to be shoveled. Tr. 140.

[13] West confirmed that before he entered the mine that day he had viewed the inspection reports and with those in mind he was looking particularly to see if those problems had been corrected. West agreed that one of the things he noted in that report was the presence of float coal dust. The belt running on a frame and the bottom roller running in coal were not listed in the report. Instead, he discovered those things during his inspection. Tr. 157.

[14] On the way to the 5B, a loose rib was discovered and a citation was written for that condition. Tr. 151.

in color, had been corrected. Tr. 153. West found some belt cutting into the framing between crosscut 2 and 3, that is, the bottom belt was cutting into the roller stands. The belt *was operating* and it had cut into the stand about a half inch. Tr. 154. West then felt the belt frame with his hand and found that it was hot. Tr. 155. West added that, from crosscut 3 on inby as far as he could see, the belt was black in color from rib to rib and there was float coal dust on the belt framing. The entry at that location is 19 to 20 feet wide and he saw float coal dust from crosscut 3 to 15. That is a length of about 840 feet, and the float coal dust was about 1/16 to 1/8 inch in depth. Tr. 155, 160. The Court believes that it is helpful, in appreciating the scope of this problem, to envision a length of nearly 3 football fields. Importantly, West observed no one as he traveled that distance. Tr. 160. West also observed 20 bottom rollers running in coal and coal dust between crosscuts 3 and 9. West then confirmed that what he observed was coal by digging under the bottom rollers. Tr. 156. West stated that the coal accumulations underneath the rollers were black from crosscut 3 to 9 were cupped around the rollers, "basically submerging them." Tr. 157. He explained that this creates a fire hazard due to frictional heating and the rollers moving in coal causes it to become more powdery, causing float coal dust. Tr. 158.

Between crosscut 6 and 7 West also found the bottom belt cutting into the frame. Tr. 158. This is another fire source and there was float coal dust on the frames too. Tr. 159. West also found the belt rubbing against the framing at three additional places between crosscut 11 and 12. Tr. 159. At that location it felt warm to hot to the touch. Tr. 159. Concerning that 840 foot distance, West opined that since it was already in the examination book, the mine operator knew of the problem and it should have been rock dusted on the third shift prior to production beginning on the day shift. Tr. 160. In fact, West suggested that it could have been rock dusted even earlier, that is, on the second shift after the examiner found the condition. Tr. 161. This earlier action was warranted, West believed, because if the examiner found the belt black in color, that examiner should have notified the mine foreman right then. Tr. 161. It was West's opinion that the condition had existed for two shifts. Tr. 161. The basis for this view was that the belt was examined some time during the second shift on the 8th. That is uncontested. West then arrived at a time into the morning on the 9th. Therefore, all of the third shift had passed and part of the prior day's second shift and part of the following day shift on the day he was there. Adding those together, the time elapsed totals nearly two shifts. Tr. 161.

Upon discovery of this 840 foot area, West found Troy Cowan, the mine's ventilation supervisor, along with the miners' representative and Felix Caudill and he then issued an order and hung his red tag[15] at crosscut 3. Tr. 161. Having found those problems, West then made the decision that he needed to walk the rest of the belt. Tr. 162. He accomplished this by teaming up with Caudill, sending him to the tail piece of that belt and having him walk from there to him, that is walking outby towards West, while West started at crosscut 15 and started walking inby towards Caudill. Tr. 162. In that process, West next found coal under the belt 4 inches deep at crosscut 21 to 26. This encompassed a distance of about 350 feet. West explained that this was

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[15] The red tag signifies a closure order for a particular area which has the effect of taking such area out of service. Tr. 162.

coal and coal dust and that it had been there for quite awhile, by which he meant one to two production shifts with the belt running, as it takes time for a buildup of 4 inches to accumulate. Tr. 162-163. Following that, from crosscuts 30 to 38, West observed 4 inches of coal under the belt. That distance, 8 crosscuts, amounts to 560 feet. Tr. 164. This too would have existed for one to two production shifts. Tr. 164. Then, from crosscut 39 to 41, a distance of about 140 feet, he found 3 bottom rollers running in coal and the belt on the supply road side was not level, causing it to spill coal. Tr. 164. Showing his fairness and attention to detail, West volunteered that at that location only 3 bottom rollers were observed to be running in coal. Thus the entire 140 feet was not running in coal. Tr. 165. However there was float coal dust there, 1/16 to 1/8 inch deep, and on the belt frame, rib to rib. The coal dust, as opposed to the rollers running in coal, was not limited, because it was there over the 140 foot distance and its 20 foot width. Tr. 165.

Again, West stated that there was no one working in that area, so the problems were not being addressed. Next, West spoke to crosscuts 43 to 44, where he found 4 inches of loose coal under the belt.[16] Tr. 166. It was not until crosscut 49 that West observed anyone working on the belt. Thus, he computed that he walked some 3,430 feet, or more than 6/10th of a mile, before observing someone working on the belt. Tr. 167. At that crosscut, No. 49, he saw Perry Cavanaugh, who informed West that he was shoveling the belt. Tr. 167. This was around 10:45 a.m. Tr. 167. Cavanaugh told West that he was given a list of places to shovel that morning at the start of his shift and stated that he spot cleaned the 5B belt drive to crosscut 3 and then moved to crosscut 41. Tr. 168-169. Although Cavanaugh told West that he had shoveled from crosscut 41, West found accumulations at crosscuts 43 and 44. Tr. 169.

West noted that Cavanaugh was wet from sweat, indicating that he had been working hard that day. West concluded that having a single man deal with the accumulations was not enough because they were too extensive. Tr. 169. The Court agrees with that conclusion as well. Further, in West's estimation, the problem was not solely about shoveling; rock dusting also needed to be performed. At the time West met him, Cavanaugh still needed to shovel eleven more crosscuts, a distance of about 770 feet. Tr. 170. Again, it is useful to envision a length of 2 and ½ football fields, a significant distance. West believed it would have taken Cavanaugh at least the rest of his shift to complete the shoveling. That is to say, to shovel the areas cited in the belt inspection record from the second shift of December 8, 2008. Tr. 170. Given the amount of workers and the time ultimately expended to correct the accumulation problems, West's estimate was too modest. Until West had 'red-tagged' the belt that morning, issuing his D order, the mine had been producing coal at the face. Tr. 171. It was West's view that if the problems he found had been addressed at the start of that day shift, it would have taken seven or eight men about the entire shift to correct the problems.[17] Tr. 172. West stated, without equivocation, that the mine

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[16] The distance between two crosscuts is about 70 feet. Tr. 167

[17] West's estimate was based on his personal observations and did not take into account Caudill's observations. Accordingly Caudill's observations of problems would be in addition to

should not have been running coal until the problems listed in the belt inspection record had been corrected. Tr. 172. The Court, finding West's accounting of the problems credible, agrees.

Following West's meeting with Cavanaugh, he discovered more problems. From crosscut 50 to 51, there were two bottom rollers running in coal and there was float coal dust 1/16 to 1/8th of an inch deep. Float coal was on the frame as well. Tr. 172. West then met up with Caudill at crosscut 53. Caudill informed West of the problems he saw of the belt rubbing the frame on the belt entry from crosscut 53 to the tail piece, in twenty locations and this was recorded by West in his notes. Tr. 174. Caudill also reported to West that he found float coal dust between crosscuts 62 through 64 and that it was 1/16 to 1/8 of an inch deep. When the Court asked if that was a significant amount of coal dust, West advised that it has been shown that a lot less than that, probably only half what was found, can cause an explosion if it gets suspended in the air. Tr. 174. West later learned that the mine assigned 14 people to correct the conditions that he and Caudill found on the 5 B belt and that it took them 5 hours to correct the problems. Tr. 176, 185. That totals about 70 man hours and accordingly the Court agrees with West's characterization that the correction required an extensive amount of time.

Referring to his contemporaneous notes, West related that the rock dusting began on that day at 12:45 p.m.. Tr. 179. The rock dusting started outby the airlocks, at the temporary stoppings just outby the tail piece, in the belt entry. Tr. 180. This resulted in inundating the area with rock dust up to and including the last open crosscut on both sides of the unit. Tr. 180. Thus, rock dust was visible in the air, and it had traveled through the air locks on to the unit and then mixed with intake air and traveled to the last open crosscut and from there to both sides of the unit.[18] Based on those observations, West knew that some of the belt air was traveling

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those West observed. Tr. 173.

[18] Regarding Inspector Caudill's citation, No. 8492213, Gov. Ex. P 6, alleging that rock dust inundated the last open crosscut, Highland's Cowan later stated that the 5B tail piece on that day was inby the airlocks. Under the mine's plan it was allowed to have the tail piece just inby the airlock and thus it was about 40 feet inby the airlock curtain. Tr. 342. Thus, Cowan asserted that if miners were rock dusting the tail piece, it would inundate the section because the feeder is in the intake and therefore it would inundate the last open crosscut. Tr. 342. Cowan maintained that rock dust inundating the last open crosscut does *not* mean there is belt air traveling to the face. Tr. 342. Cowan admitted that he did not know if French told Cavanaugh to rock dust along the 5B belt. Instead his assertion to that effect was based upon that it would be "normal procedure." Tr. 354. Also, he did not know where they started rock dusting to abate the violation, rather he made assumptions about that. Tr. 355. Cowan was also asked about Caudill's citation, No. 8492214, in which Highland was cited for using spads instead of Hilti nails. A Hilti nail has a one inch head on it but a spad, which is a wedge piece of steel, does not. Tr. 344. Cowan admitted that the spad is not approved under the plan but he maintained that it serves the same purpose. Use of such spads would not, Cowan stated, have any effect on rock dust inundating the unit. Tr. 344. Cowan did not believe that the mine had belt air at the face.

towards the last open crosscut on the unit. Tr. 181. That meant the belt air had a higher negative pressure than the primary escapeway on the main intake that was traveling to the unit. With that situation, belt air and supply road air is trying to get to the last open crosscut on the unit.[19]

Around 3:25 p.m. that day the conditions on the 5 B had been corrected and West met with Scotty Maynard, the mine assistant superintendent. Tr. 182, 185. According to West, Maynard told him that he knew about the hazards in the book but that he didn't have sufficient rock dusters to correct the problem and that he decided to go ahead and run the unit (i.e. produce coal) anyway. Further, Maynard allegedly told West that higher ups, in St. Louis, would have to approve pulling personnel from production to correct problems like West cited. Tr. 183. West's notes at p. 27. In fact, West was so surprised at Maynard's candor that he asked him again if he meant what he had stated and Maynard confirmed his statement to him. Tr. 184. Having later heard the testimony of Mr. Maynard, the Court credits West's testimony about this conversation.

Although Maynard also told West during that conversation that he had found only five bottom rollers running in coal between crosscut 3 and 15 and that he had cleared them,[20] West then went to that area but found five rollers that were still running in coal. Maynard then returned to that area and re-shoveled it. Tr. 185.

In citing the Respondent for a violation of 75.400 for the accumulations of loose coal, coal dust and float coal dust, West reiterated that it presented a risk of fire and/or explosion, that the likelihood of injury was reasonably likely in that it presented a discrete hazard to miners because a fire or explosion would inundate the escapeways with smoke and carbon monoxide. Again, West found that the ingredients were present because there was fuel, oxygen in the airflow and ignition

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Instead he believed they had "stuck a rock dust hose through the airlock and rock dusted the tail piece," as required. Tr. 344-345. The problem with that belief is that, as noted in footnote 17, below, West saw rock dust inundating the last open crosscut. While the Court credits West' testimony on this, ultimately, it concludes that this issue is more of a distraction from the accumulations problem involved in this decision.

[19] West later clarified that he also *observed* rock dust inundating the last open crosscut, along with Caudill. Tr. 231. West did not agree that if the mine rock dusted inby the airlocks, rock dust would be inundating the last open crosscut. Rather, he maintained that this would not occur continually and that it would clear but that, in this instance, it did not clear. Tr. 231-232. Thus, because the air pressure was not right, the rock dust on the section did not clear directly after rock dusting began. Tr. 233. As noted, the whole matter of rock dust at the face can be viewed as a misfocus, because the case is not about a violation for the presence of rock dust at the face. Rather, the rock dust issue was offered as additional evidence that belt air was moving to the face. Tr. 245-246.

[20]Maynard acknowledged that there was an area that was blacker than what he had expected to find. Tr. 184.

sources from the frictional rubbing of the belt on the frame. Tr. 188. The ventilation violations found by Caudill was a factor considered in determining the number of persons affected. Tr. 189. West marked lost work days or restricted duty as the type of injury which could occur and 18 persons, the number of miners on the No. 5 unit, being affected. Tr. 189. This number was based on the number of persons inby and West provided considerable detail about what could happen, including the air courses which would be affected by smoke or carbon monoxide traveling inby towards the section. Tr. 190. The Court agrees with, and adopts, West's analysis of the S & S dimension to the cited violation.

In addition to his statement that Scotty Maynard had acknowledged his awareness of the problems, West also expressed that Terry Johnson, the third shift mine foreman, was aware of the conditions that were cited, as he countersigned the record book on the surface. Tr. 191. West concluded that the conditions he observed justified classifying Highland's negligence as "high," but he did not list it as "reckless disregard" because he to into account that Perry Cavanaugh was shoveling the belt at some point. That effort by Cavanaugh was insufficient however, in West's estimation, because the problem was too extensive for one person to take care of it. Tr. 193. The result was that West issued a 104 (d)2 order, which reflected his view that it was an unwarrantable failure on Highland's part. Tr. 193-194. The Court also agrees with this evaluation and adopts it as findings in support of its unwarrantable determination.

Following his testimony regarded the problems on the 5B belt, West identified the violation he issued on December 9, 2008 for a section 1725(a) violation. Tr. 195, GX P 11., Citation No. **8492282**. That standard requires equipment to be maintained in safe operating condition. Tr. 195. This related to the 5B bottom belt rubbing the hangers in several locations, presenting the risk of fire or explosion from frictional heating.[21] Tr. 195. He believed this condition "could easily" start a fire and that the same 18 miners would be affected as with the other citation.[22]

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[21]The citation stated that the "bottom belt is rubbing the roller stands in approximately twenty seven places form crosscut two to crosscut 69 ... Four places are cut into the bottom roller stands ½ inch in depth. The places where the belt is cutting the frames were hot to the touch and all others where the belt is rubbing is warm to the touch. In several of these places float coal dust, coal dust, and loose coal accumulations exist [the citation referenced citation 8492281 which was just discussed in this decision]. The out of align *running* belt conveyor is very obvious and extensive when inspector made belt entry. The mine operator shut the belt conveyor down until cleaning, rock dusting, and the proper belt alignment could be made." Citation 8492282 (emphasis added). The Court finds that all noted aspects of the citation were established by a preponderance of the evidence of record.

[22] The Court inquired of West why he did not choose the other characterizations of "unlikely" or "highly likely." West explained that those choices were not appropriate because a fire *would* occur if the belt continued to operate under the conditions he observed. It would only be a matter of time before such an event. On the other hand, West did not opt for "highly likely"

Tr. 196. For this citation, West also considered it to be 'high negligence' due to the amount of spillage that was present and his opinion that this had to have existed for one to two shifts. Tr. 197.

Upon cross-examination, the Respondent attempted to show there was some mitigation. In that respect, West agreed that if a mine operator identifies a problem in a record book and made an effort to address it, that is mitigation. Accordingly, West agreed that the December 9, 2008 entry in the belt books for 5A and 5B noted the hazards listed and the corrections that had been made. That belt book report in issue was for December 8th and West agreed that he reviewed the corrections that were listed on the second shift for that date.[23] Tr. 201. While there was some mitigation that does not mean that the required special findings should be rejected and, upon consideration of the entire record, the Court upholds those findings.

As to West's view that the violation was high negligence and unwarrantable failure, he stated that while Scisney wrote that 41 to 60 were dirty, when West viewed the area he saw that only 41 to 46 and 58 to 60 had been cleaned. Tr. 206. Thus, he listed the situation as unwarrantable and high negligence because nothing had been done between crosscut 3 and 15. Tr. 206. Accordingly, West compared what was listed in the belt book with what had been accomplished when he viewed the problems. Tr. 208.

Although the corrections on December 8, 2008 belt inspection report for the second shift only referred to cleaning on 41 to 46 and 58 to 60, West agreed that his unwarrantable and high negligence findings were based on the corrections he read in the belt inspection report for the second shift on December 8, 2008. However, West's position was strengthened by his remark that his view was also based on what he observed underground. Tr. 208. Accordingly, while West did not dispute that he observed Cavanaugh shoveling on the belt, and that he could have been shoveling for about two hours before West saw him, it was West's point that the effort was both late and an insufficient response. The Court agrees with that assessment. West also did not question that Cavanaugh was given a list of areas that needed to be addressed that day and that Cavanaugh told him he had been assigned to shovel the belt that day. Tr. 210. While Respondent suggested that West had no reason to doubt that Cavanaugh would rock dust after he finished

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as he prefers not to list that unless the condition is approaching an imminent danger. Tr. 198-199.

[23] In a matter that ultimately is not of determinative consequence, West stated that the belt examiner had listed that the belt was black from crosscut 3 to 15. Tr. 202. However the Respondent challenged West's note in that regard, because Respondent's Exhibit 5, belt examiner Scisney's report lists the belt as 'black *to gray*' not simply '*black.*' West maintained that *his* notes would have listed "black to gray" if that had been written at the time he reviewed Scisney's report. Thus, the implication was that the language about "gray" had been added subsequently. While not willing to claim that falsification occurred, West stood by his remark that he would have included the "gray" language had it been there. Tr. 202- 204. The Court finds it unnecessary to resolve this conflict.

shoveling, West responded that Maynard told him he didn't have anyone to rock dust. Tr. 212.

Further, while the Respondent tried to challenge West's tally of the number of crosscuts with problems, West, upon checking his notes stated that there were some 26 crosscuts where there was coal that needed to be cleaned up or float coal dust was present. Tr. 214. West added that there were several other places where there was "just coal underneath bottom rollers." Tr. 214. Thus, West maintained that there were 26 crosscuts that needed to be cleaned in addition to areas where there was coal under bottom rollers.

As pointed out by the Respondent, Highland did not run production on the third shift on December 8, 2008 and West arrived at the mine right after that third shift. Tr. 224. Further, West agreed that there is no requirement to walk or examine a belt if it's not going to be operated or worked on during a shift. Tr. 224. Although West did not assert that Maynard knew more about the conditions beyond what was listed in the belt examination report, he at least knew about the report's identification of problems.[24] Tr. 225. In the Court's view, these contentions miss the larger point that the extent of the problem, the attendant aggravating conditions, as identified by West, the time that had elapsed since the examiner's report, and the insufficient response, all add up to, and amply support, his special findings.

Addressing a major contention of the Respondent, as evidenced through its demonstrative exhibit enlargements of the belt inspection report presented at the hearing, with the point of comparing the belt inspection report for the second shift on December 8, 2008 with the corrections during the second shift on December 8th, West was asked to assume that the December 8, 2008 correction sheet for the second shift was dealing with the corrections for the belt inspection report made during the day shift on December 8, 2008. West's response was that if the corrections were for the day shift inspection, then the conditions he would consider the situation to be *more* serious. Tr. 250.

Accordingly, West stated that when, on December 9, 2008, he examined the second shift belt inspection report of December 8, 2008, he assumed that the corrections for those problems had been made by then. Tr. 251. West maintained that the corrections the mine operator had put forward were for the first shift on December 8th and that the no corrections for the second shift had

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[24] Upon cross examination of West's claim that Terry Johnson, Guy Scisney and Dean Arnold had knowledge of the conditions listed in his order, West agreed that his basis for imputing knowledge to Johnson was the fact he countersigned Scisney's inspection of the 5 B belt and he agreed that Johnson's knowledge would be limited to what Scisney had written in his inspection report. Tr. 217-218. However, West did not back away from his position that if one has bottom rollers running in coal when the belt report says 'dirty' or if one has float coal dust on the belt when it says 'black,' one should not be producing coal. Tr. 219. The Court agrees with West's assessment that coal production should not be ongoing under such conditions.

been put in the books, if in fact any corrections at all had been made by then.[25] However, the Court concludes and finds that, given all that West found underground, even buying into the Respondent's argument for the moment, the extent and nature of the problems West found are determinative here. Simply put, Highland should have done more in reaction to the belt exam report and done so sooner.

Ezra French, Highland's mine superintendent was called as a witness by the Secretary. At the time of the events in issue in this proceeding, he was the mine foreman. French agreed that if a report listed an area as 'dirty,' he would assign someone to clean it up and that means shoveling. Tr. 264. He also confirmed that the phrase "black to gray" means that the area needs to be rockdusted. Tr. 264. Although on December 9, 2008, the mine had a "3 person dedicated belt crew during production shifts," the other 3 miners on the 'belt crew' would have been handling anywhere from 13 to 16 belts at the Highland underground mine. Tr. 266.

French conceded that, at least one purpose of a belt corrections page is to show that a correction has actually been made along a belt and he moved back from his earlier contention that belt examiners may exaggerate problems, allowing that a given examiner "may see things a little differently than another individual." Tr. 266-267. He admitted that on December 9, 2008[26] he

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[25] West understood, without agreeing, that it was Highland's claim the corrections were not listed in the page *after* the problems identified in belt report. Tr. 252.

[26] Some questions were directed to belt exams prior to those in issue here. Directed to the 5B belt exam for December 3, 2008, which listed header to crosscut 15 as black to gray, French agreed that the corrections page, at page 26, listed nothing regarding cleaning that area and he conceded that meant that no dusting occurred on that night, which was the idle shift, after the exam conducted on the second shift for December 3rd. Tr. 272. French was then asked to view the examination part for the first shift on December 4th, and its notation for 5B of a small build-up under the head roller, outby end of takeup dirty. It also listed black to gray from header to crosscut 30. Then, French was asked to look at the second shift corrections for that day shift report, which stated only "5B is clean header and tail and crosscut 38 and 3" and he agreed that meant no rock dusting had occurred during that shift. Tr. 273. GX at page 29. Next, French was asked to look at the second shift inspection report for December 4, 2008, and he agreed it stated, 'header to crosscut 15 black to gray" and that the next page reflects that it was dusted at the 5B header, but with no note that dusting occurred after that header to crosscut 15. Tr. 273. GX 12 at 30.

Critically, French agreed that if the inspection reports show only that there was rock dusting on the 5B for the third shift on December 5th, he has no evidence to show more rock dusting was done. Tr. 274. French also conceded that at page 35 for December 5, 2008 and the remark that 5B header to crosscut 15 black to gray, there is no mention about 5B, but area belts 2A, 2B, 4A and 4B are mentioned as being dusted in parts. Tr. 274. For December 6th, at page 38 of the exhibit, French agreed that it states 5B black to gray header to crosscut 28, tail dirty. Tr.

had no personal knowledge of the conditions along the 5B belt. Tr. 267. Instead he was working entirely off of the information he had from the belt examiner. Tr. 267. He added that belt examiners at the mine may only list areas that need to be addressed but that if an examiner encounters an immediate danger, those must be addressed immediately. Tr. 268. The Court finds that it is fair to note that French contradicted himself on what belt examiners do and do not write down and he stated that he found it difficult to explain what he was trying to express. Tr. 270. French acknowledged that the mine does the bulk of its rock dusting on the third shift and that, in December 2008, one of his duties as the mine foreman was to review the belt examination report for the preceding shift. Tr. 271.

French agreed that for the day shift of December 8, 2008, the examination for the 5B header reflects that it was cleaned on header to crosscut 15 and tail, but there is no mention of rock dusting. Tr. 276. GX at page 43. French also conceded that, by signing his name on the report, he was going back to correct conditions that were listed during the second shift on December 6, 2008. Tr. 276. GX at page 40. As mentioned earlier, French admitted that he reviewed the belt inspection report prepared by the second shift belt examiner on December 8th and he identified R 5 as the belt examiner report for that date.[27] R5 is the same exhibit as P-12.

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275. Further, he agreed that for the second shift for 'corrections,' it reflects 'clean header and tail crosscut 15 to 25 but that it says nothing about cleaning or rock dusting from the head or after the header to crosscut 15. Tr. 275. Ex. at p. 39. So too, he agreed that for the second shift the inspection report shows 5B header to crosscut 15, black to gray and that for December 7, for the idle shift, it mentions only cleaning but no rock dusting and there is no mention of cleaning on 5B. Tr. 275. Ex. 9 at page 40. Further, at page 42 of the exhibit, pertaining to December 8th's idle shift, there is no mention about dusting or cleaning of the 5B. Yet there is mention of dusting at 2A tail, 2B dump point and the slope tail. Tr. 275-276. Thus, it is fair to conclude that if dusting was not listed, it did not occur.

[27] French read from Exhibit R 5, the second shift belt examination report of December 8, 2008, which was made by Mr. Scisney. While the Court does not find French's take on that report to be critical to its findings of the conditions involving the citation and orders in issue here, it is included as a footnote for the purpose of completeness. In any event, French noted that it recorded: "5B header to crosscut 15 black to gray. Header and tail and crosscut 41 to 60 dirty. BR 19 and a half 22 and a half." Tr. 290. French interpreted that information as follows: '5B header to crosscut 15 black to gray" means an area needing dusting. "Header and tail and crosscut 41 to 60 dirty" means that area also needs to be cleaned. "BR 19 and a half 22 and a half" indicates "this is third shift information that there is a roller that needs to be seen; that it refers to a roller that is damaged "a little bit" and needs to be changed out. Tr. 291. French confirmed that Scisney would have filled out the actual belt examination book at the end of Scisney's shift, around 11 p.m. Tr. 292. This would be done before the third shift would go underground. Tr. 293. Problems identified by the belt examination are not corrected until the next shift. That is, corrections are not made during the same shift in which the belt exam is conducted. Tr. 294. For this reason, French stated that *corrections* listed on the second shift for

French, asked what Highland attends to on the third shift regarding belts, responded that among other tasks, rollers may be changed out, and tank dusters will be used during that shift too. Belts are not examined during that shift because they are not running at that time. Tr. 295. French stated that he did have four shovelers working on December 9, 2008, the day the order in this case was issued, although normally there would only be three shovelers. Tr. 295. French added that it was his practice to make a copy of the belt inspection report and then use a "highlighter" and make a list for each person working the belts on a given day. Tr. 296. On December 8, 2008, French assigned Perry Cavanaugh to clean the 5 B belt. Tr. 297. He handed Cavanaugh the list he had copied with the tasks on it and he stated that he highlighted the entire line next to 5B. Tr. 297. French described Cavanaugh as an "older gentleman," who recently retired and is probably 63 or 64 now. Tr. 298. French confirmed that there is some subjectivity in assessing the conditions with belts as, for example, one examiner might call a belt gray while another might describe it as 'black to gray,' for example. Tr. 298- 299.

French believed that Cavanaugh could do the tasks identified with the 5B belt, which included cleaning crosscuts 41 to 60 and rock dust at the header to crosscut 15 if it was needed. Tr. 300. In sum, from French's perspective, there was nothing out of the ordinary regarding the 5B belt report for that day, no MSHA inspector had ever told Highland if it finds conditions such as 41 to 60 dirty or a belt described as "black to gray," that the belt should be shut down; that he had no knowledge on December 9th of rollers running in coal; and that nothing in Scisney's report suggested the belt was out of alignment or rubbing a frame making it hot or warm to touch. Tr. 302-303. He also disagreed with the claim that someone would need to call St. Louis before sending anyone to help a shoveler who needed help with assigned tasks.[28] Tr. 303.

Troy Cowan, Highland's ventilation supervisor, was called as a witness for the Respondent. Cowan was working at the mine on the day West issued his 104(d)(2) order, number 8492281 and he went underground with MSHA's West and Caudill on December 9, 2008. Tr. 323. Cowan agreed that West walked the 5B belt line. Tr. 324. While Cowan stated that West told him that he wanted the belt aligned from crosscut 7 towards the header, Cowan couldn't see the belt rubbing anywhere but he acknowledged where it might "had possibly rubbed in the past." Cowan believed that the cuts in the frame also occurred at some time in the past, as he asserted that the frames were five or six years old and they had been used in different panels. Tr. 325. Clearly, Cowan maintained that he saw nothing to support West's claim of misalignment. Tr.

December 8, 2008 are addressing items listed on the day shift for December 8, 2008, that is to say, from the *first* shift. Tr. 294-295.

[28] French agreed that back in December 2008 Scotty Maynard was French's supervisor but now French is *his* supervisor. Tr. 315-316. French admitted that he wouldn't know if Maynard was required to call St. Louis before shutting down a belt, but he still added that such calls do not happen. Tr. 316.

326. Also, he felt no heat on the frame.[29] Tr. 326. At that point, Cowan related, West told him he wanted the belt shut down and he advised Cowan that he, West, would be walking to the header. Tr. 326. Cowan then walked from crosscut 7 to 3, where the telephone was located, so that he could have the belt shut down. Tr. 327. Cowan essentially disagreed with all of West's view of the situation. For example, he noted only "dry flakes" under rollers, but nothing to support West's view that they were "dirty." Tr. 327. The "flakes" in Cowan's view were mud, or "fireclay," not coal.

The stark differences between Cowan's perception of the conditions and those of West, prompted the Court to note that great disparity between their assessments of the same area. Tr. 328. When the Court asked just how far apart Cowan's view was from the inspectors' view of things, asking if Cowan felt that not only was no Order justified but perhaps there shouldn't have even been a citation, Cowan would not go quite that far, as he acknowledged a spill at crosscut 39 to 41, but he called this a "fresh" spill and that was right where Cavanaugh was working to clean it up. Tr. 329. With that kind of opinion expressed by Cowan, the Court observed that his testimony suggested that not even a citation should have been issued.[30] Tr. 329. It is of significance that Cowan admitted however that he was *not* with West during the whole time of his inspection. Tr. 331. As Cowan put it, "[h]e took off by himself and walked to the unit." Tr. 331. Further, when West did meet up with Cowan and informed him of more areas that needed to be addressed, *Cowan did not argue with him*, acknowledging, "I couldn't. I hadn't made the areas yet." Tr. 332.

Yet, despite the extent of his disagreement with MSHA's view, Cowan hedged when the Court questioned him, asking if he believed there was no need to even clean the belt areas cited. Thus, the Court concluded that Cowan's primary objection was whether the violation was unwarrantable, as Cavanaugh had been assigned to the problem. While he admitted there was spillage, stating "I'm not saying we didn't have spillage there. We did," he asserted it was just one fresh spill. Tr. 339-340.

The Respondent also called Guy Scisney. Scisney, an hourly employee of the Respondent, is a mine examiner, a job which includes examining belt lines. He was a belt examiner on December 9, 2008 and he identified Exhibit R 5 as the report he filled out upon returning to the surface following that examination. Tr. 366. Scisney stated that 'black to gray' means the rock dust was not adequate and needs dusting. 'Black' means immediate attention is needed. 'Dirty'

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[29] Cowan did agree that if there was a fire in the belt entry, smoke could enter the secondary escapeway. The secondary escapeway is adjacent to the belt entry. Tr. 355.

[30] Mr. Cowan's dramatically different view of the conditions observed by Inspector West continued as he went through the areas listed in West's Order. Tr. 333-339. Cowan agreed that Caudill had issued an accumulations violation at the 5A tail roller prior to West's order for the 5B, but as with his view of West's citations, he did not think the conditions cited by Caudill were as bad as the inspector's evaluation of the conditions. Tr. 350.

means there is an accumulation of coal and coal dust on the belt line. Tr. 371. He later elaborated that 'black to gray' means the 'second stage' that is, a belt in need of rock dusting, but for which there is some time to get that fixed and does not need immediate attention. Tr. 378-379. In contrast, the description 'black' means you need to do something now. Tr. 379. Scisney would not seek to have a belt shut down unless he believed there was an imminent danger. Tr. 375. In response to questions from the Court, he stated that, as to Exhibit R 5, his signature is the top one on the page listing "bad rollers 19 and a half." Tr. 375. Scisney's practice when examining a belt was to write down what he observes on a pad and then he will write it down again when he goes to the surface, unless he is sure he can remember where a particular problem was spotted. Tr. 376.

Scisney stated that he did not see rollers running in coal along the 5B belt on December 8, 2008. Tr. 379. Nor did he observe a belt out of alignment nor cutting the belt structure when he made his exam, though he conceded there was evidence that it had been out of line and that there had been cutting in the past. Tr. 380. However, Scisney did believe Highland should have had somebody on the issues he identified in his belt exam, because he did write it up as "dirty." Tr. 381.
He did agree that it was possible that a belt examiner could report a condition and then the next belt examiner could observe the same condition before the belt crew could get to the problem. Tr. 382.
Scisney confirmed that the belt was running that day and that production usually stops around 1:30 a.m. He would have completed his belt exam sometime around 5 or 6 p.m., that is, around seven hours earlier. The shifts run about 10 hours, Scisney explained. Tr. 384.

Scisney acknowledged, belt exams are important. As he put it, "It's got to be done, because we [ ] have mine fires here in west Kentucky, a couple of mines were shut all the way down because of mine fires, and they originated on the belt line. So you've got to examine them daily, because if you don't we won't have [a] job and people could get killed in there." Tr. 385. Scisney explained that it's his job to write it up and "then it's left up to Highland to address it." Tr. 386.

He added that his exam noted "three different findings [Highland] needed to address." These were to change two rollers, rock dust black to gray from the header to 15 and third, 41 to 60 dirty. Tr. 386. Scisney had to examine four to five miles of belt back in December 2008, a task that he does most of it by using a golf cart, although there are areas where he has to get off the cart and walk the belt.

Scott Maynard, who is the assistant superintendent at the Highland #9 mine and who was at the mine on the day of the citation in issue was called by the Respondent. Tr 391, 393. As he does not review belt exam reports he did not know of any issue for the 5B belt until Troy Cowan called him and advised that inspector West was issuing an order and a citation for it. Tr. 393. Maynard essentially agreed with Cowan that the conditions on the belt were nothing like West's contentions. Tr. 394- 400. Regarding the tail piece and the rock dusting there, Maynard stated that as soon as one sprays, the dust will go into the intake air and go to the face, exiting both sides, left and right. Tr. 402. The tail is located inby the airlocks. That arrangement is used so the neutral air can't go

to the face. The neutral air is channeled to the return. Tr. 402. As to whether belt air was being used to ventilate the face, Maynard denied that occurred, as he sprayed the rock dust over the top o the feeder into the intake air, which then goes to the face. Tr. 402.

After the rock dusting, Maynard wanted to find the whereabouts of Inspector West, "to make sure he [West] was satisfied that we could start the belt back up and start producing coal." Tr. 403. Maynard denied that he ever told West that he knew about the problems identified in the belt exam and that he went ahead and produced coal anyway. Tr. 403-404. He also denied makin any statement about the need to call St. Louis before miners could be pulled off the face. Tr. 404.

While Maynard agreed that he met with MSHA's Charlie Jones on September 19, 2008 an that Jones advised him that there were 51 section 75.400 violations in the fourth quarter of 2008, he stated that the majority of those involved accumulations on things *other* than belts. Tr. 405. In response to that meeting the mine purchased another tank duster and two trickle dusters, and took other actions in response to that meeting. Tr. 405-406.

Inconsistent with his assertion that he did not observe anywhere near the problems that West claimed were present, Maynard stated that after seeing Cavanaugh working on the 5 B belt, he "told him to get the man-trip and go up to the unit and start bringing people out and distribute on the areas that we needed shoveled." Tr. 407. Those would be the areas where Maynard stated there were essentially no or minimal problems. Further, Maynard implicitly acknowledged Highland's reluctance to stop producing coal by stating that if a belt examiner sees a roller running in coal, the examiner is to either fix it himself "or shut the belt off. At that point he'll get plenty o attention." Tr. 407.

Other than relying on the mine's usual practices, Maynard admitted he had no personal knowledge that rock dusting occurred between when Scisney examined the belt on December 8th and when he examined the belt the following day. Tr. 411.

Regarding the need to rock dust between crosscuts 7 and 3, Maynard would only agree that "[b]ehind the bottom roller you could have put some dust on it." Tr. 417. However, he didn't feel there was any *need* to do that and it was just Scisney's opinon. Tr. 418. In his deposition, however, Maynard stated that crosscuts 7 to 3 needed dusting. Tr. 419. While Highland talked about its trickle duster, Maynard admitted that on the morning of December 9, 2008, it was about 3 miles from the 5B header. Tr. 424.

ADDITIONAL FINDINGS, DISCUSSION, AND CONCLUSIONS OF LAW

Applicable Law:
Unwarrantable failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 1. 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See, for example, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("Consol").

Significant and substantial

A significant and substantial or "S&S" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Accord, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); Austin Power, Inc. v. Sec'y of Labor, 861 F.2d 99, 103 (5th Cir. 1988) (approving Mathies criteria). In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125 (August 1985), the Commission explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (Aug. 1984). It noted that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). Further, the question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). Last, any determination of the S&S nature of a violation must be made in the context of continued normal

mining operations. *U.S. Steel*, 7 FMSHRC at 1130; *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

Additional Contentions, Comments and Conclusions regarding the Orders and Citation.

1. The Roof Bolt Spacing Violation.

Regarding the section 104(d)(2) order, **Order Number 8489815**, alleging a failure to follow the approved roof control plan, in violation of 30 C.F.R. § 75.220(a)(1), Respondent contends that neither the S & S designation nor the unwarrantable finding are justified. Regarding that finding, made by MSHA Inspector Fazzolare, Highland contends that the inspector's basis rested upon a "small slip" some 90 feet away from the condition. Also, Respondent contends that the Secretary failed to show that "the bolt spacing discrepancy itself was reasonably likely to have an adverse impact on the stability of the mine roof." R's Br. at 33.

As to the unwarrantable finding, Highland asserts that the condition was neither extensive nor of long duration. *Id.* at 35. Beyond those contentions, it notes this was not a situation where Highland had knowledge of the bolt spacing discrepancy and then ignored it. Merely contending that Highland "should have known" of the condition does not justify an unwarrantability finding. Further, it maintains that there were no "aggravating circumstances" present to show unwarrantability. *Id.* at 35-36.

The Court does not share Highland's perspective. First, the condition, while escaping Highland officials' notice, was immediately obvious to Fazzolare. Although the precise distances of exceedance were presented as difficult to detect, it was the crooked row that first caught Fazzolare's attention, not measurements. That condition was readily apparent and it should have alerted Highland, just as it did Inspector Fazzolare. That it escaped Highland is not surprising as Highland's Mr. Wilkins has never detected wide bolt spacing in 36 years of mining experience. Kuykendall, though the section foreman, also found that the condition was not obvious. However, this was understandable as well, as he stated that he never got closer than 50 feet to the condition and from that far away it was hard to detect spacing issues. While the distances of exceedance for any particular row varied, the more pertinent point is that the problem was over *nine continuous rows*. Accordingly, the MSHA document referring to small exceedances does not apply because that only allows for "occasional variances." Nine continuous rows with excessive spacing is not an occasional variance. Beyond that, even that MSHA document, highlighted by the Respondent, allowed the occasional exception only for exceedances *less* than six inches. Here, Fazzolare found several instances that did not even meet that, quite limited, exception allowing for small exceedances.

Also relevant, the preshift examiner was exposed to the wide spacing, as his initials had been recorded on the rib. Fazzolare was justifiably concerned about the moderate slip in the top

and that it might continue inby, presenting the risk that there could be a roof fall. That this was listed as "reasonably likely" is more than demonstrated by the fact that the mine already had part of a roof fall on the previous crosscut outby. Accordingly, based on the record evidence, as already set forth in more detail *supra*, the special findings are all upheld.

2. The accumulation of combustible materials violation.

Regarding the second violation contained within this docket, the section 104(d)(2) order, **Order Number 8492281**, issued on December 9, 2008, for accumulations of combustible material in the 5B belt conveyor entry and alleging a violation of 30 CFR §75.400, the Court upholds the special findings, and therefore determines that the violation was significant and substantial, with high negligence, that it was reasonably likely to occur, would result in lost workdays or restricted duty, and that the violation was the result of an unwarrantable failure.

The Respondent asserts that the Secretary failed to establish the "confluence of factors" necessary to show that the violation was significant and substantial. It also maintains that the condition would have been corrected if normal mining operations had continued, as the 60 plus year old Cavanaugh had been assigned to the problem and the belt would have been examined again during the 1st shift on December 9, 2008. R's Br. at 15-16. The Respondent also maintains that the violation was not unwarrantable.

Respondent argues that Inspector West got it wrong in asserting that the belt was black. Instead, it was noted by Scisney as "black to gray." R's Br. at 17. Beyond that, Respondent also asserts that West assumed that the corrections noted in the December 8, 2008 belt examination report were for the conditions noted by Scisney on that same shift. Because Scisney did not record his belt examination report until the end of the second shift, the 2nd shift crew was correcting the problems identified in the report for the 1st shift of December 8, 2008. Highland also asserts that West did not list the violation as a "reckless disregard," and could not have, because action was underway to correct the conditions. R's Br. at 18.

More specifically addressing the unwarrantable finding, Highland maintains that knowledge of the conditions could not be imputed to Highland as it can only be held accountable for what is reported in the belt examination report. It maintains that Highland "took timely and adequate action to correct those conditions." R's Br. at 19. Highland thus asserts that the focus should be on how it responded to the belt report. In that regard, it contends that assigning Cavanaugh was a sufficient and fully adequate response. *Id.* at 21. Respondent contends the conditions were neither extensive nor did they present a "high degree of danger." *Id.* Highland maintains that the conditions identified in Scisney's report existed for a portion of the second shift, and for the idle 3rd shift and accordingly correcting them during the 1st shift of December 9, 2008 was timely on its part. Beyond that, the Respondent contends that additional problems must have occurred after Scisney made his examination and therefore Highland can hardly be held accountable for what must have transpired after Scisney's exam. Thus, Highland argues that those subsequent problems existed for an even shorter period of time. *Id.* at 23.

It is also Highland's contention that it received no notice that greater efforts were needed for compliance with accumulations on belt lines. In support of this, Highland first notes that West himself stated that his findings were not based on any prior warnings but rather on the conditions he observed at the time he issued the citations/ orders in issue here. Apart from that, it asserts that the Secretary must "establish the precise nature of the prior violations to show that they would be relevant to place the operator on notice regarding the violation at issue." *Id.* at 24 citing *Cantera Green*, 21 FMSHRC 310, 312 (ALJ 1999).[31] It is not sufficient, Highland maintains, that the same standard was involved. Still another problem with using past violations of 75.400 to establish notice and therefore unwarrantability, is that the standard is so broad. Whereas the violations involved here concerned accumulations, the standard is much broader than that. Respondent characterizes it as a "catch all" standard. Besides, Highland continues, even if notice is considered to have been established, that doesn't mean by itself that unwarrantability has been proven. *Id.* at 35. Continuing with its claim that unwarrantability was not proven, Highland asserts that applying the test of considering all the relevant facts and circumstances, no such aggravated conduct was established. Thus, by its lights, Highland didn't know about the conditions cited in the Order, those conditions were not extensive anyway, they posed no high degree of danger, none of the conditions existed for an extended period of time and Highland took adequate and timely steps to deal with those conditions it knew about and further, Highland made good faith efforts to reduce 75.400 violations along its belt line. *Id. 26*

In support of its contention that the violation was S & S, the Secretary's view as to Order No. 8492281 is that the discrete safety hazard was the risk of fire and/or explosion resulting in fumes, smoke and CO that would flow towards the unit. It was reasonably likely to occur because of the presence of fuel, oxygen and ignition sources from frictional heating. That amounts to a confluence of factors. Sec. Br. at 10. The injury would be lost workdays or restricted type duty. 18 persons would be affected because the pressure differential would cause the smoke or carbon monoxide contaminated air to travel down the belt entry and inundate the section. It adds that a fire or explosion would obviously produce graver results.

As to unwarrantability, the Secretary cites *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-4 (December 1987) for the principle that such conduct involves reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. In practice, factors to be considered include, the extent of a violative condition, the length of time it has existed, whether it was an obvious violation or posed a high degree of danger, whether the operator has been placed on notice that greater compliance efforts are necessary, and the efforts the operator has made since such notice. *Amax Coal Co.* , 19 FMSHRC 846, 851 (May 1997). Further, the Commission has explained that all the relevant facts and circumstances at least should be considered. *Coal River Mining*, 32 FMSHRC 82, 88-89 (February 2, 2010). The Secretary asserts that the conditions were

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[31] Displaying the candor that is required, Respondent's Counsel does acknowledge that the Commission has held to the contrary of the view expressed in *Cantera Green* by stating that previous conditions need not be identical to those involved in the violation at issue. *Peabody Coal Co.* 14 FMSHRC 1258, 1263 (Rev. Comm. Aug. 1992). R's Br. at 24.

extensive. Thus, this speaks to the scope or magnitude of a violation. The Secretary notes that in *Consolidation Coal Company,* 23 FMSHRC 588, 593-594, it was determined that accumulations of 20 inches in depth, 12 feet long and 8 feet wide at one crosscut, along with other accumulations some 600 feet in length, were extensive. Sec. Br. at 12. The Secretary contends that the accumulations in this case were of a similar extensiveness.

The Secretary also asserts that the duration of the cited conditions was considerable. However, the Secretary also notes that unwarrantability can be satisfied even if the duration is short, where the other factors point to that conclusion. That aside, the Secretary maintains that at least 15 hours elapsed with the conditions. Sec. Br. at 14. It notes that the conditions could have been corrected during the third shift but were not. The Secretary further contends that there was a high degree of danger associated with the conditions in that there were frictional heat sources in contact with fuel. Caudill's testimony regarding belt air reaching the face also supports the confluence of factors element. Sec. Br. at 16.

As to the issue of whether Highland was on notice that greater efforts were needed to comply with 75.400, the Secretary asserts that past discussions with an operator about accumulation problems puts that operator on "heightened scrutiny" about the compliance steps it must take. *Enlow Fork Mining Co.* 19 FMSHRC 5, 11-12 (Jan. 1997). In this regard the Secretary points to the testimony of MSHA's Archie Coburn and a September 2008 meeting he attended with Highland to address the subject of the mine's accumulation violations. Then too, West noted that less than a week before the violations in this case, he cited Highland for an accumulations violation along its Main East belt entry.

The Secretary also contends that several Highland agents were aware, or should have been, of the conditions on the 5B belt on December 9, 2008. To establish this, the Secretary notes that Scisney, as the certified belt examiner, is considered to be an agent of the operator when performing in that role. Sec. Br. at 20. The conditions noted by Scisney were hazards which Highland needed to address. Beyond that, the third shift mine foreman, Terry Johnson, was aware of the conditions cited by Scisney in the preceding shift but he took no corrective actions for those.

The Secretary maintains that, putting actual knowledge aside, Highland's agents "reasonably should have known" of the violative conditions on the 5B. The Court agrees with the Secretary's contentions. Finally, the Secretary maintains that the abatement efforts conducted by Highland were inadequate. Highland had been informed in the September 19, 2008 meeting with MSHA that the belt accumulations were a problem but there is scant evidence that Highland did much to deal with this issue. While there was talk of doing more rockdusting, the fact is that no rockdusting occurred during the third shift on December 9, 2008. Certainly the evidence shows at most that Cavanaugh was there to shovel, not rockdust. Here as well, the Court concurs with the Secretary's arguments.

3. The failure to maintain machinery and equipment in safe operating condition.

Regarding Citation **No. 8492282,** within Docket Number KENT 2009 0756, as noted, that 104(a) citation was issued on December 9, 2008, for operation of the 5 B belt conveyor not being maintained in safe operating condition. Marked as significant and substantial, this Citation is closely related to Order Number 8492281, discussed immediately above, as it pertains to the same matter, accumulations along the 5B conveyor belt. Both parties largely focused their energies in their briefs on that first Order and then applied those arguments, in large part, to this Citation. The Court has employed the same approach in its decision.

As with its analysis for Order number **8492281**, Highland believes that no "confluence of factors" was established by the Secretary. It contends that West erroneously believed that the 5B belt was cutting or rubbing the belt's structure and he could not have made that assessment as the belt was not running. R's Br. at 27-28. Further, it asserts that the accumulations were not in close proximity to any heat source. Even where West claimed the belt was rubbing the structure, West himself admitted there were no fuel sources at those locations. *Id.* at 28. It takes the same position, that is, denying West's claim that the belt was running in coal dust, as its witness did not observe such conditions.

Highland also contends that there was no high negligence for this Citation. From its perspective, Highland maintains that it neither knew nor should have known about the condition and, beyond that, there were mitigating factors. R's Br. at 30. It asserts that West's claim that the condition existed for one to two shifts, means that Scisney should have seen the problems but Scisney's testimony does not support West's claims. In addition, Highland maintains that the Secretary's evidence actually shows that some "unpredictable event" likely occurred sometime after Scisney's examination. *Id.* at 31. Even if these contentions are rejected by the Court, Highland asserts that there were mitigating factors. These consist of its employment of "belt examiners to detect and prevent hazardous conditions" and by the fact that it had assigned a miner to clean up the conditions. *Id.* These proactive steps, Highland maintains, justify reducing the negligence attributable to it.

From the Secretary's point of view, concerning Citation No. 8492282, that violation was also S & S and high negligence was associated with it as well. As the Court's earlier recounting of the evidence for this citation amply demonstrates, the preponderance of the evidence supports the Secretary's position.

Beyond the matters already noted in this decision, the Court wishes to reemphasize and highlight the following points. However, before making these points, it must be noted that, with such sharp differences in the accounts of the conditions along the 5 B belt between West and Caudill for MSHA and French, Cowan, Maynard for Highland, the Court had to determine which side's account was more credible. To do this, beyond assessing the witnesses during the testimony and finding that the testimony of West and Caudill was more trustworthy, the Court's determination of credibility is supported by a very significant and unchallenged fact. Namely, it

took 14 miners 5 hours to clean up the accumulations and this was after Cavanaugh had been at the task for some hours. Those uncontested remedial actions taken by Highland are not unlike the expression that actions speak louder than words. Here the extensive actions required to correct the conditions West found demonstrate that the testimony from the MSHA inspectors was more credible.
One would not assign so many miners to perform a task which was as minimal in scope as Highland's witnesses suggested nor would such a task have required so much time to correct.

A word must also be stated about one of Highland's major contentions. This relates to its claim that when Scisney finished his belt exam, the shift following that was the evening or "Hoot Owl" shift. When West arrived the next morning, Highland contends, it was already addressing the matter with Cavanaugh assigned to the clean up. Highland asserts that it had no duty to deal with the belt examination findings from the second shift until that morning following the evening shift.
There are significant problems with that point of view. Highland *did know* that MSHA had concerns about its section 75.400 problems, Scisney noted these problems early during the second shift and had the observations recorded well before the Hoot Owl shift commenced. Highland could have attended to those identified problems during that time. Further, the idea that an MSHA inspector could arrive at the mine, become alerted to the problems identified in the belt exam report and then proceed underground to discover a problem of significant scope which was being attended to by only a single miner of advanced years, while the mine itself is apparently less well informed about the conditions easily detected by the mine inspector, is inconsistent with the safety obligations of a mine under the Mine Act.

Accordingly, with the observation just made borne in mind, the Court finds the testimony of the MSHA inspectors to be more credible and it adopts the following as additional findings of fact. At the time Inspectors West and Caudill were at the 5B belt, the mine was running coal. It is undeniable that a bottom roller running in coal creates the hazard of a frictional point. That is, such coal provides the fuel and the friction created by the roller provides the heat. As West noted, there was also air, and that completes the "triangle" for a fire to occur because one has heat, fuel and air. Further, again noting that the belt was operating, the Court finds that it had cut into the stand about a half inch. West then felt the belt frame with his hand and found that it was hot. West added that, from crosscut 3 on inby as far as he could see, the belt was black in color from rib to rib and there was float coal dust on the belt framing. The entry at that location is 19 to 20 feet wide and he saw float coal dust from crosscut 3 to 15. That is a length of about 840 feet, and the float coal dust was about 1/16 to 1/8 inch in depth. A length of almost 3 football fields is a very significant distance. It is noted that West observed no one as he traveled that distance. West also observed 20 bottom rollers running in coal and coal dust between crosscuts 3 and 9. Significantly, West then took the important step to confirm that what he observed was coal and he did this by digging under the bottom rollers. West stated that the coal accumulations underneath the rollers were black from crosscut 3 to 9 were cupped around the rollers, to the point that basically the rollers were submerged. He explained that this creates a fire hazard due to frictional heating and the rollers moving in coal causes it to become more powdery, causing float coal dust.

Again, West stated that there was no one working in that area, so the problems were not being addressed. Next, West spoke to crosscuts 43 to 44, where he found 4 inches of loose coal under the belt. It was not until crosscut 49 that West observed anyone working on the belt. Thus, he computed that he walked some 3,430 feet, or more than 6/10th of a mile, before observing someone working on the belt. At that crosscut, No. 49, he saw Perry Cavanaugh, who informed West that he was shoveling the belt. This was around 10:45 a.m. Cavanaugh told West that he was given a list of places to shovel that morning at the start of his shift and stated that he spot cleaned the 5B belt drive to crosscut 3 and then moved to crosscut 41. Although Cavanaugh told West that he had shoveled from crosscut 41, West found accumulations at crosscuts 43 and 44.

West noted that Cavanaugh was wet from sweat, indicating that he had been working hard that day. West concluded that having a single man deal with the accumulations was not enough because they were too extensive. Further, in West's estimation, the problem was not solely about shoveling; rock dusting also needed to be performed. At the time West met him, Cavanaugh still needed to shovel eleven more crosscuts, a distance of about 770 feet. One should again call to mind a length of some 2 ½ football fields. West believed it would have taken Cavanaugh at least the rest of his shift to complete the shoveling. That is, to shovel the areas cited in the belt inspection record from the second shift of December 8, 2008. Until West had 'red-tagged' the belt that morning, issuing his D order, the mine had been producing coal at the face. It was West's view that if the problems he found had been addressed at the start of that day shift, it would have taken seven or eight men about the entire shift to correct the problems. West's estimate was based on his personal observations and did not take into account Caudill's observations. Accordingly Caudill's observations of problems would be in addition to those West observed. West stated, without equivocation, that the mine should not have been running coal until the problems listed in the belt inspection record had been corrected.

Following West's meeting with Cavanaugh, he discovered more problems. From crosscut 50 to 51, there were two bottom rollers running in coal and there was float coal dust 1/16 to 1/8th of an inch deep. Float coal was on the frame as well. West then met up with Caudill at crosscut 53. Caudill informed West of the problems he saw of the belt rubbing the frame on the belt entry from crosscut 53 to the tail piece, in twenty locations and this was recorded by West in his notes. Caudill also reported to West that he found float coal dust between crosscuts 62 through 64 and that it was 1/16 to 1/8 of an inch deep. As noted earlier in this Decision, when the Court asked if that was a significant amount of coal dust, West advised that it has been shown that a lot less than that, probably only half what was found, can cause an explosion if it gets suspended in the air. West learned that the mine assigned 14 people to correct the conditions that he and Caudill found on the 5 B belt and that it took them 5 hours to correct the problems. That totals about 70 man hours and accordingly the Court agrees with West's characterization that the correction required an extensive amount of time.

In citing the Respondent for a violation of 75.400 for the accumulations of loose coal, coal dust and float coal dust, West reiterated that it presented a risk of fire and/or explosion, that the likelihood of injury was reasonably likely in that it presented a discrete hazard to miners because a

fire or explosion would inundate the escapeways with smoke and carbon monoxide. Again, West found that the ingredients were present because there was fuel, oxygen in the airflow and ignition sources from the frictional rubbing of the belt on the frame. The ventilation violations found by Caudill was a factor considered in determining the number of persons affected. West marked lost work days or restricted duty as the type of injury which could occur and 18 persons, the number of miners on the No. 5 unit, being affected. This number was based on the number of persons inby and West provided considerable detail about what could happen, including the air courses which would be affected by smoke or carbon monoxide traveling inby towards the section.

Although the corrections on December 8, 2008 belt inspection report for the second shift only referred to cleaning on 41 to 46 and 58 to 60, West agreed that his unwarrantable and high negligence findings were based on the corrections he read in the belt inspection report for the second shift on December 8, 2008. However, West's position was strengthened by his remark that his view was also based on what he observed underground. Accordingly, while West did not dispute that he observed Cavanaugh shoveling on the belt, and that he could have been shoveling for about two hours before West saw him, it was West's point that the effort was both late and an insufficient response. West also did not question that Cavanaugh was given a list of areas that needed to be addressed that day and that Cavanaugh told him he had been assigned to shovel the belt that day. While Respondent suggested that West had no reason to doubt that Cavanaugh would rock dust after he finished shoveling, West responded that Maynard told him he didn't have anyone to rock dust.

Further, while the Respondent tried to challenge West's tally of the number of crosscuts with problems, West, upon checking his notes stated that there were some 26 crosscuts where there was coal that needed to be cleaned up or float coal dust was present. West added that there were several other places where there was "just coal underneath bottom rollers." Thus, West maintained that there were 26 crosscuts that needed to be cleaned in addition to areas where there was coal under bottom rollers. French admitted that on December 9, 2008 he had no personal knowledge of the conditions along the 5B belt.

Cowan agreed that West walked the 5B belt line. As Cowan acknowledged, West took off by himself and walked to the unit. Further, when West did meet up with Cowan and informed him of more areas that needed to be addressed, Cowan did not argue with him, acknowledging, he couldn't as he hadn't made the areas yet.

After the rock dusting, Maynard wanted to find the whereabouts of Inspector West in order to make sure that West was satisfied that we could start the belt back up and start producing coal. Further, Maynard implicitly acknowledged Highland's reluctance to stop producing coal by stating that if a belt examiner sees a roller running in coal, the examiner is to either fix it himself "or shut the belt off. At that point he'll get plenty of attention." Tr. 407. This admission by Maynard speaks volumes about Highland's misplaced priority in focusing upon producing coal in the face of significant accumulation of combustible materials issues.

CIVIL PENALTY ASSESSMENT

Having found the alleged violations existed, and affirming each of the special findings associated with those violations, the Court must assess civil penalties for them and do so by taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(I). The Negligence, Gravity, including significant and substantial findings have already been discussed.

Ability to continue in business. The parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business.

Good faith. The Respondent demonstrated good faith in abating the violations.

History of previous violations. Per the parties' stipulations, the proposed data sheet as well as the contested assessment sheets for these dockets, as contained within Exhibit A, and the R 17 Assessment History Report were admitted into evidence for this criterion. They stipulated that a computer printout is the history of prior violations for the Mine for the purposes of this proceeding

Size. Highland Mining Company, LLC, is a large mining operation.

Given the civil penalty criteria discussed above, the Court assesses a civil penalty of $64,752.00.

ORDER

Within 40 days of the date of this decision, Highland Mining Company, LLC, is **ORDERED** to pay a civil penalty of $64,752.00 for the violations set forth above. Upon payment of the penalty, this proceeding IS DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

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March 1, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2009-490 A.C. No. 11-03054-183603-01
	:	Docket No. LAKE 2009-491 A.C. No. 11-03054-183603-02
v.	:	Docket No. LAKE 2009-531 A.C. No. 11-03054-186350-01
	:	Docket No. LAKE 2009-532 A.C. No. 11-03054-186350-02
BIG RIDGE, INC., Respondent	:	Mine ID: 11-03054 Mine: Willow Lake Portal

DECISION

Appearances: Tyler McLeod, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur Wolfson, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Big Ridge, Inc. ("Big Ridge"), at its Willow Lake Portal mine (the "mine" or "Willow Lake"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This matter involves four separate docket numbers, which include 78 total alleged violations, and a total proposed penalty of $481,148.00. As set forth more fully below, the parties have agreed to resolve all but nine of the violations, leaving those for decision here. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana, that commenced on December 1, 2010.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Big Ridge, Inc. operates the Willow Lake Portal Mine, an underground, bituminous, coal mine, in Saline County, Illinois. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Big Ridge is the operator of the mine, that its operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1. Willow Lake is a large, bituminous, coal mine requiring at least two inspectors to timely complete a quarterly inspection. (Tr. Vol. I, 20). The mine utilizes the room and pillar system of mining and is a gassy mine subject to a five day spot inspection. (Tr. Vol. I, 20,50)

Docket No. LAKE 2009-490

a. Order No. 6683136

On March 12, 2009, Inspector Scott Lee issued Order No. 6683136 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

> The accumulations of oil and coal saturated with oil (due to oil leaks) ranging in depth from ½ to 4 inches deep was known to management. This condition was observed in the pump motor compartment on the unit 3 (013/003) section feeder, while the feeder was running. Immediately below this compartment was a pool of oil approximately 3 ft. in diameter and 3 to 4 inches deep, which appeared to have accumulated from cited location. Management informed this inspector that they knew they had a problem in the pump motor compartment and had a part on order to repair it. The cover for this compartment had been left leaning on the adjacent rib which indicated to this inspector that work was still ongoing in this compartment. This same condition was cited in this compartment on 3/6/2009 for accumulations of oil.

The inspector found that an injury was reasonably likely to occur, that the injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $14,743.00.

The cited standard requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400.

1. The Violation

Scott Lee, an MSHA mine inspector, has worked for the Mine Safety and Health Administration for nearly 11 years. He has worked in the mining industry since 1975 and has operated nearly every piece of equipment used in mining. He has held a variety of positions in coal mines and holds a MA degree with a specialty in mining. (Tr. Vol. I, 15-19).

On March 12, 2009, Lee conducted an inspection of the belt line and the feeder of unit 3. As he looked down the back side of the belt, i.e., the side least traveled, he noticed a large pool of oil on the ground next to the feeder, as well as a steady stream of oil coming from the pump motor compartment. He also observed that the cover of the pump motor compartment had been removed and was sitting on the ground. He could see a steady stream of oil coming off the fitting in the motor compartment and then forming a large pool of oil on the mine floor. (Tr. Vol. I, 27-29). Lee dipped his walking stick into the oil and determined that 3-4 inches of oil had pooled in the area. In addition, a considerable amount of oil had already saturated the coal on the mine floor. He was accompanied by Ronnie Hughes, a company representative, as well as a walk around representative from the union. He saw no other miner in the area at the time. Since the cover was off of the compartment, Lee believed that the mine knew they had a problem. Later, he was told that a part was on order to repair the oil leak.

This mine operates three shifts, with the midnight shift being the maintenance shift. The inspector believes that the mine was trying to "nurse" the feeder to get it through the production shift until it could be repaired on the last shift when production was normally at a stand still. This feeder was on the last belt set up. The coal was dumped into the feeder, then onto the belt and conveyed out of the mine. In Lee's view, the mine did not want to shut down the feeder while waiting for parts to repair the motor compartment because it would essentially shut down production on the shift.

James Kielhorn, the maintenance foreman for Willow Lake, testified that, when he arrived at the mine for the afternoon shift, he learned that a part had been ordered to repair a control module for a hydraulic pump. (Tr. Vol. I, 134). After examining a work order for the pump control, Big Ridge Ex. C, he testified that the part had been ordered at about 1:24 p.m. that day and had arrived at the mine prior to the time his shift began at 4:00 p.m. Kielhorn took the part to the feeder and repaired the oil leak problem by installing the part. In Kielhorn's view, the part of the pump control module he repaired was not the same as the valve bank area that was cited a few days earlier by Lee. (Tr. Vol. I, 138).

Kielhorn recalls that he went underground around 4:00 p.m. It took him approximately 30 minutes to travel to the area, and another 30 minutes to install the part. The feeder was not running when he arrived but was probably operating during the shift before he arrived. (Tr. Vol. I, 142). Inspector Lee testified that he discovered the violation at 6:20 p.m., an hour after Kielhorn believes he repaired the leak. Brandon Williams, the section mechanic, also testified on behalf of the mine and agreed that there was an oil leak and a part had been ordered to repair such. Williams further testified that a member of his crew remained at the feeder during the shift to monitor the feeder so that it would not shut down if overloaded with coal. (Tr. Vol. I, 146). He was aware of the oil leak but did not see much accumulation and, in his view, the crew

member present at the feeder would have been monitoring the leak. Williams doesn't recall who was standing at the feeder and he was not present when the inspector arrived. (Tr. Vol. I, 148).

Based upon the uncontroverted testimony that oil was leaking from the motor compartment and pooling in the box and on the floor, I find that the Secretary has established a violation.

2. Significant and Substantial Violation

Initially, Lee designated this violation as significant and substantial ("S&S"). However, at hearing, he indicated that, upon further review, that the 4 volts present in the motor compartment would not likely serve as an ignition source. As a result, the likelihood of an event that would cause an injury or illness is little to none. Based upon Lee's testimony, the Secretary agreed that the violation is not S&S. I also agree.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The day the subject citation was issued Lee described the condition as extensive, obvious and as existing for a period of time. When Lee arrived in the area, he immediately noticed the leak, saw that the oil was not only pooled in the compartment but also on the mine floor. In addition, he noted that the oil had time to soak the coal and coal fines on the floor. He observed the cover off of the compartment, which indicated to him that the mine knew of the problem. In his view, the mine avoided a shut down of production by waiting to repair the leak on a later shift.

Lee was also concerned about the length of time that the accumulations existed, i.e., for at least the entire length of the shift. According to Lee, the leak had been there long enough to drip onto the floor and soak the coal and coal fines for some distance. In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cr. 1995), the Seventh Circuit addressed the length of time

factor as it relates to an unwarrantable failure finding for accumulation violations. The Court concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Id.*; *see also Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999).

Lee further testified that the mine was aware that greater efforts were necessary for compliance with accumulations, as the mine had been issued numerous violations prior to this one. Moreover, one citation had been issued by Lee just days before for oil leaking in this same motor compartment.

The history of assessed violations for this mine indicates that the mine was cited 150 times or more in a 15 month period for accumulation violations. Sec'y Ex. 31. The Commission, in examining an unwarrantable failure finding related to section 75.400, has recognized the following:

> [P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degrees of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

Based upon the credible evidence, the Respondent knowingly allowed an obvious and extensive oil leak in the motor compartment to go uncorrected for an extended period of time, which in turn allowed large amounts of oil to accumulate. I agree that the violation is an unwarrantable failure. Further, the credible evidence established that the mine was aware of the continuing problem of oil leaks and the continuing issue of accumulations at the mine. I find that ordering a part does not take away from the unwarrantable nature of the violation. I credit Lee's testimony that, apparently, no one was monitoring the leak as the belt continued to operate. Based upon all of the evidence, I assess a penalty of $15,000.00 for the violation.

Docket No. LAKE 2009-491:

This docket contains 38 violations with a total proposed penalty of $195,967.00. The parties have agreed to settle 37 of the violations, leaving one citation for decision here. The settlement of the 37 violations is set forth in Sec'y Ex. 32, incorporated herein and addressed more fully below.

a. Citation No. 8414037

On March 12, 2009, Inspector Larry Morris issued Citation No. 8414037 to Big Ridge for a violation of section 75.380(d)(7)(i) of the Secretary's regulations. The citation alleges the following:

> The alternate escape way, at cross cut #146 along the North travel way, is not provided with a continuous durable directional life line or equivalent device that shall be installed and maintained throughout the entire length of each escapeway. The life line is missing for approximately 20 feet at cross cut #146.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that forty persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $48,472.00.

The cited standard requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable direction lifeline or equivalent device that shall be . . . installed and maintained throughout the entire length of each escapeway . . . ." 30 C.F.R. § 75.380(d)(7)(i).

1. The Violation

Inspector Larry Morris has been with MSHA for four years and has 36 years of mining experience. After viewing the directional lifeline in the escapeway, he cited a violation of 30 C.F.R. § 75.380(d)(7)(i).

Morris was at Willow Lake conducting a spot inspection on March 12, 2009. As he was traveling along the main north travelway, i.e., the primary means of travel into the north side of the mine and its three units, he happened to look up at cross cut #146 and immediately noticed that the lifeline was missing for approximately 20 feet. (Tr. Vol. II, 110-111). He observed that someone had taken the time to tie an "S hook" on both ends of the line and re-attach the ends onto the roof bolt plates. Morris attempted to take the line from the roof bolts and connect the two "S hook" ends, but the ends would not extend far enough to be reconnected. (Tr. Vol. II, 112).

As indicated on the map submitted as Sec'y Ex. 12, at the time the citation was issued mining was taking place in three locations near the area of the missing lifeline. The cited entry is the secondary escapeway and is next to a belt entry and, therefore, air flows in the same direction in both entries, i.e., out toward the main portal. (Tr. Vol. II, 121). The purpose of the secondary escapeway is to have a separate and different aircourse from the primary escapeway in the event ventilation is disrupted. A secondary escapeway offers an alternative route in such a situation and makes it more likely that miners will be able to leave the mine quickly in the event of an emergency. The lifeline, as Morris explains, is in place to "help miners effectively escape." Its use is absolutely necessary in the case of smoke or heavy dust, where vision is

impaired. *Id.* There were at least 40 miners in the working area that would use this escape route in the event of an emergency.

The area where the lifeline was missing is a heavily traveled area at a crosscut. Miners travel this road throughout the shift. (Tr. Vol. II, 124). There is equipment traveling in the area throughout the shift and a mechanic's shop is directly across from the belt drive. In addition, there is a rock dust station and a beltmen's area with tools in the area.

If smoky conditions exist, miners are taught to find and grab a lifeline and slide their hand along the line in order to use it to guide them out of the mine. Miners trained to use the lifeline often hook themselves together in an effort to ensure that no one is left behind. According to Morris, when escaping miners reach an area without the lifeline, they often stop because they don't know where to go in order to continue the trip out of the mine. In his experience, Morris explained, it is easy to get disoriented in an emergency. Getting lost will result in wasting precious time that should be used to quickly and safely exit the mine. The presence of the conveyor belt would contribute to the thickness of the smoke in the cited area. Morris testified that, based upon his experience, the smoke would be so thick from the rollers of the conveyor belt that you would not be able to see your hand in front of your face. (Tr. Vol. II, 129). He was once in a fire near a belt and he described how difficult it was to find his way out. Miners become disoriented, and self-rescuers make it difficult to see and communicate. In an intersection, as was the case here, there is no rib line to help find the way and there are other wires and cables that may be confusing when looking for a missing lifeline. (Tr. Vol. II, 131).

According to Morris, miners, even after training on emergency evacuation, often get excited or panic during an emergency. Miners are in a hurry to exit the mine. Moreover, there are tripping hazards which further add to the confusion and chaos. This mine has a history of accumulation violations, many of them along the belt lines. (Tr. Vol. II, 132-133). In addition to the accumulations and ignition sources, this is also a gassy mine. Morris has issued citations on the belt drive near the cited area for a faulty fire suppression system and a faulty alarm. He has also issued accumulation violations around the belt drive a number of times. This mine has had a belt fire, as well as equipment fires and some face ignitions. (Tr. Vol. II, 134).

Brad Champley, a member of the Willow Lake safety department, accompanied Morris on his inspection and agreed that the lifeline was not continuous across the entry. Champley and Morris failed in their attempt to re-connect the lifeline and, as a result, Morris stated that he ought to have everyone evacuated. Instead, they quickly retrieved additional lifeline material and replaced the missing piece. Champley remembers the lifeline being frayed and looking like it was severed. He testified that the frayed ends were hanging down, possibly several feet down from the roof. (Tr. Vol. II, 157-158). The roof is 6 feet or lower and it is not uncommon for a mantrip or other equipment to hit the roof and sever the lifeline. (Tr. Vol. II, 158-159).

According to Champley, the miners are trained to use the primary escapeway first, if possible, and then the secondary escapeway only if necessary. The lifeline is used in the event there is heavy smoke or something that prohibits good sight when using the escapeway. The

lifeline would only be needed in case of a fire and, in his opinion; a fire was not likely on the day of the inspection. (Tr. Vol. II, 161-162).

Martin, the mine examiner, testified that he conducted a preshift examination in the morning, prior to the inspector's arrival, and did not see the missing length of lifeline that was cited. The record of examination shows that he conducted a preshift of the lifeline in a different area, the primary escapeway, but does not reflect an examination of the lifeline in the secondary escapeway that was cited. However, he testified that he does in fact examine the lifelines when he conducts an examination. In his view, it is not uncommon for the scoop or tractor to come close to the roof and sever the lifeline. (Tr. Vol. II, 167-168).

Champley and Martin hypothesize that the line was cut by equipment traveling through the area, and they suggest that it was done shortly before the inspector arrived. Morris on the other hand, suggests that it occurred at an earlier time because the line was not only severed, but also, someone had taken the time to attach S hooks and reattach the ends to the roof bolts. Morris' testimony also indicates that whenever it was done, the person did not take the time to repair the rope and, rather, simply hung up the line with the 20 foot gap. I credit the testimony of Morris, who was far more specific in his recollection of the events.

Finally, Chad Barras, the Midwest Safety Director for Peabody Energy, testified regarding the training that is conducted every 90 days at the mines. (Tr. Vol. II, 175). In his view, the more likely escape route is the primary escapeway, or what he terms the "smoke free" way out. (Tr. Vol. II, 176-177). Barras explained the ventilation system of the mine in some detail. (Tr. Vol. II, 178-179). It is his opinion there would be no fire on the belt or equipment, and that there would be no ignition because the methane liberation is primarily from the seals. (Tr. Vol. II, 181). According to Barras, there is no likelihood of a belt fire, the mine has fire suppression systems that work, the ventilation is good, and the ignitions that have occurred in the mine do not relate to the hazards addressed by the inspector. (Tr. Vol. II, 177-179). Barras provided a long dissertation regarding what would have to happen for smoke to be in the escapeway, thereby necessitating the use of the lifeline. He concluded that it was unlikely the lifeline in this area would be needed.

The Commission has regularly disagreed with the opinion espoused by Mr. Barras. First, in *American Coal Co.*, 29 FMSHRC 941 (Dec. 2007), the Commission discussed the importance of escapeways and concluded that:

> There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is "to allow persons to escape quickly to the surface in the event of an emergency." S. Rep. No. 91-411, at 83, Legis. Hist., at 209 (1975).

29 FMSHRC at 948.

Similarly, in rejecting the argument that a fire suppression system negates the importance of a clear escapeway, the Commission in *Maple Creek Mining Inc.*, 27 FMSHRC 555 (Aug. 2005), and *Eagle Energy Inc.*, 23 FMSHRC 829 (Aug. 2001), found a violation of 30 C.F.R. § 75.380, where it was demonstrated that miners could not quickly and safely exit the mine in the case of an emergency. In this case, the lack of a continuous lifeline would prevent miners from quickly and safely exiting the mine. Given that there is no dispute that the lifeline was missing for a length of 20 feet, I find that the Secretary has demonstrated the violation as alleged.

2. Significant and Substantial Violation

The primary dispute as to this citation is whether or not it is S&S. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of being unable to quickly and safely escape the mine in the event of an emergency where smoke and/or fire are created by various scenarios, including fire on equipment, fire on the belt, or an explosion. The fact that there are safety measures in place along the belt does not take away from the fact that an incident is likely to occur in a gassy mine with many accumulation violations and a history of ignitions. Third, the hazards described, i.e., that of not being able to escape in smoke and fire, will result in an injury. Fourth, that injury will be serious, even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I address initially the issue of a likelihood of an explosion, fire or other emergency, which both parties agree must occur before the use of the lifeline becomes necessary. There are a number of mandatory standards that are designed to protect miners in the event of an emergency. Among those are the escapeway regulations and, specifically, the requirement that lifelines be installed and maintained. The Secretary urges that I "assume" the existence of an emergency in order to evaluate the likelihood of a reasonably serious injury. I do not find it necessary to make any assumptions in this case.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and reviewed in the context of continued mining. *Texasgulf, Inc.*, 10 FMSHRC 498. Thus, I address the likelihood of an emergency and, within the context of that emergency, whether the lack of the lifeline in an entry for a distance of 20 feet creates a reasonably serious hazard.

Morris addressed the likelihood of an accident or explosion when he testified that this is a gassy mine subject to a five day spot inspection. Additionally, he has cited the mine many times for extensive accumulations, including accumulations of coal dust and float coal dust along the belt line and other areas. His undisputed testimony is that this mine has had a number of ignitions. Morris took into account the number of ignition sources he has found during his inspections as well as the number of ventilation issues, including low air quantities in some areas. Given the continued course of mining, I am persuaded that an emergency is likely to

occur. It has been demonstrated that if a large gap remained in the lifeline, it would hinder the evacuation of the mine, thereby causing serious injury. *See Enlow Fork Mining Co.*, 19 FMSHRC5 , 9 (Jan.1997); *Texasgulf, Inc.*, 10 FMSHRC 498, 501(Apr. 1988). The evacuation would include the 40 miners who were working nearby.

In reaching these conclusions, I have not disregarded Respondent's argument that a fire or explosion is not likely to occur, and even if it does, the nature of the ventilation plan, along with the fact that there is a primary escapeway available for use, will negate the use of the lifeline. I have also considered that the miners have been trained how to react in an emergency situation and that there are fire suppression systems in play. However, the Secretary has established a pattern of accumulation violations, ignition sources and ignitions, all of which contribute to the likelihood of a fire or explosion. I have also considered the testimony of Champley and Martin who, not surprisingly and without much basis, agreed that a fire would not occur. Finally, I have considered the testimony of Barras and, although his factual explanation of training and the ventilation system may be mostly accurate, I give his opinion and conclusions little weight. Based upon my observations, I find that Barras is simply not a credible witness in many respects.

I conclude that the preponderance of the evidence establishes that the lack of the lifeline in the escapeway is reasonably likely to result in an injury causing event and that the injuries sustained would be serious or fatal. I find that the Secretary has satisfied the four Mathies criteria and established the violation as S&S.

3. Negligence

Inspector Morris found that the violation was the result of high negligence on the part of the mine operator. Morris testified that the violation was obvious and in a main travelway that was used daily by 40 or more miners as well as by shift inspectors, supervisors, managers and foreman. According to Morris, "virtually everyone that goes into that end of the mine has to travel past this area. It was in plain sight." (Tr. Vol. II, 135). Morris noticed the violation immediately as they passed the entry. Also, in Morris' view, someone would have had to hook the line onto the S hook and re-attach the line to the roof bolts, thereby negating the theory of the mine that the rope had only recently been cut by passing equipment. The line was evidently hooked up onto the roof bolts for a very specific purpose, i.e., to leave a 20 foot gap at the intersection. (Tr. Vol. II, 135). I am mindful that Champley described the line as hanging down on each end, with frayed edges. However, I credit the testimony of Morris, who had a much better memory of the events and who I find to be more credible. Therefore, I agree with Morris that the negligence is high and assess a $50,000.00 penalty.

Docket No. LAKE 2009-531

This docket contains two orders, both for alleged accumulations; one of coal and float coal on the belt and one for oil on equipment. Both orders are discussed below.

a. Order No. 6683161

On April 6, 2009, Inspector Scott Lee issued Order No. 6683161 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

> Accumulations of combustible material in the form of coal float dust on rock dusted surfaces (black in color) was present on the 4B belt. Accumulations ranged in depth from 1/8 to ¼ inches deep from rib to rib and in adjoining crosscuts. This condition was present on the back side of the belt from the head to fifteen crosscut. The belts overall condition was being carried in remarks instead of hazards (citation will be issued). Based on this inspectors experience this condition had existed for at least 2 to 3 shifts. The belt was first described as light gray to black in color on 4/01/09. One of the examiner when interviewed stated that he thought he was doing management a favor by keeping condition in remarks instead of hazards. Management did know of its more serious condition since the examiner Charlie Hyers stated that he had previously informed Mine Manager Terry Ward about the belts condition. The belt was taken out of service.

Inspector Lee determined that an injury was unlikely to occur, but that any injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was non S&S, that two persons were affected, and that the negligence was high. The Secretary has proposed a penalty of $4,000.00. After the hearing, the Secretary moved to change the violation to S&S.

1. The Violation.

Lee testified that he issued this citation as he was traveling the area along the 4B belt. According to Lee, unlike most mine examiners who travel the belt on golf carts and look for hazards from the main travelway, he travels the back side, or opposite the side, of the belt while conducting his inspection. Shane Ralston, the miners' representative, and Brad Champion, a member of Willow Lake's safety department, accompanied Lee. While on the back side of the belt Lee observed accumulations of coal and float coal dust along the belt for a distance of approximately 1200 feet. (Tr. Vol. I, 53-55). The accumulations cited by Lee consisted of float coal dust on rock dusted surfaces. The accumulations were very black in color and 1/8 to 1/4 inch deep. In Lee's experience, because the accumulation of coal dust was black rather than grey or white, it was combustible and had been in place for some time. The area had been rock dusted, but these accumulations were on top of the rock dust throughout the entire length from the head of the belt to crosscut 15.

Lee reviewed the mine books, including the preshift examination books, back to April 2 2009, i.e., four days prior to his inspection. He noted on April 2, 2009, the examiner listed some

black and some grey accumulations in the areas cited by Lee. The next preshift entry, and the following ones through April 5th, also mention float dust in color from black to grey. Additionally, Lee believed that the mine examiner was incorrectly listing accumulations under the heading "conditions" in the report instead of under "hazards". Lee explained that listing the accumulation under conditions instead of hazards gave the mine more time to deal with the problem, as only items listed under hazards are required to be remedied immediately.

Charles Hyers, the mine examiner, testified on behalf of Big Ridge. Hyers is an hourly employee who conducts preshift examinations and fills out reports to record the result of his examinations. He is charged with looking for hazardous conditions, recording them and, in some cases, immediately remedying those conditions. He explained that accumulations are a matter of judgment and if the belt is running in accumulations, then it is a hazard. If the belt is not running in the accumulations, then it is recorded as a condition in the remarks section of the preshift exam book so that management is put on notice of the condition. (Tr. Vol. I, 154-157).

On April 6, 2009, Hyers examined the 4B belt and noticed that there was a large amount of dust in the air. He encountered Terry Ward, the mine manager, shortly thereafter and explained that it was dusty near the belt and suggested that the water be turned back on. He did not observe the float dust that was later cited and did not record any hazards during that preshift inspection. Hyers later ran into Inspector Lee on the 4C belt line. When questioned by Lee about the accumulations Lee found earlier, Hyers attempted to respond to the questions but was not able to clearly hear or really understand what Lee was asking him. According to Hyers, Lee stated that Hyers wasn't doing the company any favors by marking the accumulations in the books as a condition and not a hazard. (Tr. Vol. I, 157). Hyers did not say, as Lee alleges, that he was doing management a favor by marking it in such a manner. Lee interpreted the conversation to mean that Ward was told about the accumulations, and that Hyers routinely lists hazards as conditions so that management has a greater time to respond and take care of the condition. It is clear that the conversation was misunderstood by both parties. (Tr. Vol. I, 157-158). Therefore, I do not consider the conversation in reaching any conclusions as to this order.

Hyers did not agree that black coal dust existed along the belt. However, there may have been dust that was grey in color but, in his view, it was not combustible. (Tr. Vol. I, 158). On cross examination, Hyers agreed that, if there were large accumulations of black coal dust along the belt, it would be a hazard. (Tr. Vol. I, 160).

Terry Ward, the mine manager at Willow Lake, is in charge of daily production, ventilation and general matters on his assigned shift. He has been at Willow Lake a little more than 7 years but has a total of 25 years mining experience. On April 6, 2009, he was on the day shift, which starts at 7:00 a.m. He recalls talking to Hyers about the water sprays on the belt and the dusty conditions. Ward was not told anything about accumulations or the need for rock dust. (Tr. Vol. I, 165). Ward talked to Lee and learned of the accumulation along the belt. Ward believed that the area was not a hazard. Even though there was float coal dust, in his opinion, it was heavily rock dusted on the floor. He didn't agree that the accumulation was black in color,

but he did agree that he was looking at and kicking the dust on the travel side, and not the side of the belt that was cited. (Tr. Vol. I, 169).

The Commission has addressed the issue of accumulations in conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld the ALJ's finding that an extensive accumulation of loose, dry coal and float coal dust along a belt line was a violation of section 75.400. While the operator has offered a differing account of the type of accumulation in this case, I credit the clear testimony of Lee, who observed the black coal for a long distance on the "off side" of the belt. I find that the Secretary has demonstrated the violation as alleged and affirm the violation.

2. Significant and Substantial Violation

Lee did not mark this violation as S&S because, as he testified, he "did not have an ignition source," which, in turn, made it unlikely that an event would occur that would result in an accident or injury. The Secretary has, since the time of the hearing, suggested that the violation should be found to be S&S.

I note that the S&S nature and the gravity of a violation are not the same. The focus of the seriousness of a violation is not necessarily on the reasonable likelihood of an event occurring that will result in an injury, but rather on the effect of a hazard if it occurs. *See Quinland Coals Inc.*, 9 FMSHRC 1614 (Sept. 1987). Hence, a violation may be serious yet not be found to be S&S. Such is the case here. I find the accumulation of float coal dust to be a very serious violation and, therefore, a high penalty is appropriate. Lee credibly testified that the dust was dark in color, had little rock dust, and was extensive. In the event of an explosion, the coal dust would quickly propagate the fire and further the effects of the explosion.

The accumulations were found along the belt line in an active working area. As Lee explained, if an ignition were to occur, the float coal dust would be suspended and it would take little of the dust to ignite and perpetuate the explosion. It is often the case that rollers go bad, belts begin to rub, and sparks are created. Moreover, other heat sources may exist along the belt line that, in time, would ignite the coal. If this condition had been allowed to persist, as it obviously had here, it could have reasonably led to a fire or explosion. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985). While I note the high gravity of the violation, I find that it would prejudice the Respondent if the Secretary were to be allowed to amend this violation to S&S after the hearing and, as a result, I deny the Secretary's request.

3. Unwarrantable Failure

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been

placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Lee, in determining that the accumulation violation existed for a number of days, relies, in part, on the preshift reports. The reports show that examiners, including Hyers, found accumulations on the 4B belt from April 2 until the time of Lee issued his order on April 6. Sec'y Ex. 6. The examiners report refers to accumulations that are grey and black in a number of book entries. This belt normally operates 16 hours per day. The designation of "black" indicates to Lee that there was little, if any, rock dust in the float coal dust, making it highly combustible. (Tr. Vol. I, 62-63). In *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cr. 1995), the Seventh Circuit addressed the length of time factor as it relates to an unwarrantable failure finding for accumulation violation. The Court concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Id.*; *see also Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999).

Lee further described the accumulations as extensive and obvious. He immediately noticed the accumulations when he entered the area. He credibly testified that they were extensive and that they had existed for 1200 feet. Since management reviews and signs the preshift examinations, management was made aware of the condition. In addition, the mine had been put on notice about an accumulation problem. Lee told the company in meetings, and in the prior quarter, about his concern for the number of accumulation violations issued. He addressed accumulations in general but, he argues, the company should have been more diligent based upon the conversations. This mine had over a 200% increase in accumulation violations in the one quarter. (Tr. Vol. I, 73-75).

The history of assessed violations for this mine demonstrates over 150 accumulation violations in the 15 months prior to this violation. Sec'y Ex. 31; (Tr. Vol. I, 81). The Commission, in examining an unwarrantable failure finding related to section 75.400, has recognized the following:

> [P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history may be relevant in determining

> the operator's degrees of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMRSHR 588, 595 (June 2001).

I conclude that the Secretary has established that the violation is unwarrantable as alleged. Based upon the negligence and the gravity of the violation, along with the other factors addressed in the penalty section of this decision, I assess a penalty of $10,000.00 for this violation.

b. Order No. 6683186

On April 21, 2009, Inspector Scott Lee issued Order No. 6683186 to Big Ridge for a violation of section 75.400 of the Secretary's regulations. The order alleges the following:

> Accumulations of a combustible material in the form oil, due to oil leaks was allowed to accumulate. These accumulations ranged in depth from1/4 to 3/4 inches deep on the floors of the pump motor and motor compartments. Management is aware that they have an ongoing problem with oil leaks. They have addressed the problem of removing the cited accumulations by washing, but have failed put a program in place to illuminate the root cause, oil leaks. Based upon the following history at this mine or its repeated violation of the 75.400 standard this order is being issued: 354 citations issued under this standard in the past 14 months. 88 or 25% or the citations issued have been S&S, also numerous meetings have been held with management regarding the repeated violation of the 75.400 standard. This condition was observed on the 870 ram car located in unit 1 (011/001).

Inspector Lee determined that an injury was unlikely to occur, but that if an injury did occur it could reasonably be expected to result in lost workdays or restricted duty, that the violation was non S&S, that two persons were affected, and that the negligence was high. The Secretary has proposed a penalty of $4,000.00.

1. The Violation

Lee testified that he found the accumulation of oil on the ram car as he was inspecting equipment at the mine. At the time of the inspection, this mine had been experiencing a high number of accumulations of oil on equipment, such as the ram car cited here. Lee agreed that the mine had been washing the machines, but the mine was not repairing the leaks. Lee determined that washing the equipment was not enough to deal with the continued issue of accumulations. Lee had numerous meetings with persons at the mine about the condition of the equipment, specifically the oil leaks and the resulting accumulations.

Robert Hill, the Willow Lake mine manager, has 43 years of mining experience and he primarily delegates the work each shift. He accompanied Lee underground and remembers that Lee told him that he was going to inspect the equipment and that any accumulation violation would be issued as an order, due to the mine's history. (Tr. Vol. I, 172). He explained that a ram car carries coal from the miner to the feeder and operates 16 hours a day. The 870 ram car cited by Lee was part of an equipment inspection conducted by Lee. During the course of the inspection, the pump motor cover was removed and Lee could see accumulations of oil and floor clay. Hill didn't measure the depth of the accumulation but he testified that the there was maybe 1/8 inch of oil, that it was not as much oil as Lee suggested, that it was not obvious, and that it was not a hazard. (Tr. Vol. I, 173). It was Hill's understanding that the ram car had been washed that morning on the day shift and had been subject to a weekly examination on April 16th, i.e., just five days prior to the order. The weekly examination found that it was dirty and had oil leaks. Big Ridge Ex. T; (Tr. Vol. I, 176). The equipment was washed and the fittings tightened. Hill agrees that they are constantly fixing oil leaks on the equipment but, in his view, it is the nature of mining. (Tr. Vol. I, 179).

Given the undisputed testimony of Lee, and the explanation provided by Hill that there was, without question, an oil accumulation on the ram car, I find that a violation is established.

2. Unwarrantable Failure

The citation was issued as an unwarrantable failure based upon the number of alleged accumulation violations found and the fact that MSHA had put the mine on notice about the accumulations of oil that persisted on its equipment. Lee addressed a number of aggravating factors in his testimony, i.e., length of time that the violation existed, the extent of the violative condition, that the operator has been placed on notice, that greater efforts were necessary for compliance, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

Lee discussed that he found high negligence due to the ongoing problem with the accumulations, specifically accumulations of oil on equipment at this mine. He noted many previous violations in the body of the citation. He also testified that there were ongoing discussions about the problem with mine management and how he had attempted to get the problem under control through meetings with the company. Still, the mine had failed to put a program in place to eliminate the cause. At a closeout meeting at the end of March, Lee prepared a list of citations which included the number of accumulation violations at the mine. According to Lee, what really stood out was the increase in accumulation violations of 230% from the first quarter to the second quarter. Most of the violations were related to mobile equipment and leaks. One month prior to the subject order, Lee told mine management that they needed to do better with the equipment, conduct better pre-operational checks, detect leaks, and immediately repair them. This order was issued three weeks after that closeout and Lee was still

finding these problems. In addition, Lee speaks to management every time he is at the mine and management assures him that they are taking care of the problem. In Lee's view, they have not taken care of the root cause, i.e., the oil leaks.

Hill disagrees with Lee and testified that the mine has been washing the equipment to eliminate the accumulations and that the weekly checks were being done. When a leak is found during those weekly examinations, it is repaired. He indicated that the mine is constantly repairing oil leaks and consequently the mine is doing what it should. This piece of equipment had been repaired after its last weekly check and had been washed the day before the inspection. However, I agree with Lee that the mine was not doing enough to eliminate the problem and that the unwarrantable designation is appropriate in this case. I affirm the proposed penalty of $4,000.00.

Docket No. LAKE 2009-532

This docket contains 37 violations with a total proposed penalty of $262,438.00. The parties have agreed to settle 32 of the violations as set forth in Sec'y Ex. 32, which is accepted and incorporated herein. The remaining five violations are addressed below.

a. Citation No. 6682879

On April 1, 2009, Inspector Marty Gayer issued Citation No. 6682879 to Big Ridge for a violation of 75.202(a) which requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The citation states that "[t]here is an area of unsupported mine roof at crosscut #49, in #4 entry, located on the #2C Travel Road. The area measured 6'3" X 7'3" feet from the last permanent support." Inspector Gayer determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person was affected, and that the negligence was moderate. The Secretary has proposed a penalty of $5,961.00.

1. The Violation

Gayer has been a mine inspector since 2007 and had 24 years mining experience prior to becoming an inspector. (Tr. Vol. II, 34). On the day he discovered the violation, Gayer was conducting a spot inspection and was traveling on the unit 2 travel road to the unit section working area. The travel road is the main route of travel into the mine and to the working section. Gayer observed a 6' 3" by 7' 3" area from the last permanent support that was not adequately supported. This is a dry rock or stack rock area and, given the mine's history of roof falls, the mine is required to provide extra support in an area such as this. (Tr. Vol. II, 37). This unit has a history of numerous roof falls, particularly roof falls in the stack rock areas. As a result of the problems, the roof control plan requires the mine to install roof bolts longer than usual or, alternatively, timbers as added support in stack rock areas. Gayer explained that the mandatory standard requires all areas where miners work or travel to be adequately supported.

The miners travel in this area when entering and leaving the mine. Although the roof was bolted, the material surrounding the roof bolts had fallen and the plate was no longer against the roof. In Gayer's opinion, other material was poised to fall. (Tr. Vol. II, 39). He measured from the last support to the next good support, in both directions, and discovered an area approximately six feet by seven feet that was not adequately supported. Gayer credibly testified regarding the location of the bad roof and explained that it was in an area where miners drive and walk daily. There was evidence that a 5 feet by 5 feet portion of the roof had already fallen directly under the bad bolt/plate.

Gayer believes that this violation is S&S and that the mine examiner who regularly travels this roadway should have noted and corrected the bad roof. (Tr. Vol. II, 41). Gayer learned that the area had been rock dusted a week prior to his citation so there was rock dust covering the top of the plate and, in his opinion, this was evidence that the condition had been in place for at least a week. The violation was obvious and, therefore, the negligence could have been high rather than the moderate negligence he attributed to the violation. (Tr. Vol. II, 43).

Champley, the operator's representative from the safety department who accompanied the inspector, testified that the inspector was looking at the top and stopped several times to examine the roof. Champley was a roof bolter for 4 years and understands that the mine uses fully grouted bolts designed to glue the layer of rock, creating a beam across the entry. (Tr. Vol. II, 96). He responded "no" when asked if a primary roof fall is more likely when one bolt is missing. (Tr. Vol. II, 97). Champley didn't recall seeing any draw rock but did observe that the rock area was white and the plate had moved. He did not see any slips, cracks, or over-wide cuts. (Tr. Vol. II, 99). He testified that he recalled the bad roof being closer to the rib line, but there is some confusion as to which citation Champley was addressing in his testimony. Given the confusion, I give little weight to much of his testimony. (Tr. Vol. II, 99-101).

The Secretary's roof-control standard in 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (*cited with approval in Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998). Gayer's testimony reveals that a reasonably prudent person would have required more support in this area given that the roof had already fallen where the bolts were loose and the plate moved. I credit the testimony of Gayer regarding the condition of the roof and the location that was affected by the bad roof. I affirm the violation.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there

exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission set forth the test for S&S in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation; the danger of roof falling in an area that is routinely traveled by miners working in the mine. Third, the fall of roof will easily result in an injury and that injury will be serious or even fatal. Gayer credibly explained that the hazard created is the fall of a part of the roof and, in fact, part had already fallen, leaving loose pieces of rock hanging from the roof. The area that had already fallen which was 5 feet by 5 feet, was enough to cause fatal crushing injuries according to Gayer. (Tr. Vol. II, 44). This area is traveled regularly on each shift both in vehicles and on foot. It is also an alternate escapeway.

What the Commission said twenty years ago, that "[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining" and "remain the leading cause of death in underground mines," is just as true today. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984). Since any fall of roof would result in a serious injury or death, I find that there was a reasonable likelihood that the injury would be of a reasonably serious nature. I agree with Gayer that this violation is S&S and I assess a penalty of $6,000.00.

b. Citation No. 6682881

On April 1, 2009, Gayer issued a second citation, Citation No. 6682881, for a roof control violation on the same travel road but inby the earlier violation and on the working section. He again cited a violation of 75.202(a) and stated in the body of the citation that "[t]here is an area of unsupported mine roof in #4 entry, at 53+85 survey station, located on the #2C Travel Road. The area measured 6.5 x 7.5 feet from the last permanent support. The unsupported area is in front of the Transformer #66 and dinner hole area, which is well traveled and open and obvious." Inspector Gayer determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that nine persons were affected, and that the negligence was high. The Secretary has proposed a penalty of $56,763.00.

1. The Violation

After issuing two citations for bad roof, including the citation discussed above, Gayer traveled toward the working section. While traveling towards the working section he observed another area of loose roof located near the transformer and the "dinner hole". Gayer explained that there was an inadequately supported area that he measured to be 6.5 feet by 7.5 feet, with two bolts damaged to such a degree that their integrity was compromised. The bolts were bent

and would no longer hold the roof in place and the plates were also damaged. In addition, the roof had several slips near the transformer and dinner hole area. (Tr. Vol. II, 47-48). Gayer testified that the roof he observed was a violation "because the integrity of the roof bolts [was] compromised, and they weren't adequately supporting the roof." (Tr. Vol. II, 51). He observed several slips and cracks in the roof. Given the location of the condition, the entire crew from the working section may be walking under or very near the bad roof. This is, like the area discussed in the previous citation, a stack rock zone. (Tr. Vol. II, 51).

Gayer described the area affected by the bad roof and drew an illustration of the area. Sec'y Ex. 34. The illustration shows the dinner hole area and the area between the dinner hole and the transformer; the intersection where the bad roof was located. Gayer described tools in the area that would need to be retrieved throughout the shift, as well as a first aid kit and mine maps. The area is accessed by repairmen, equipment operators, and foremen, as well as the mining crew.

Champley testified generally about the roof control violations and remembered that this violation was not in the location identified by Gayer. Instead he believes that it was closer to the rib. (Tr. Vol. I, 99-100). He did agree that it was near the "dinner hole" but he doesn't remember a picnic table. (Tr. Vol. II, 101). In his opinion, the bad roof was not in a location where miners would sit or drive under it. (Tr. Vol. II, 102).

I find that the conditions observed by Gayer constitute a violation of the cited standard, and that a violation has been shown by the Secretary. I credit primarily the testimony of Gayer and his description of the roof condition and the area where the bad roof was located.

2. Significant and Substantial Violation

Gayer designated this violation S&S due to the slips in the roof, the cracks in the roof, the bad bolts, and the bad plates he observed. He further explained that all of those working on the section would travel or linger under this area during the shift. According to Gayer, it is reasonably likely that the roof will fall, thereby injuring anyone in the area. The injury would be a crushing injury that could be fatal. Based upon the Mathies criteria, discussed *supra*, I find that the violation is significant and substantial. I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of roof falling in an area that is routinely traveled by all working in the mine. Third, the fall of roof will easily result in an injury and that injury will be serious or even fatal.

Gayer credibly explained that the hazard created is the fall of a part of the roof in an area that is often traveled and accessed throughout the shift. Gayer observed the bad roof in the travel area and in a stack rock zone which calls for additional support. He explained that the hazard created by the condition of the roof is a fall of roof which could cause injuries ranging from broken bones to the fatal crushing of miners. Gayer considered the size of the area, the history of stack rock and instability at this mine, and the fact that the cracks and slips appeared to

be subject to failure. He credibly testified that, due to the size of the unsupported area, the history of the mine, the stack rock in the area, and the slips and cracks he observed, the roof was likely to fail. (Tr. Vol. II, 54). He further testified that the dinner hole area has a picnic table, tool box with tools, first aid box, mine map, and escapeway maps. Many miners keep dinner buckets at the dinner hole and may return to the area several times a day to retrieve things from their bucket or eat nearby. On the other side of the travelway is a transformer which supplies power to equipment on the unit. Equipment operators, foreman, and repairmen access the transformer to energize or de-energize all equipment from that point. There is exposure to the bad roof throughout the course of the shift, both on foot and in equipment. (Tr. Vol. II, 53, 56).

Champley observed slips of the roof over the transformer area, and noted that rock had fallen out when cut, but the area had been subsequently supported. He did not believe that the slip he observed compromised the roof. According to Champley, there was just one pin identified as being missing, but he spotted a couple bolts near it to support the roof. The citation was terminated by replacing the bolt with one of similar length. Champley explained that the area he described as the cited area was too close to the power center for any vehicle to pass under the unsupported roof. He testified that there are power cables on each side, but the bad pin could have exposed only one person.

I find Gayer to be an extremely credible witness based on both his detailed memory and notes about the violation. I find Gayer's recollection of the cited area and the condition of the roof far more credible than Champley's recollection. Champley was focused only on the area directly under the "bad pin" and not the extended area that Gayer believed was affected by the bad roof bolts and plates. I reject any suggestion that Gayer cited only a small area where a "bad pin" was located and that the pin had no effect on the remainder of the roof for some distance.

As stated above, the Commission has acknowledged that "[r]oof falls have been recognized by Congress, the Secretary of Labor, the industry, and this Commission, as one of the most serious hazards in mining" and "remain the leading cause of death in underground mines." *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n.4 (Jan. 1984). I conclude that the Secretary has proven that this violation is S&S.

3. Negligence

Gayer designated this violation as high negligence because, in his opinion, the condition was open and obvious. This area, like the other areas he cited that day, had been rock dusted on March 24, a week before the citation. The location of the rock dust led Gayer to believe that the bad roof had existed at the time it was dusted. Management is constantly in the area and examiners are in the area to look for hazards. (Tr. Vol. II, 55). The roof condition was easily detected and Gayer was able to see it immediately upon entering the area. I conclude that the negligence is high and, therefore, based upon the negligence and gravity of this violation, along with the other penalty criteria discussed below, I assess a penalty of $60,000.00 for the violation.

c. Citation No. 6682883

On April 1, 2009, Inspector Gayer issued Citation No. 6682883 to Big Ridge for a violation of section 75.360(b)(1) of the Secretary's regulations. The citation alleges the following:

> An inadequate preshift examination was performed on the in that the hazardous conditions listed in Mine Citation numbers 6682879, 6682880, 6682881 and 6682882 was neither posted not recorded in a book maintained for that purpose. All affected areas have rock dust present on the unsupported roof and on top of the roof bolt plates and the area was last dusted on 3/24/2009. Termination of this citation shall require that those miners required to perform preshift examinations be re-instructed in the requirements of the cited standard.

According to Gayer, all of the citations he issued that day were on the examiners route and all were open and obvious. (Tr. Vol. II, 57). He reviewed the examiner's books and found no notes to indicate that the examiner had observed the violations. He cited a violation of section 75.360(b)(1) which requires that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: . . . [r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift." The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that nine persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $42,944.00 this violation.

1. The Violation

Gayer's citation is based upon four other citations he issued on April 1, 2009, including the two roof violations discussed above. He also issued Citation No. 6682880 for unsupported roof in the travelway, and Citation No. 6682882, also for unsupported roof. He considered the four violations that were not recorded in the book maintained for the preshift results as a basis for the citation. All of the cited areas were areas of stack rock and had been rock dusted on March 24, 7 days prior to the citations. The roof violations were issued by Gayer at 8:00 a.m., 8:20 a.m., 9:55 a.m. and 8:40 a.m. The preshift would have been conducted between 3:30 a.m. to 6:30 a.m. (Tr. Vol. II, 70). In each case the roof problem was obvious. The roof had deteriorated, some had fallen to the ground, and roof and bolts were hanging and plates were no longer against the roof. Gayer expected that the preshift examiner would have observed the areas of bad roof as they were on his route of travel. He should not only have detected the bad roof, but should have recorded and subsequently repaired the area. Upon reviewing the books before entering the mine, Gayer found that the examiner had found no hazards in these highly

traveled areas. Gayer made no special efforts to see the violations, hence the examiner would have seen them just as easily. (Tr. Vol. II, 62-65).

Martin, a mine examiner for Willow Lake, has worked at the mine for two years and has ten years of mining experience. He testified that he conducted the preshift examination and recorded it on the examiner's report for unit 2 and unit 3 for April 1, 2009. Big Ridge Ex. L. As Martin traveled the roadway, he recalled that it was dusted, with the dust being white in color. When conducting a preshift, he scans the roof and takes note of the condition of the roadway. (Tr. Vol. II, 85-86). In the event there are cracks or unsupported roof he identifies it as a hazard on the report and places a tag on loose pins. (Tr. Vol. II, 87). He believes that he can view hazards if the area has been rock dusted or if roof has fallen. The entries are normally 18 feet, and there are 5 rows of bolts across the top, making it necessary to see a large number of roof bolts. If material had fallen out prior to the travel road being dusted, then it would be black where roof had fallen, or black on the floor, and he would have discovered the problem. If the plate is not secured or is hanging down, that is an indication that the roof is bad. He does note bad bolts from time to time and they are repaired. Martin did not testify specifically regarding his examination on the day of the citation and, instead, testified in general terms about preshift examinations.

Based upon Gayer's observations during his inspection, it may reasonably be inferred that bad roof existed in several locations at the time of the preshift examination. While Martin asserts that he would not have missed the roof violations, particularly if part of the roof had already fallen, I find it probable that he did. In Gayer's experience, because the roof was rock dusted over the roof bolt and the hanging roof, he was able to determine that it had been in place for at least a week and had not been noted by any examiner. Gayer further opined that the bad roof was located in four distinct areas along a regularly used travelway and, therefore, should have been obvious to anyone traveling the road, particularly a mine examiner trained to look for bad roof. Martin's testimony does nothing to refute the observations and opinions of Gayer. Since the preshift examination took place only hours before the violations were issued, and there were at least four roof violations noted by Gayer, I find that a violation has been proven as charged. The fact that Gayer found four violations of bad roof, with bent or hanging bolts, roof falls on the ground, and rock dust to indicate that the roof had been in the condition for a week, persuades me that the examiner was not doing an adequate job.

2. Significant and Substantial Violation

Gayer designated this a S&S violation because failure to note the hazards of the roof will result in miners will being exposed to such hazards. Miners rely upon the preshift examiner to find and correct conditions that can be a hazard. When an examiner fails to do so, it creates in miners a false sense of working in a safe environment. Gayer explained that, during the shift, all of those miners working on the section would travel or linger under the various areas of bad roof. According to Gayer, it is reasonably likely that the roof will fall, thereby causing a serious, or even fatal, crushing injury. Based upon the Mathies criteria, discussed *supra*, I find that the violation is significant and substantial.

I have found that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, the danger of miners unknowingly being exposed to unsupported roof that is likely to fall. Third, the fall of roof will result in an injury and that injury will be serious or even fatal. Gayer credibly explained that the hazard created is the exposure of miners to at least four areas of bad roof, all well traveled and accessed throughout the shift, that were left unreported by the mine examiner.

Gayer expressed his concern that failure to record hazards, and in particular the failure to record the four areas of bad roof, means the conditions are not brought to the attention of miners and not corrected prior to the miners beginning their work for the day. The fact that the conditions were not found and not corrected leads to the obvious hazard of roof falls. There were slips and cracks in the roof, hanging bolts and roof material, and roof had fallen to the ground, all leading to the likelihood that the roof would fall and cause a fatal crushing injury. The miners rely on the preshift examiner to look for hazardous conditions prior to their entry into the mine. Relying upon an inadequate examination may engender a false sense of security and cause the miners to pay less attention to their surroundings as they travel the roadway. The roadway is traveled each shift, both directions, both on foot and in uncovered vehicles. The entire working crew of at least nine miners was affected by the lack of adequate examination.

In support of the S&S finding made by Gayer, the Secretary submitted a data retrieval report, Sec'y Ex. 22, to demonstrate the number of mine accidents from January 5, 2006 until March 2009. The accidents are reported to MSHA by Willow Lake. During the three year period of the report, there were eighty-nine reported accidents due to the fall of roof or rock. Those falls resulted in fifteen miners sustaining injuries but there were no fatalities. As Gayer opined, it only takes one fall to cause a fatality. (Tr. Vol. II, 67-69).

Martin disagreed that the alleged lack of an adequate examination would lead to any injury. He said that most, but not all, vehicles traveling the road have canopies. However, the roof of the vehicle he drives does not protect against a roof fall and it would only keep the rain out. (Tr. Vol. II, 89).

In reaching my conclusion, I have not disregarded the arguments of Willow Lake that the lack of an adequate preshift does not create a hazard. Indeed, the Commission has determined that preshift examinations are fundamental in assuring a safe work environment for the miners. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan.1997*); Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). "The preshift examination is intended to prevent hazardous conditions from developing." 19 FMSHRC at 15. The preshift examiner must look for all conditions that present a hazard. *Id.* at 14. Given the obvious nature of the violation herein, I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard herein, would have recognized that this hazard needed to be recorded in the preshift examination book. *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) *aff'd* 951 F.2d 292 (10th Cir. 1991). Accordingly, I find Respondent's argument to be without merit.

The mine argues that, like the roof control violations themselves, there is no danger of a primary roof fall in the areas cited by Gayer. However, I find that there was a likelihood of a roof fall and that the miners were exposed to a serious hazard due to Respondent's failure to record the roof conditions and either correct them or warn miners of the hazards. The miners on the oncoming day shift were not alerted to the presence of the dangerous roof. If mining operations were allowed to continue, the bad roof would have remained in place unreported. The violation was therefore significant and substantial.

3. Negligence

The Secretary argues that the Respondent's failure to record the hazards was the result of high negligence. The roof control violations were certainly obvious because of the number and location. In addition, the violations should have been obvious to the mine examiner and management because they occurred in areas of primary travel that had to be examined on a daily basis. *See Quinland Coals Inc.*, 10 FMSHRC 705, 708-09 (June 1988) (obvious nature of lack of proper roof support); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007, 2010-11 (Dec. 1987) (finding of unwarrantable failure where preshift examinations had been conducted but the roof control violations were not reported); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (violations not reported following preshift examinations).

The high negligence finding is also supported by the duration of the violation, which was determined by the inspector to have existed for weeks. *See Quinland*, 10 FMSHRC at 709 (poor roof conditions associated with section 75.200 violation had existed "for a considerable length of time"). The lack of a thorough inspection presented a high degree of danger to miners because of the threat of roof falls. Most significantly, the mine examiner is trained to find the very conditions that Gayer found. The examiner must find the conditions in order to protect the miners from hazards as they go about the work day. The only explanation offered by the mine is that the areas were rock dusted and difficult to see. Consequently, I conclude that the violations were the result of high negligence and assess a penalty of $50,000.00.

d. Citation No. 6680529

On April 16, 2209, Inspector Keith Roberts issued Citation No. 6680529 for a violation of section 75.220(a)(1) of the Secretary's regulations. The citation alleges that "[t]he cross sectional area of the 4-way intersection of Entry 6, 22+25' station, Unit 1 is 71 feet. The maximum area approved in the roof control plan is 68 feet." The cited standard requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used in the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1). Inspector Roberts determined that a fatal injury was reasonably likely, that the violation was S&S, that one person was affected, and that the negligence was moderate. A penalty of $5,080.00 has been proposed.

1. The Violation

Keith Roberts has been an inspector with MSHA for 11 years and is presently a roof control specialist. He has worked in coal mining since 1972 and has held different positions ranging from general laborer to mine foreman. He has worked on proposed rulemaking for MSHA and, in 1998, chaired the coal safety division for the mining association. (Tr. Vol. I, 186-191). On April 16, 2009, Roberts was at the Willow Lake Portal to conduct a five-day spot inspection. He was accompanied on the inspection by Terry Ward, for the company, and Greg Fort, the miners' representative. (Tr. Vol. I, 196-197). Roberts observed the violation of the roof control plan as he walked by the entry 6 area while traveling to the working section. Roberts observed that three of the corners were cut off in the entry and appeared to be wider than normal. He measured the area and recorded the measurements in his notes. Sec'y Ex. 30 p. 4. Three of the corners had been cut; one by the continuous mining machine while turning, and the other two were sheared down by the miner as it backed up. (Tr. Vol. I, 199-200).

The roof control plan provides that the maximum cross sectional width at an intersection shall not exceed a total of 68 feet, and that the maximum average diagonal distance at a four way intersection is 34 feet. Sec'y Ex. 25; (Tr. Vol. I, 194). The maximum cross sectional width is required by the plan because, in Roberts view, any time the pillar is reduced, it weakens the natural support structure and can be a significant contributor to roof failures. Diagonals must add up to 68 feet, and if the total width exceeds 68 feet then it is a violation of the roof control plan. If the width is exceeded, the plan calls for additional support. If the width is off by less than 2 feet, the plan allows for additional roof bolts to be installed. However, if the width is off by greater than two feet, then standing support, such as posts, jacks or cribs are required. (Tr. Vol. I, 202-203); Sec'y Ex. 25, p. 8, items 18-19. In this case, the width exceeded the total of 68 feet by nearly 4 feet, and the inspector was unable to identify any additional support, such as standing support in the intersection as required by the plan.

Terry Ward, the mine manager, accompanied Roberts when he issued the roof control violation. He agreed that the intersection looked wider than normal but felt that the ribs and roof were in good shape. (Tr. Vol. II, 6-7). In Ward's opinion, the cut corners were adequately supported by the roof bolts. Four and six foot bolts would have been used in that area. Ward agrees that the roof control plan requires 68 feet diagonal, but asserts that the slightly greater than three feet difference would not make it likely that a roof fall would occur. (Tr. Vol. II, 9). He does agree that most roof falls at this mine occur in the intersections.

The requirement for each underground coal mine to develop a roof control plan is a fundamental directive of the Mine Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. *See* 30 U.S.C. § 862(a) (setting forth general requirements for plans "to protect persons from falls of the roof or ribs."). The intent of the provision was "to afford comprehensive protection against roof collapse – the 'leading cause of injuries and death in underground coal mines.'" *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989) (citation to legislative history omitted). The Commission has relied upon the high degree of danger posed

by roof control plan violations as a basis for finding unwarrantable failure. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994).

Chad Barras, the regional safety director denies that any violation of the plan existed. However, I credit the testimony of Roberts and affirm the violation.

2. Significant and Substantial Violation

In designating this violation as S&S, Roberts took into account a number of things. First, this mine has a significant roof fall history. Second, the type of roof strata at this mine, a mixture of weak shales that weather easily, is not always adequately controlled. The excessive widths, along with the type of roof, contribute to the hazard of a roof fall. This is a four-way intersection on a travel road where miners are exposed each shift. The road is used by the crew going in and out from the working face. Mechanics, examiners, and supervisors also use this road. The area is traveled by vehicles that have no canopy and is also used as an area to park vehicles. The Secretary provided a list of roof falls at the mine which contains 14 pages listing unintended roof falls from 2005 to the present. Sec'y Ex. 26. The exhibit shows 125 roof falls and, in reviewing the document, Roberts identified that the majority of the falls are at intersections. With this history, Roberts knows that an intersection like the one he cited is a major area of concern. (Tr. Vol. I, 205-208).

Roberts explained that the rock in the roof of the mines in this part of Illinois are a weak composition and, given everything he observed, it is highly likely this over-sized width will result in a roof fall in the intersection. When the roof fails it won't be a single rock but, rather, a large piece of roof that will cause fatal crushing injuries. The falls, such as the one expected in this intersection, are often 20 feet in length and result in the entire intersection collapsing. In previous roof falls, there was not an obvious defect prior to the fall. Based on such, Roberts determined that a roof fall is even more likely in an area where he can see that the area is too wide. He noted this violation as moderate negligence because no further defects were visible, but he opines that he should have indicated high negligence because management should have seen the over-wide intersection. There are two production bosses and mine managers who should have seen the turn of the corner and the significant cuts on the sides and made an effort to measure and repair the area. (Tr. Vol. I, 213).

Roberts did not note any roof defects at the time of the citation and the roof was bolted as required by the roof control plan. The mine uses fully grouted resin rebar bolts of varying length, e.g., 4 ft, 6 ft, and sometimes longer bolts. The bolts are 3/4 inch in diameter and spaced 4.5 feet apart. Since this diagonal was off by more than two feet, it was necessary, according to the plan, to install standing support. Roberts agrees that there is nothing to indicate that a diagonal greater than 68 feet is enough to cause a roof fall but, Roberts explained, roof falls do not always follow strict parameters. When the intersection diagonal exceeds the plan amount in a mine with a history of roof falls and the type of roof here, a fall is likely to happen. (Tr. Vol. I, 240).

Ward believes that the roof was in good condition at the intersection and that additional bolts were placed in the area. He said that the mine normally places five to six bolts in a pattern, and those bolts create a beam that helps support the roof. (Tr. Vol. II, 8-9). The total diagonal, according to Ward, was 71 feet, and 68 is required. According to Ward, the 3 foot difference does not make it likely that an accident will occur. He opines that the roof was adequately pinned and looked good. He discussed how the corners had been cut to create the longer diagonal; the miner will cut them to give extra room for equipment and, even though they should be 68 feet, the miner can easily make a mistake given the difficulty of judging the length as the corners are cut. Ward agrees that this area should have been subject to a preshift exam and that faults do occur at intersection.

Chad Barras is the area safety director for Peabody, i.e., the parent company of Big Ridge, and is responsible for 12 mines in the area. He has worked for Peabody since 2003, and has an engineering degree in mining. He is familiar with roof control plans, including those at the Big Ridge mines. (Tr. Vol. II, 21-22). He understands the plan to mean that, if one diagonal, required to be 34 feet, is found to be greater than 36 feet, then that triggers the need extra support. His review of the roof control plan, Sec'y Ex. 25 p. 8 ¶ 19, indicates that only one diagonal at 34 feet, not the sum of the two widths, must be longer than required in order to trigger a violation. He takes a much different approach to the roof control plan than does Roberts. Barras believes the plan refers to the average diagonal length, which in this case was 35.5 feet, and how there must be a more than a two foot difference before additional support is required.

Next, Barras believes that a roof fall will not occur. He bases his opinion on the fact that the extended width is small, Ward saw no cracks or problems with the roof, and the area is typically bolted with 4 foot bolts, or even 6 foot bolts in the "turned area". In his view, the plan does not require more than extra bolts. However, even if I determine that the plan called only for extra bolts as opposed to standing support, no one credibly testified, that there were such bolts in place. Barras assumed there were extra bolts, and Ward said there "probably are" extra long bolts, but he was not able to identify where they were placed. Further, the plan provides that bolts will be on two corners. Ward testified that bolts were only on one corner. After observing Barras and understanding that he had no direct knowledge of the area cited, I give his testimony no weight.

With regard to the first and second elements of the Mathies test – I have already found that there is a violation of section 75.220(a)(1), and I find that there is a discrete safety hazard, i.e., the hazard of a roof fall. On the issue of a discrete safety hazard, I credit MSHA inspector Roberts' testimony detailed above. With regard to the third element of Mathies, I again credit the testimony of Roberts that, given the location of the wide entry, the type of roof, the number of roof falls, and the absence of any additional support, the roof is likely to fall in the continued course of mining. In doing so, I agree that the roof fall will be a large one, in an area traveled daily by miners, and that, as a result, a serious injury will occur.

In *U.S. Steel*, the Commission addressed several defenses to the designation of a violation as S&S, including the operator's argument that its violation of a ventilation plan was not S&S because at the time of the violation the level of methane was low and not at explosive levels. In rejecting those defenses, the Commission explained that "the question [of whether the violation is S&S] must be resolved on the basis of the circumstances as they existed at the time the violation was cited and as they might have existed had normal mining operations continued." 7 FMSHRC 1125, 1130 (Aug. 1985). In a later case, the Commission further explained, "[t]he operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

In the current proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall, but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove a S&S violation by establishing that the mine roof is under a specific type of stress that could lead to a roof fall, as urged by the operator, places an onerous burden of proof on the Secretary. I find that the violation is significant and substantial and assess a penalty of $10,000.00

e. Citation No. 6680534

On April 16, 2209, Inspector Keith Roberts issued Citation No. 6680534 for a violation of section 75.512 of the Secretary's regulations. The citation alleges the following:

> Inadequate weekly examinations of the battery-powered Long Airdox/DBT coal scoops, Co. Nos. 511 & 512, were conducted during the week ending April 11, 2009 in that the conditions listed in Mine Citation Nos. 6680531, 6680532 & 6680533 were not identified nor corrected and recorded in a book maintained for that purpose. The coal scoops are in operation on Unit 1, MMU 001-0 & 011-0. Termination of this citation requires that all persons assigned to perform weekly examinations of electrical equipment be re-instructed in the requirements of the cited standard.

The cited standard requires the following:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

30 C.F.R. § 75.512. Section 75.512-2 specifies that "[t]he examinations and tests required by §75.512 shall be made at least weekly. Permissible equipment shall be examined to see that it is in permissible condition." 30 C.F.R. § 75.512-2. Inspector Roberts determined that an injury was reasonably likely to occur, that such an injury would result in lost workdays or restricted duty, that the violation was S&S, that one person was affected, and that the negligence was moderate. A penalty of $4,329.00 has been proposed.

The underlying citations regarding the condition of the scoops were not contested by the operator. The three citations, Sec'y Ex. 28, were issued because the scoops had accumulations of oil: In each citation, Roberts lists the condition he observed that led to the oil leak and subsequent accumulation. (Tr. Vol. I, 217-219.) All were issued on April 16, 2009. Roberts testified that the condition of the scoops led him to believe that there was an inadequate examination of these three scoops. Roberts began by examining the weekly electrical examination records. Sec'y Ex. 29. There were no examination records after 4/11/09 that would indicate that someone had examined the condition of the scoops. (Tr. Vol. I, 221). Roberts explained that there is no requirement that the examination records be filled out at the end of the shift, although that is how it is routinely done. At hearing, Big Ridge provided examination records that demonstrated that the equipment had been examined after April 11, i.e., the date of the records that Roberts reviewed.

The examination books examined by Roberts at hearing included entries after April 11 and, specifically, noted that on April 15, the 511 scoop was repaired and washed. However, Roberts says, if it had been washed the day before, he would not have seen the oil accumulations that he cited. The books do show that the 511 and 512 scoops were examined on April 9, 2009, a week before Roberts issued his citations. (Tr. Vol. I, 224-225). The mine argues that the scoops had been inspected a week before, as required, and any problems that were noted, were repaired. The fact that Roberts found accumulations a week later does not support a finding that the examination was inadequate.

The mere fact that the conditions existed at the time of the inspection is insufficient evidence from which to infer that the conditions existed at the time of the weekly examination five days prior. The fact that the scoops had accumulations some days after the last weekly inspection is not enough to prove the inadequacy of the weekly inspection. *See Dumbarton Quarry Association*, 21 FMSHRC 1132 (Oct. 1999) (ALJ). There is insufficient evidence to link the inadequate examination with conditions a number of days later, particularly in light of the fact that the equipment was used for many hours after the examination but before the citation was issued. Therefore, the citation is vacated.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil

penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above. I assess the following penalties:

Order No.	6683136	$ 15,000.00
Citation No.	8414037	$ 50,000.00
Citation No.	6683161	$ 10,000.00
Order No.	6683186	$ 4,000.00
Citation No.	6682879	$ 6,000.00
Citation No.	6682881	$ 60,000.00
Citation No.	6682883	$ 50,000.00
Citation No.	6680529	$ 10,000.00
Citation No.	6680534	vacated
Total:		$ 205,000.00

The parties have settled the remaining citations and orders contained in these dockets. I accept the representations and the modifications of the Secretary as set forth in the file and on the record in these cases. I have considered the representations and documentation submitted and I find that the modifications are reasonable. I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The motion to approve settlement is **GRANTED**.

The settlement amounts are as follows:

Docket Number LAKE 2009-491

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
8414025	Modify from Fatal to Permanently Disabling	$4,689	$2,107
6680175	Modify from S&S to Non S&S	$1,530	$309
8414027	N/A	$2,901	$2,321
8414028	Modify from Fatal to Permanently Disabling	$4,329	$1,945
8414030	Modify from 15 to 2 Persons Affected	$3,143	$874
6683122	Modify from S&S to Non S&S	$1,304	$264

Docket Number LAKE 2009-491 continued

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
6683125	Modify from High to Moderate Negligence	$13,268	$3,996
6683126	Modify from High to Moderate Negligence	$13,268	$3,996
6683127	Modify from S&S to Non S&S	$5,961	$1,203
6683128	Modify from S&S to Non S&S	$3,996	$807
6682871	Modify from 4 to 2 Persons Affected	$3,689	$2,678
8414035	Modify from High to Moderate Negligence	$2,473	$745
8414036	Modify from High to Moderate Negligence	$2,678	$807
6683132	Modify from High to Moderate Negligence	$2,678	$807
6683134	Modify from S&S to Non S&S, and High to Moderate Negligence	$4,689	$285
8414039	n/a	$2,678	$2,410
8414041	n/a	$2,678	$2,410
8414043	n/a	$2,678	$2,410
8414044	n/a	$2,678	$2,410
8414045	n/a	$2,678	$2,410
8414046	n/a	$2,678	$2,410
6683139	n/a	$2,678	$2,410

6683140	Modify from S&S to Non S&S	$1,944	$392
8414048	n/a	$2,473	$2,473
8414049	n/a	$3,143	$3,143
6683141	Modify from S&S to Non S&S	$3,405	$687
6683142	Modify from S&S to Non S&S	$11,306	$5,653
6683143	Modify from High to Moderate Negligence	$2,678	$807
6683144	n/a	$2,678	$2,410
6683145	n/a	$3,996	$3,397
8414054	Modify from S&S to Non S&S	$1,795	$363
8414055	Modify from High to Moderate Negligence and Number of People Affected from 50 to 2	$10,437	$874

Docket Number LAKE 2009-491 continued

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
8414056	n/a	$2,678	$1,875
6683147	n/a	$3,996	$3,397
6683148	n/a	$2,678	$2,410
6682875	n/a	$2,473	$2,473
6682876	n/a	$2,473	$2,473

Docket Number LAKE 2009-532

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
6682882	Modify from 6 to 2 Persons Affected	$12,248	$5,962
6680190	Modify from 18 to 6 Affected	$2,901	$1,530
6680193	n/a	$4,689	$4,689
6680194	Modify from S&S to Non S&S	$3,996	$807
8414066	n/a	$2,473	$2,226
6682889	Modify from 18 to 3 Persons Affected	$4,689	$1,530
6682890	n/a	$2,678	$2,678
6682891	Modify from High to	$2,678	$807

	Moderate Negligence		
6682895	Modify from 18 to 3 Persons Affected	$4,689	$1,530
6682897	Modify from High to Moderate Negligence	$2,678	$807
6683168	Modify from Fatal to Lost Workdays	$1,657	$500
6682899	Modify from 3 to 1 People Affected	$2,282	$1,796
6680208	Modify from 10 to 2 People Affected	$10,437	$2,902
6680209	n/a	$2,678	$2,678
6680530	Modify from 8 to 4 People Affected	$7,578	$3,996
6680531	Modify from High to Moderate Negligence	$4,329	$1,945
6680532	Modify from S&S to Non S&S	$13,268	$2,678
6680210	Modify from 16 to 6 People Affected	$10,437	$5,504

Docket Number LAKE 2009-532 continued

6680211	Modify from 16 to 6 People Affected	$10,437	$5,504
6682904	Modify from High to Moderate Negligence	$2,901	$874
6682908	n/a	$3,996	$3,596
6683184	Modify from S&S to Non S&S	$3,996	$807
6683185	Modify from S&S to Non S&S	$2,678	$550
6682929	n/a	$2,678	$2,678
6680218	Modify from 10 to 6 People Affected	$4,689	$2,473
7594739	n/a	$1,795	$1,795
7594786	n/a	$1,304	$1,304
6680219	Modify from Fatal to Permanently Disabling	$5,080	$2,282
6682939	Modify from 14 to 2 People Affected	$3,143	$874
6682940	Modify from 18 to 6 People Affected	$4,689	$2,473
6682941	n/a	$1,795	$1,795
7594744	n/a	$1,795	$1,795
Settlement Total:			**$146,206.00**

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of $205,000.00 and assess the stipulated penalties in the amount of $146,206.00. Big Ridge Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of $351,206.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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March 11, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-775
Petitioner	:	A.C. No. 36-02945-194224
	:	
v.	:	Docket No. PENN 2009-825
	:	A.C. No. 36-02945-197364
	:	
SHAMOKIN FILLER COMPANY	:	Docket No. PENN 2010-63
INC.,	:	A.C. No. 36-02945-200482
Respondent	:	
	:	Mine: Carbon Plant
	:	
	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. PENN 2009-736-R
	:	Citation No. 7011691; 8/12/09
	:	
	:	Docket No. PENN 2009-737-R
	:	Citation No. 7011692; 8/12/09
	:	
SHAMOKIN FILLER COMPANY,	:	Docket No. PENN 2009-738-R
INC.,	:	Citation No. 7011691; 8/13/09
Contestant	:	
	:	Docket No. PENN 2009-739-R
v.	:	Citation No. 7011952; 8/20/09
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 2009-740-R
MINE SAFETY AND HEALTH	:	Citation No. 7011695; 8/25/09
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. PENN 2009-741-R
	:	Citation No. 7011696; 8/25/09
	:	
	:	Docket No. PENN 2009-742-R
	:	Citation No. 7011697; 8/25/09
	:	
	:	Docket No. PENN 2009-763-R
	:	Citation No. 7011699; 8/27/09

	:	Docket No. PENN 2009-776-R
	:	Citation No. 7011700; 8/31/09
SHAMOKIN FILLER COMPANY, INC.,	:	Docket No. PENN 2009-777-R
Contestant	:	Citation No. 7011781; 8/12/09
	:	
v.	:	Docket No. PENN 2009-778-R
	:	Citation No. 7011782; 8/31/09
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PENN 2009-779-R
	:	Citation No. 7011783; 8/31/09
Respondent	:	
	:	Docket No. PENN 2009-780-R
	:	Citation No. 7011784; 9/01/09
	:	
	:	Mine: Carbon Plant
	:	Mine ID: 36-02945

DECISION

Appearances: Jessica R. Brown, Esquire, Office of the Solicitor, US Department of Labor, Philadelphia, Pennsylvania, for the Petitioner
Adele L. Abrams, Esquire, CMSP, and Diana R. Shroeher, Esquire, for the Respondent, Shamokin Filler Company, Inc.

Before: Judge John Kent Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ("the Act").

The petitions for assessment of civil penalties and associated contest matters in the above-captioned dockets were consolidated for hearing by ALJ Alan G. Paez, who was originally assigned to the case.

By consent of the Court and the parties, the sole question at trial would be limited to whether the federal Mine Safety and Health Administration ("MSHA") has jurisdiction over the subject facility, Carbon Plant.

During the period of discovery, this case was reassigned to the undersigned ALJ on September 10, 2010, by an order of reassignment from Chief ALJ Robert J. Lesnick. The hearing date and location were unaltered by the reassignment. Several motions were filed by the

parties prior to hearing.[1]

On September 27, 2010, The Secretary of Labor ("Secretary") filed with this Court a motion in limine to preclude any evidence of MSHA inspection activity, or lack thereof, at any facility in the United States other than the Respondent's Carbon Plant. On September 27, 2010, for reasons discussed *infra*, this Court, after full hearing and argument, granted Secretary's motion. Pursuant to Commission Rule 70, 29 C.F.R. §2700.70, Shamokin Filler Company, Inc. ("Respondent") moved for stay of the proceedings and requested certification for interlocutory review by the Commission. This Court denied such[2] and the case thereupon proceeded to trial on September 27-28, 2010 in Harrisburg, PA.

LEGAL PRINCIPALS

Section 3(h)(1) of the Act defines "mines" that are intended to be covered under the Act. Section 3(h)(i) provides:

> "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]
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> Section 3(h)(2)(i) of the Act further defines "the work of preparing coal". Section 3(h)(2)(i) provides:
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> "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal,

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[1]These motions, *inter alia*, included Secretary's Motion in Limine to Exclude the Expert Witness Testimony of Lawrence Gazdick, filed on September 27, 2010, and denied on October 13, 2010; Secretary's Motion in Limine, filed on September 27, 2010, and granted on October 27, 2010; Secretary's Motion to Quash Subpoena, filed on October 18, 2010, and granted on October 20, 2010; and Respondent's Motion to Compel, filed on October 19, 2010, and denied on September 27, 2010.

[2]By Order dated December 10, 2010, the Commission denied Respondent's motion for interlocutory review.

lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]

The MSHA/OSHA[3] Interagency Agreement of 1979 ("MOU") further clarifies the jurisdiction of each agency. Concerning jurisdictional disputes, Point 5 of the MOU provides that:

> The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

PROCEDURAL HISTORY

Motion in limine

A preliminary evidentiary issue before this Court was whether Secretary's motion in limine to preclude evidence of MSHA's exercise of jurisdiction in facilities other than Respondent's Carbon Plant should be granted. This Court notes that MSHA's jurisdiction over an individual facility must be decided on a case-by-case basis, looking at both the statutory language and the nature and purpose of the specific facility. *Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992).

The Respondent argued that the Court should have heard evidence regarding MSHA's lack of exercise of jurisdiction over certain "bagging operations" similar to Respondent's, including MSHA's past deliberations and determinations regarding such. However, this Court holds that such evidence would be irrelevant to and, indeed, detrimental to resolving the critical jurisdictional questions of what the Carbon Plant has been, and is as a facility, and what it has done, and is doing in its operation and processes. (Emphasis added.)

Given that the fundamental jurisdiction inquiry before this Court involves the specific activities and operations of Respondent's particular Carbon Plant facility, this Court found that Respondent's proposed evidence pertaining to some other similar facilities would be essentially irrelevant. See *Ohio Valley Transloading Company*, 19 FMSHRC 813, 813 (Apr. 1997)(Only the facts pertaining to the subject facility were relevant).

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[3]OSHA refers to the Occupational Health and Safety Administration.

Although Commission Rule 63, 29 C.F.R. §2700.63, states that relevant evidence may be presented as long as it is not unduly repetitious or cumulative, the Rules do not define "relevancy" or its limitations. Therefore, the Commission may look to the Federal Rules for guidance. *Cactus Canyon Quarries of Texas*, 23 FMSHRC 280, 287 (2001). Pursuant to Rule 403 of the Federal Rules of Evidence, it is provided that evidence, although relevant, may be excluded if its probative value is, *inter alia*, substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if such introduction involves waste of time or needless presentation of cumulative evidence.

Presentation of evidence of MSHA's lack of enforcement at other similar facilities involves all of the foregoing pejorative evidentiary consequences. This Court finds that it would be cumbersome and impractical to begin the evaluation of the Carbon Plant's jurisdictional question with a review of whether and why MSHA has exercised or should exercise jurisdiction over similar "bagging facilities" located in both the Carbon Plant's specific geographical area and in other parts of the country.

In its prehearing pleading and argument, Respondent requested permission to present evidence that other similar "bagging operations" – principally Keystone Filler and Kimmel – were no longer under MSHA jurisdiction and were direct competitors of Respondent.[4] (Emphasis added.)

This Court rejected said request and granted the Secretary's motion in limine on the grounds that such evidence would be irrelevant and/or, if relevant, unduly confusing and misleading. Ultimately, this Court had to consider whether such evidence would aid it as trier of fact and law in deciding the issue of jurisdiction. For reasons set forth below, this Court found that the admission of such evidence to be utilized in a comparative analysis of similar facilities to that of Carbon Plant would be improper and unreasonable.

This Court finds no appellate case law on point regarding the admissibility of alleged similar facility evidence to establish jurisdiction. However, after careful consideration, this Court is convinced that a comparative facility analysis approach to jurisdiction is improper. Rather than considering the specific characteristics of a particular facility – which is the usual analytical approach in almost all Mine Act cases – the decision-maker must instead engage in unnecessary and often confusing collateral review.

While the ALJ holding in *Dicaperl Minerals Corp.*, 28 FMSHRC 720 (July 2006), has no binding effect, this Court finds the rationale of ALJ Manning in ultimately rejecting similar facility evidence as to jurisdiction to be compelling. In *Dicaperl Minerals*, the subject plant was a free standing perlite (volcanic glass) expansion facility. *Id.* The plant was not located at or

[4] This court finds that evidence showing that a facility is in competition with another facility for some of its products may have little relevance or materiality when determining jurisdiction. Facilities may be distinctly different in overall function and character, but still may offer some similar products, placing themselves in competition for a particular product.

adjacent to a quarry. *Id.* The plant operator offered evidence that most, if not all, other perlite plants that were "geographically and operationally separate" from mining operations – just as Dicaperl's plant – were under OSHA jurisdiction.[5] *Id.* at 734. The facility owner further maintained, in arguments similar to those advanced by Respondent, that continued inclusions of its plant under MSHA's jurisdiction, while similar perlite facilities were not under MSHA jurisdiction, was unreasonable, defying common sense. *Id.* at 724. The "bizarre result" was that a Dicaperl's facility was the only such facility still under MSHA's jurisdiction, while its competitors were under OSHA jurisdiction. *Id.* at 735.

ALJ Manning initially overruled the Secretary's objections to the introduction of Dicaperl's evidence of MSHA's lack of enforcement at other perlite facilities as being irrelevant. *Id.* at 736. However, he ultimately concluded that MSHA's failure to inspect other perlite facilities was not relevant to the issue of whether the Secretary had the authority to enforce MSHA's standards at the operator's plant. *Id.* ALJ Manning observed that no perlite facility is exactly alike and it would be "quite cumbersome and impractical" for Commission judges, when considering whether a facility should be subject to MSHA jurisdiction, to evaluate whether MSHA should be exercising jurisdiction at similar facilities. *Id.* Essentially concluding that such matters called for case-by-case factual determinations, ALJ Manning held that too many factors come into play in a similar facility jurisdictional analysis. *Id.*

Just as no mine is exactly alike, and no perlite expansion operation is exactly alike, this Court believes no "bagging operation" is exactly alike. To have allowed Respondent's proposed similar facility evidence into the record would have required this Court to embark upon a jurisdictional safari, searching out all similar facilities in the country and comparing like and non-like activities, structures, operations, and products with that of the subject Carbon Plant. (The collateral inquiries would be endless – such as in the present controversy – where this Court would be required to determine why some bagging facilities chose to remain under MSHA jurisdiction.

Given the clear navigational directions for finding jurisdiction set forth in pertinent portions of the Mine Act and MOU, without the need for such evidence, this Court granted the Secretary's motion in limine and rejected the Respondent's proposed similar facility evidence as being irrelevant and as creating unduly burdensome demands.[6]

This Court notes that Respondent was in no way prejudiced by this ruling because it still had the ability to present live and depositional testimony concerning the Carbon Plant's nature, purpose, and specific activities; photographic and documentary evidence in support of the foregoing; and expert witness testimony in support of the foregoing. Further, it could present

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[5] Unlike in the case *sub judice*, more extensive evidence regarding the location and number of similar plants, locally and nationally, was offered.

[6] Further, if this court would have allowed Respondent's proposed evidence, as set forth in its offers of proof, it would have accorded such little probative value in light of this court's analysis of the law and assessment of evidence and witness credibility, as discussed *intra*.

evidence establishing or tending to prove that MSHA, in or about 2004 or thereafter, determined that the Carbon Plant should have been excluded from MSHA jurisdiction and any evidence showing that determination was conveyed to the Respondent.

FACTUAL BACKGROUND AND SUMMARY OF TESTIMONY

The Respondent operates a facility in Shamokin, Pennsylvania, that sells products consisting of anthracite coal that is unmixed, as well as anthracite coal that is blended with other carbonaceous materials. It further manufactures a variety of carbon-based products for the steel, glass, rubber and plastics industries. Prior to hearing, the parties stipulated that the Respondent neither extracts, washes, cleans, or crushes coal in its Carbon Plant that is at issue nor does it own any mines or subsidiaries that perform these functions. Shortly after assuming ownership of Shamokin Filler Company, the new owners[7], Don and William Rosini, requested that MSHA determine that the Carbon Plant should properly be under the jurisdiction of OSHA, rather than MSHA.

The witnesses at hearing testified as follows:

Matthew Bierman: Bierman is a coal mine inspector for MSHA. Prior to his becoming an inspector, he worked for Jeddo Coal Company, a surface anthracite coal operation in Hazelton, Pennsylvania, where he was a foreman in the preparation plant which included doing some quality control work. He has a degree in Environmental Resource Management. Geology classes were required in obtaining this degree. He testified that no coal is one hundred percent coal; rather, the normal scale for anthracite coal is typically between eighty-seven and ninety-two percent (87-92%). (Tr. 44-45.)

As part of his employment as an inspector, he was required to administer three complete health and safety inspections, or E01 inspections, at Respondent's Carbon Plant. These inspections involve approximately forty to fifty (40-50) hours on site. Although his last full inspection was in August 2009, he was sent to the Carbon Plant in October 2009 for the purposes of observing the flow of coal at the Carbon Plant and reporting back to his supervisors because the Respondent had challenged MSHA's jurisdiction over the facility. (Tr. 46-49.)

In his PowerPoint, Bierman first showed piles of coal, which he explains has already been washed and sized prior to arriving at the Carbon Plant. Second, explained that the feed hopper is what coal is put into before it proceeds by conveyor unit to the dryer. In the dryer, a heating unit blows hot air through a tube as it rotates. Because it is slightly sloped, the coal is dried as it moves down the tube. From here, the coal enters the screens. As the screen gyrates and circulates across the material, the oversized material is removed and the needed material falls

[7] Though Respondent's description of the Rosini cousins as being new owners is technically accurate, they are in fact sons of the original Rosini owners, who were brother-partners and still are on Respondent's payroll. Shamokin Filler is a subchapter S corporation. (Tr. 385.)

through. He testified that the Carbon Plant has two different kinds of screens because they produce different products with the materials from the different screens. After screening, the Respondent's employees informed Bierman that the coal is then moved to storage bins until it is loaded or bagged. Bierman never made a formal inquiry to management whether this process was correct. (Tr. 49-53.)

Although he acknowledged that the facility also packaged and sold graphite pellets, this was not a primary concern of his inspections. This process was only important to him in that the inside dryer typically used to dry graphite was sometimes used to dry coal when the outside dryer was not working. The inside feed hopper was used for coal at this time as well. Bierman further testified that the Respondent's facility includes a lab, where its products are inspected for quality control reasons. Here, the Respondent could ensure that the materials it produces meets the customer's specifications. (Tr. 54-60.)

Not only did employees tell Bierman that coal was being stored, but they also told him that they did not typically mix the coal with any other materials. Again, Bierman never confirmed this with management, nor did he test any of the bags of materials located on site. He did, however, testify that he saw hundreds of tons of coal at the facility while the existence of metallurgical and petroleum coke, which are not covered under the Mine Act, was much less prevalent. These measurements were adduced by estimation rather than scientific calculations. (Tr. 54, 62.)

John Petrulich: Petrulich was the former production manager at Respondent's Carbon Plant. In this position, he testified that his primary duties were the coordination of different orders to ensure that they were shipped on time, the control of the information flow as to what products were to be run by production, the training of lab technicians, the interviewing and hiring of some general laborers, and the revision and implementation of standard operating procedures. He was later terminated after an agreement. The reason for termination listed on his unemployment papers was "attitude." (Tr. 97, 99.)

In his role of training the lab technicians, Petrulich demonstrated how to check moisture content both after receiving the coal and after drying to ensure that the levels were acceptable. He also monitored the sulfur values and ash content of the coal. Because of these roles, he had to be familiar with the makeup of the Respondent's products. Knowing the specifications of the products was also important because individual customers needed materials at different specifications. Petrulich was not as familiar with the actual processing that occurred on site. (Tr. 97, 98, 100, 101.)

Petrulich also testified that coke was used more as an additive or filler. The coal, however, was not necessarily changed into something else because the coke was added to it. Rather, the coke was used as a cost effective weight increase and could have just as well have been alternative fillers, but the bulk of the bag content was ultimately coal. However, he later testified that there were several Carbon Plant products that contained no coal whatsoever. He

also testified that due to the properties of most of the non-coal materials, it could not be mistaken for coal easily. His one caveat was that coal was often crushed into fine dust from the weight of the "supersacks,"[8] which could look like carbon black to an untrained eye. (Tr. 101-105.)

Next, Petrulich testified to emails that were sent both to customers concerning Respondent's products and among employees of the Carbon Plant as well as the owners in the days leading up to a visit by MSHA, that will be explained in more detail *infra*. One string of emails demonstrates that a customer was questioning the specifics of one product and owner, William Rosini responded by writing that Shamokin B-593 is "100 percent anthracite coal and barley size." The other emails were concerned with the jurisdictional visit that members of MSHA were to conduct on July 28, 2009. The first email stated, "We need to convince [MSHA] that we blend many things together to make our products. Do we have piles of different types of carbon sitting around?" William Rosini replied that their were and each type should be jarred and labeled. When Petrulich asked if he was to retrieve, jar, and label each, William Rosini told him just to retrieve it and Rosini would label it himself. Later that day, William Rosini send an email saying "It's probably a horrible idea to be running straight coal when they come. Let's mix the met coke with it while there are there." The last string of emails were sent from Donald Rosini writing, "Even the mystery bank can be represented as a coke and graphite blend." William Rosini responded, "If need be we can demonstrate by cutting a sack of material on the pile." (Tr. 110-111, 113, 115-120.)

In explaining the purpose of the emails, Petrulich testified that the owners were attempting to "trick" MSHA into believing that its continued jurisdiction over the Carbon Plant was improper. The Respondent had never previously suggested putting graphite or coke into a pile of coal. Further, he stated that the coal and graphite were even separated on the mystery bank during the period of time that he worked there. Even under cross-examination, he maintained that he had no belief that the owners were simply attempting to demonstrate the full range of their products and processes. But he did admit that he did not know whether any of the ideas spoken in the emails came to fruition. (Tr. 114, 121-22, 134-139, 141-142.)

Ronald Farrell: Farrell is a coal mine inspector for MSHA, who only inspects surface mines. Prior to working for MSHA, he worked at a coal processing plant and strip mine for nearly twenty-eight (28) years as a coal inspector, a second-shift supervisor, and a day-shift supervisor. He has only inspected the Respondent's Carbon Plant. He testified that during each E01 inspection, they must inspect the entire facility and at the date of this hearing, he had last been there in September 2010. During his inspections of the Carbon Plant, he observed employees "stockpiling [coal], picking it up, feeding it into a feed hopper, drying it, screening it, and loading it out for sale." He had only been to Respondent's Carbon Plant for the purposes of inspections, never to specifically monitor the flow of coal. (Tr. 162-164.)

[8]Supersacks are one-ton bags of coal or other products that are sold on the market.

During an inspection on March 8, 2010, Farrell asked an employee[9] to explain the Carbon Plant's processes. He described the process as follows: "Coal from several sources is fed to the dryer. Then up a bucket elevator, sized, then goes to the proper phase. They make three products, Barley, No. 5 and 20, all coal." He wrote this information down because his supervisor had accompanied him on the inspection and was unfamiliar with the Carbon Plant's processes. He did not sample or analyze the coal and recognizes that it may have been mixed with another carbonaceous product although the employee did not allude to that when he told Farrell about the process. He did not ask management about the correctness of this statement, and he did not ask the employee about the manufacturing processes that occur on other parts of the Respondent's property. (Tr. 168-169.)

Although Farrell was not part of the 2004 jurisdictional fact-finding committee specifically for the Respondent's Carbon Plant[10], he testified that he was aware that a discussion was held about the jurisdiction of the Respondent's Carbon Plant and it was later decided that no actual offer was to be made. This differed from his deposition testimony indicating that an offer had been made. He explained that he had assumed an offer had been made from conversations that he had overheard around the office. Later, though, other documents were produced, mainly written replies from two other facilities, to clarify that he had heard incorrectly. He could not state, however, whether the Carbon Plant was, in fact, given no offer to opt out of MSHA jurisdiction or whether the options given to these other two facilities were absolute options to move under OSHA jurisdiction. (Tr. 171-173.)

Farrell reviewed the report regarding the Carbon Plant and testified that the report was not a detailed description of the Respondent's activities. He also noted that it was much less detailed than the report that he completed for a different facility. It failed to mention the blending of non-mine materials with the coal and the existence of some products that were entirely non-mined materials. He further testified that Bierman's PowerPoint was not an accurate detailed description of the Carbon Plant because it too failed to acknowledge the existence of several materials and processes at the facility. (Tr. 184, 208-210, 216-218.)

Farrell conceded that MSHA does not have any specific safety standards that pertain to manufacturing, but he stated that he believed that the Respondent's products should be considered processed coal and under MSHA jurisdiction. In his deposition, he stated he would not consider a product that was forty percent (40%) coal to be a "mined product," but now that he understands what metallurgical coke is, his answer would be different. (Tr. 118, 223)

Patrick Boylan: Boylan is currently the senior staff investigator and staff assistant with MSHA whose duties include accident coordination, peer review coordination, and 110 investigations under the Act. He was previously a conference and litigation representative in District 1, a promotion from an underground mine inspector. He began his mining career at the Reading Anthracite Coal Company breaker, or custom coal preparation plant, where he worked for twenty

[9]The employee's name was redacted for anonymity purposes.

[10]Farrell was a part of the fact-finding committee for other facilities.

(20) years. He has been to Respondent's Carbon Plant and last inspected it in 2004. (Tr. 233-236.)

Boylan spoke to and obtained a declaration from Ricky Rollins, the manager of Steel Dynamics, indicating the company purchased about 4,300 tons of Shamokin 585 from the Respondent, who advertised that the product was one hundred percent (100%) coal and not a mixture. Boylan did not know, and made no assertion that, Rollins checked the ash and sulfur content to ensure that the product was completely anthracite coal. Further, he acknowledges that there really is no such product as one hundred percent (100%) anthracite coal from a technical standpoint. (Tr. 246-249.)

In 2004, Boylan was part of the fact-finding committee. He, however, did not know whether a jurisdictional determination concerning Respondent's Carbon Plant had been made. He acknowledged that the Respondent does not extract coal and is not affiliated with any mines that do. He also acknowledged that the Respondent is actually a customer of preparation plants and breakers in District 1. (Tr. 251, 255-257.)

Thomas Yencho: Yencho is the field office supervisor for MSHA in Shamokin, Pennsylvania. In his position, he leads inspectors in their inspection of approximately 120 surface mines, roughly half of which are strip mines and the other half are facilities. He does field activity reviews and company activities every six months with each inspector. He must personally visit every mine at least once annually. Prior to his position with MSHA, he worked for Jeddo Highland Coal Company for fourteen (14) years and for Reading Anthracite Coal Company for ten (10) years. He has never worked at a coal preparation plant, nor has he ever inspected the Respondent's facility. (Tr. 258-260.)

Yencho became the field office supervisor in 2004. He discovered the Respondent's intention to challenge MSHA jurisdiction from the District[11] in 2009. During this call, he also learned that they were to visit the site to conduct fact-finding; he testified that in preparation for this visit, he asked Bierman to create a PowerPoint concerning the flow of coal at the facility. Rather than have Bierman make a special visit to the facility to obtain the information, he had him create it from memory as a way to inform the solicitors when they arrived for the jurisdictional visit. (Tr. 260-261.)

During the visit, Yencho testified that they met in the mining office where nine or ten vials of coal and non-coal materials were demonstrated. They company informed them of what was in some of the vials but refused, for proprietary reasons to explain the makeup of others. Then, they toured the stockpiles, where Yencho testified that he saw No. 4 and No. 5 coal, as well as graphite, and possibly metallurgical or petroleum coke. Next, they toured the inside of the building and finished by looking at the outside dryer and the area where the materials are bagged. He testified that while they were at the facility, he believed that they were processing

[11]Although it was not further clarified at hearing, it is assumed that this refers to District 1.

either No. 4 or No. 5 coal and he did not see any mixing activities being conducted. The owners mostly talked about mixing activities as they approached the graphite pellet mill, but did talk about mixing coal with the non-coal materials as well. (Tr. 262-263, 322-323.)

While accompanying inspectors in previous inspections, Yencho observed coal being loaded in the hopper of the top dryer. He admitted, however, that he did not "stand there and observe [the employee] for hours and hours and hours." In his opinion, he testified that the Respondent's drying and screening of coal would place them under the jurisdiction of MSHA. (Tr. 264-265.)

Yencho also testified that no offer was made to the Respondent following the fact-finding committee's jurisdictional determinations in 2004. This contradicted his past deposition testimony that he had personally went to the Respondent and made an offer. However, upon checking his time and activity records for the time in question, he discovered that he was at the Mine Academy. Further, he testified that no "offer" was made. He explained that he had no authority to make an offer and that he was trying to clear that up in the second day of his deposition by explaining that the letter writing process would have to be followed and that "offer" was a poor choice of words. (Tr. 266-268, 274, 280, 283, 290.)

When asked about the lack of detail in the Respondent's report prepared by inspectors Kathleen Radzavicz and Joe Fisher, Yencho testified that he trusted what they had prepared. He explained that they may not have seen any of the Respondent's non-coal-related manufacturing activities, and therefore, could not have documented them in their report. He also testified that the reports were then sent to the District, but he did not know their fate from that point forward. He could only assume that they were given consideration. (Tr. 296, 334, 353.)

William Sparvieri: Sparvieri was the former assistant district manager for MSHA in District 1. Also, briefly in 2004, approximately two or three months, he was the acting district manager in that District. When the issue of jurisdiction first arose in 2004, he organized the fact finding committee to visit each operator and determine what activities were taking place. At the time that the committee was established, no decision had been made as to whether MSHA should be exercising jurisdiction over other facilities, nor did Sparvieri have the authority to release the Respondent, or any other facility, from MSHA jurisdiction. (Tr. 368-369.)

Although Sparvieri did not visit the Carbon Plant with the fact finding committee, the result of the facts gathered were that it met the criteria of being classified as a mine. He admitted that the report does not reflect any of the manufacturing activities that take place on the premises; however, he said that this would have no reflection on the issue of jurisdiction because of the amount of activities performed that fall under the Act. This result was then sent to the district manager, but, as far as Sparvieri knows, was never forwarded to the Office of the Solicitor or the MSHA administration office. Neither his signature nor Yencho's appear on the report for the Carbon Plant. (Tr. 370, 373-374.)

When questioned why different inspectors were sent to Keystone Filler Company[12] than the Carbon Plant, Sparvieri explained that time constraints forced them to add inspectors to the fact-finding committee. Boylan and Farrell were not originally part of the fact finding committee, but had to later be added. Radzavicz and Fisher were the two inspectors who were assigned to visit all of the facilities when the fact-finding committee began its jurisdictional inquiry. (Tr. 376.)

Donald Rosini: Donald Rosini is the owner and president of Respondent with fifty percent (50%) ownership. The Carbon Plant was previously under the ownership of his father and uncle. Donald Rosini attended the University of Pennsylvania and received his Bachelor's degree in economics from the Wharton School where he double majored in finance and management. After school, he traded derivatives in Philadelphia for Susquehanna International Group and later traded currency derivatives in Tokyo, Japan for ten years with Chase Manhattan Bank and Bank of New York. At the time of the financial meltdown in 2008, he was trading bonds back in Philadelphia for Susquehanna. At that time, he returned home and joined the Respondent. (Tr. 381-383.)

Prior to becoming a derivative trader, Donald Rosini testified that he had never actually worked for the Respondent, but he would assist his father in doing financial projections and engage in discussions about the business in an unpaid capacity. Now, neither his father nor his uncle are active in the management of the business, but Donald Rosini explained that they are still on the payroll as consultants and that he and his cousin talk to the former owners everyday or nearly everyday. (Tr. 383.)

Under the former ownership, both men were active in all aspects of the company. Under this ownership, Donald Rosini testified that there is somewhat more of a division of labor. He describes himself as the Chief Financial Officer (CFO). He looks at the company's assets and resources and attempts to determine how they can most efficiently be employed. He further engages in financial projections to determine which processes need to be carried out more efficiently and in what direction the company should further go. William Rosini, his cousin and co-owner, was more active in the production specifications of each product and the sale of the finished product. (Tr. 384.)

Donald Rosini testified that, in early 2009, he decided to challenge MSHA jurisdiction. He said that decision was made based upon projections for the future of their company. He testified that they are expanding and the processes now being employed focus much more on the manufacturing of items, such as graphite paint, than the activities that are found under the Act. Because of these changes, he proffered that OSHA seemed to be the more appropriate jurisdiction. As evidence of this, he testified that there are no risks of silicosis and there are no

[12]Keystone Filler Company was released from MSHA jurisdiction in 2004, after the fact-finding committee concluded that it would more appropriately be under OSHA jurisdiction and, based on the committees report, either MSHA administration or the Office of the Solicitor, in fact, released them from MSHA jurisdiction.

steep grades at the facility, which are two issues that MSHA works with quite a bit. Further, his employees complain that MSHA training seems like a waste of time to them because many of the issues are irrelevant to the Carbon Plant. When asked if he talked to his father prior to the jurisdictional challenge, he testified that he had spoken to him and his father said that he had been afraid of MSHA retaliation if he challenged its jurisdiction. (Tr. 386-388.)

Leading up to the Respondent's jurisdictional challenge, Donald Rosini talked to a number of people, including individuals at Keystone Filler and Kimmel. From these discussions, he was referred to the lawyer who wrote to MSHA for both requesting a release from jurisdiction. Donald Rosini testified that the letter was written and a meeting was to be arranged. However, MSHA was unable to produce a copy of the letter from its records and the Respondent claimed that it never received a copy of the letter for which it paid. Under cross-examination, he admitted that he does not ever remember seeing the letter at all and, in fact, he is relying on a confirmation email sent from the attorney stating that the challenge letter had been sent. Respondent was presented with a letter from its present counsel explaining that the request for jurisdiction transfer had been denied. The denial was based upon the number of activities that constituted activities under the Act. (Tr. 389-390, 394-395, 479.)

When describing the products offered by the Respondent, Donald Rosini testified that approximately twenty percent (20%) are straight coal, seventy percent (70%) are a coal blend, and the remaining ten percent (10%) are comprised entirely of non-mined materials. He further stated that their product list is constantly in flux because William Rosini is constantly making up new products depending on the specifications needed by the customers. In response to the testimony that MSHA employees had never seen coal being blended in the dryers, Donald Rosini said that he was certain that they had seen it but were completely unaware of it; although, he opined that they should have realized that blending was taking place. (Tr. 408, 412-413, 416-417.)

In response to Petrulich's interpretation of the emails prior to the MSHA business, Donald Rosini testified that the Respondent was attempting to give MSHA the complete view of its business activities. The labeling of the vials was done to ensure that the visitors would get the full scope of the blending activities. He did not address the suspect wording of the email. When asked about the email that he sent suggesting that they could cut a sack of material on the mystery bank, he testified that he did not know his intention of the email and that no action was taken on the suggestion. (Tr. 435-437, 441.)

Under cross-examination, Donald Rosini admitted that he had never heard of the offer to opt out of MSHA jurisdiction until the deposition of Yencho. It was at this time that he asked his father about it. William Rosini's father also said that no offer had been made to them when asked. He also acknowledged that while he felt that the Carbon Plant was being retaliated against for its challenging jurisdiction, he had no knowledge that fine amounts had risen, in general, by the passage of the Miner Act. (Tr. 447-448, 469.)

David Pfleegor: Pfleegor is the president of Keystone Filler and Manufacturing Company in Muncy, Pennsylvania, which is a competitor of the Respondent's Carbon Plant. He testified that it processes carbon into mineral fillers and carbon products for the steel industry. These products are essentially the same as those produced by the Respondent. (Tr. 484-485.)

Pfleegor testified that, in 2004, inspector Paul Sargent came to the plant to alert them that they were no longer going to be under MSHA jurisdiction. This inspector also said that they would be releasing "the rest of the companies, Shamokin Filler, Leopold, and named numerous companies that they were probably going to have to release." He said that the inspector explained that the Respondent would be released because it was the same type of operation as Keystone and Keystone had just been released. However, Pfleegor admitted that he had no idea whether Sargent had any authority to make these types of jurisdictional decisions or whether he was just assuming. Further, he backed off of his certain testimony by saying that Sargent said the other facilities were "probably going to be released." (Tr. 486-488.)

Kathleen Radzavicz: Radzavicz is a conference and litigation representative for MSHA, District 1, Coal, in the Wilkes-Barre office. Prior to this role, she was a coal mine inspector health specialist, but has never actually worked in a mine. She was chosen as part of the fact finding committee because she handles all problems dealing with repeat test sampling because of testing disclosures. Along with Joe Fisher, she was assigned by Sparvieri to visit the Respondent's Carbon Plant and write the fact-finding committee report. Although she was not present during the visit to Keystone, she compiled the information and wrote the report for that facility as well. (Tr. 495-497, 499, 501.)

The report on the Carbon Plant was to be written to detail the on-site processes, specifically focusing on the flow of coal. Although graphite was mentioned in the report written, none of the other materials on-site were mentioned; there was also no mention of other processes that occur on-site. She said that she did not see any other processes being conducted while she was at the facility. Radzavicz testified that she realized that the report was less detailed. She admitted that she did not take any samples at the Carbon Plant. But she also testified that she did not know that samples had been taken at Keystone until she wrote the report, after her jurisdiction visit to the Carbon Plant. During her visit to the Carbon Plant, she was given the impression that the Respondent was a custom coal preparation facility. Further, the Respondent's owners would not give permission for the inspectors to take pictures of the facility. (Tr. 497, 500-502, 509-510.)

Radzavicz testified that she did not know what happened to the report after she gave it to her supervisor, Jack Kuzar. She was never given feedback on the report and did not know what the ultimate purpose behind the report was. She testified that she realized that the jurisdictional visit was conducted in response to Keystone's jurisdictional challenge, but she was only told to observe the day-to-day operation at the Carbon Plant with particular interest in the coal flow. No one at the Carbon Plant told her that coal was being mixed with other materials while she was conducting the visit, even though she testified that she spoken to someone in management. (Tr.

512-514, 518, 521.)

William Rosini: William Rosini is Respondent's owner, along with Donald Rosini, chairman, and secretary/treasurer. He owns twenty-five percent (25%) of the company, but speaks for his sister's twenty-five percent (25%) as well. He attended Bloomberg University and received degrees in psychology and sociology with a minor in business, but he testified that he has worked for the Respondent nearly all of his life. (Tr. 523.)

William Rosini testified to the nature of the business by saying, "We manufacture all types of carbons. It involves getting materials from across the United States, is mostly what I do, trying to find scrap products, find anthracite coal, petroleum coke, metallurgical coke. We buy some carbon black. We do a number of things with it, mostly drying and – We do whatever the customer actually wants, to be honest with you." He then testified that the company is engaged in the same activities that it was thirty (30) years ago, with no substantial changes in equipment, products, or customers. The Respondent does not have a mine permit in the state of Pennsylvania. (Tr. 524-526.)

William Rosini further testified that he spoke with Ricky Rollins, who gave the signed statement to Boylan that the Shamokin 585 was 100% anthracite coal. He said that Rollins avoided phone calls four or five times and then eventually just signed the prepared statement. Also, he said that Rollins was aware that the products were not really 100% anthracite coal from the conversations they had, both prior to and after the email. As far as Petrulich was concerned, although he was hired as a lab technician to perform quality control, William Rossini dismissed his position as basically a gofer, who was there more or less for employee morale. He testified that Petrulich was not a production manager and would not have directed the product formulation, because he did not have access to the customer specifications. (Tr. 530-532, 534, 536-537.)

In explaining the emails before the MSHA visit, William Rosini testified that Donald Rosini had not been at the stockpiles for a while and wanted to make sure that all of the materials used in the products were accurately presented. William Rosini asserted that Donald Rosini was not attempting to misrepresent the facility or trying to trick MSHA inspectors. William Rosini said that his intent with email stating that he would label all the materials was written because he did not believe that anyone else would do what he was asking. He explained that he did not want to be running straight coal because he knew that MSHA was under the impression that they were a mine, but that they ended up running straight coal that day anyway, so the email was pointless. Further, he explained that the email calling for the possible cutting of a bag of material on the mystery bank because he wanted to demonstrate they really do mix metallurgical coke with anthracite coal on a regular basis. Finally, he explained the email representing Shamokin B-593 as 100% anthracite coal as either "sales" speak or a typographical error. (Tr. 539-540, 543-545, 547-548, 551, 571.)

Under cross-examination, William Rosini admitted that many of the carbonaceous

products they have listed on-site are not mixed with the anthracite coal unless there is a specific need for it. He also said that metallurgical coke and coal are the only two materials stockpiled at the top of the facility at this time. Further, these are the two materials that are most frequently mixed. When asked on direct examination about some other materials, limestone, glycerine, etc., William Rosini testified that they were kept at the facility and used. However, under cross-examination, he admitted that their use was fairly rare and only for particular purposes. When asked about a 5/16th inch screen, he said that the facility does not have this size screen now and that he had never heard his father talk about one, but he was not sure if that sized screen was at the facility before he started working there. He did say that he would not have been sure what use his father and uncle would have had for it. (Tr. 541-543, 550, 558, 563-566, 582-583.)

Lawrence Gazdick: Gazdick was a maintenance foreman with Jeddo Highland Coal Company for fourteen years. For the next eight years, he designed, built, and operated preparation plants for the same Company. He later worked for Pennsylvania Power & Light Company were he was a design draftsman and his specialty was preparation of coal to feed the generating stations and generating station design. In 1991, he was hired as a surface inspector for MSHA. Over his sixteen years of experience in MSHA he was promoted to underground inspector, surface specialist, and eventually to the position of supervisor of underground mines at the Pottsville field office. At one point, he held the position of senior special investigator, staff assistant to the district manager in District 1, who was Jack Kuzar. Gazdick is currently working as a consultant to coal industry. (Tr. 586-589.)

During his time as senior special investigator, the fact finding committee to determine the jurisdiction of the bagging facilities was assembled. Gazdick testified that the Respondent was under the scrutiny of the fact finding committee and, further, he had been to the Carbon Plant both in his capacity as an inspector and as an assistant to Jack Kuzar in performing "walk and talk" safety talks at the facility. He also observed the facility prior to writing his expert report. He testified that the facility looks exactly as it did when he inspected for the first time. The equipment and operations were identical to 2004. (Tr. 589, 594, 596-597.)

He testified that, in his experience the Respondent's Carbon Plant is not similar to the coal preparation plants that he has worked for and designed in the past. The Respondent has no equivalent operation to those that would process extracted coal. They do not deal in several sizes of coal and they do not wash it. They also have no equipment on site allowing them to change the size or the quality of the coal like a normal breaker would. They can only buy coal that has already been prepared by another facility. (Tr. 589.)

He testified that the Respondent does screen the coal as it enters the dryer. This is to prevent damage to the equipment by pieces of coal that are too large. He said that this quarter-inch screening could be considered incidental to jurisdiction under the Act. He further testified that the drying, storing, and loading of coal can also be considered incidental to jurisdiction. He was concerned that the PowerPoint by Bierman mentioned media filter, which is a process that is covered under the Act and could have erroneously caused members of the fact finding committee

to conclude that the Carbon Plant should be retained under MSHA jurisdiction. In his expert opinion, the Plant should be under OSHA jurisdiction because the regulation under OSHA are a better fit for this type of facility and would enhance the safety and training of its employees. (Tr. 603-607, 610.)

Under cross-examination, Gazdick admitted that the Act does cover custom coal facilities, but he testified that coal is only one of many products that they used. However, he acknowledged that it would also depend upon the processes that follow as well. He did not take any samples of the products at the Carbon Plant. Although Gazdick recognizes that the Respondent's process does involve "changing the moisture content of the coal," he does not refer to that process as drying. Further, he did not know of any case law, provision in the MOU, or program policy letters that concluded that bagging facilities should not be covered under MSHA, even if they are just bagging materials. Finally, he admitted that he is currently involved in the litigation an EEO complaint that he filed against MSHA and is appealing in federal District Court after an administrative law judge ruled against him. (Tr. 627, 632-633, 636-637, 639-640.)

ISSUES

The general issue before this Court is whether Respondent's Carbon Plant facility is subject to MSHA jurisdiction based on whether the Carbon Plant was/is a "coal or other mine" within the meaning of Section 3(h)(1)(c) of the Mine Act, and/or whether the Carbon Plant had engaged/is engaging in the "work of preparing the coal" within the meaning of Section 3(h)(2)(i) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Alleged past MSHA jurisdictional determination

Before addressing the specific jurisdictional questions of whether the Carbon Plant constitutes a "coal or other mine" and/or whether it is engaging in the "work of preparing coal," this Court will address the evidentiary/factual issue of whether MSHA had in fact determined the Carbon Plant should be given the option to go under OSHA and/or had conveyed such to Respondent.

Respondent has variously argued that such a jurisdictional determination had taken place, that such a determination should be afforded deference, and that MSHA/the Secretary's failure to effectuate said determination constituted arbitrary and capricious conduct. This Court accepts – as a general proposition – that a past MSHA "determination" would be a legitimate consideration in deciding a facility's jurisdictional status. However, this Court finds it unnecessary to address any of Respondent's associated legal arguments in that such are posited upon a critical factual assumption – that MSHA had in fact previously determined that it should no longer exercise jurisdiction over the Carbon Plant. After careful review of the record, including an assessment of

witness credibility, this Court finds that Respondent has failed to carry its burden of proof as to this factual claim.

It is uncontroverted that MSHA had exercised jurisdiction over the Carbon Plant for decades, and indeed, for generations of Rosini ownership. (Ex. G-7.) At hearing, the Secretary maintained that no specific determinations had ever been made that the Carbon Plant should be excluded from MSHA jurisdiction, nor had any offer to opt out of MSHA jurisdiction ever been extended to Respondent. (Tr. 39-40.) No written proof was offered by Respondent to support its contention.[13] The evidence presented by Respondent at hearing was sparse and contradictory. Neither of the previous owners were called to testify, nor were written statements or depositions by such offered into evidence. Given Donald Rossini's testimony that the prior owners were still on the payroll, were still consultants, and still continued to discuss the "business [...] everyday" (Tr. at 383.), the Respondent's failure to produce the past owners at hearing is puzzling to this Court. (See, however, *infra* one possible explanation for Respondent's failure.)

At hearing Thomas Yencho, the field office supervisor for MSHA in Shamokin, Pennsylvania, testified that no offers to leave MSHA jurisdiction had ever been made to Respondent in 2004. (Tr. 265-267.) Yencho explained that he had been incorrect in past recollections at a prior deposition. After reflection and after review of his "T and A" records, Yencho concluded that he could not have gone to Respondent's facility to make such an offer during the time in question. Further, he would not have had in any case the authority to do so. (Tr. 268-280.)

Despite the Respondent's vigorous cross-examination, alleged discovery surprise and attempted impeachment of Yencho, this Court found Yencho credible. *Inter alia*, this Court reached its credibility assessment in considering the testimony of one of Respondent's principal witnesses, Donald Rosini. When questioned as to whether either of the prior owners, the senior Rosini brothers, had reported that such a critical jurisdictional offer ever was made, Donald Rosini admitted that both said it "never happened." (Tr. 447-448.) Thus, both senior owners' recollections contradicted the assertions of Respondent and support and corroborate Yencho's hearing testimony.

Further at hearing, Donald Rosini raised for the first time an assertion that prior owners had failed to challenge jurisdiction in the past due to fears of retaliation by MSHA (Tr. at 387-388). This Court finds no credible evidence in the record supporting such an allegation. That MSHA employees would somehow become personally enraged over Respondent's questioning of its jurisdiction status strains this Court's credulity.[14] Mr. Rosini's further assertion that an

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[13] As announced by this Court at hearing, an *in camera* review of the memoranda that was subject of Respondent's motion to compel contained no specific reference to the Carbon Plant (See Tr. at 24-25).

[14]Donald Rosini's testimony was further undermined by the Respondent's failure to produce a copy of a letter contesting jurisdiction allegedly written by counsel retained by the Respondent. That Mr. Rosini, a Wharton school graduate and owner and president of Shamokin

increase in citations after the Respondent's jurisdictional challenge was proof of MSHA's animus is rejected by this Court as a fallacious "post ergo propter hoc" (after this, therefore because of this) proposition.

As agreed by the parties, the validity of the underlying citations/contests/penalty petitions would not be considered by this Court at this time. Without a full hearing regarding such, this Court cannot assign sinister motivations to MSHA based upon a general bald accusation of malevolence.

Respondent's reliance upon the speculations of Ronald Farrell as to the import of conversations on which he had eavesdropped to prove its factual contention calls for this Court to essentially speculate on speculation.

The proof presented by Respondent is simply too thin a layer of evidentiary ice for this Court to base a finding of fact. Therefore, this Court, as trier-of-fact, finds that the Respondent failed to establish that any specific jurisdictional determination was ever made by MSHA or offer to opt out of MSHA ever conveyed to the Respondent.

II. Jurisdictional Analysis

The Respondent maintains that the Carbon Plant is a "sophisticated manufacturer of carbon products" that properly should be under OSHA jurisdiction. The Secretary, however, maintains that the Carbon Plant may reasonably be construed as a "custom coal preparation facility" within the meaning of the Mine Act.

This Court notes that when Congress passed the Mine Act, the report of the Senate committee on Human Resources stated that "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act shall be give the broadest possible interpretation and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (*S. Rep. No. 95-181* at 14 (1977, reprinted in *Senate subcomm. on Labor, comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978))(emphasis added). Thus, any jurisdiction search must use this Congressional mandate as its north star.

A further navigational aid in finding jurisdiction is the Interagency Agreement between the Mine Safety and Health Administrative, U.S. Department of Labor and the Occupational Safety and Health Administration, U.S. Department of Labor (March 29, 1979). Like the Mine Act, this agreement is inclusive rather than exclusive in considering MSHA's jurisdiction, again providing that doubts regarding MSHA/OSHA jurisdiction be resolved in favor of Mine Act coverage. (See MOU at §A.3, Authority and Principle and §B.5, Clarification of Authority; see also *Nelson Quarries Inc.*, 2010 WL 4362432 FMSHRC (Oct. 2010) (ALJ)).

Filler Company, did not have even a copy of a letter for which an attorney charged $7,500 likewise strains credulity (Tr. 389-390).

Given the "broadest possible interpretation" to what constitutes "a coal or other mine" and what constitutes "work of preparing coal" and the Congressional and interagency directives to resolve doubts in favor of Mine Act coverage, this Court is constrained to find that the Carbon Plant falls within the "sweeping" definition of a mine engaged in the work of preparing coal, and thus, should remain subject to MSHA jurisdiction. (*See also Secretary of Labor v. Sturdt's Ferry Preparation Company*, 602 F.2d 589, 592 (July 1979).

This Court also reaches this decision despite factually accepting that the Carbon Plant uses non-mined materials in some of its operations and recognizing that "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." *Secretary of Labor v. Carolina Stalite Company*, 734 F.2d 1547, 1551 (May 1984). Further, the Court agrees with the Secretary's position that the testified-to activities at the Carbon Plant fall within the ambit of "preparing the coal," though again recognizing that the nature of the activities performed at the plant must be considered along with the activities listed in section 3(h)(2)(i) of the Act. (*See also Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 619 (May 1985). This Court specifically finds that the Secretary, by a preponderance of the evidence, proved that such activities as storing, loading, sizing ,and drying of (anthracite) coal took place at Respondent's facility and that the overall purpose of Respondent's operation was that of a custom (coal) preparation facility as broadly defined in section 3 of the Act.

At hearing, Inspector Bierman testified that the anthracite coal was delivered and stored in a "lay down" area on the north side of the Carbon Plant. (Tr. 49, Ex. 2.) The coal was prepared by being placed in a feed hopper and then dried in the outdoor rotary dryer. The coal was then screened to remove over-sized pieces. (Tr. 49-51, 164, Ex. 2.) Following this preparation, coal is stored at the Carbon Plant. (Tr. 51, Ex. 2.) Coal is then bagged, loaded, and shipped for bulk sale in trucks and rail cars. (Tr. 52-53, Ex. 2.) Ronald Farrell testified that he had inspected the Carbon Plant in March 2010, and had questioned a miner regarding the operation of an outside dryer. Reading from his notes taken at the scene, Inspector Farrell indicated that, according to the miner, coal from several sources was fed to the dryer, then up a bucket elevator, sized, then went "to the proper phase." All the products made were coal. (Tr. 168-169.) At hearing Thomas Yencho testified that while at the Carbon Plant, he observed a bucket of coal being placed into the hopper of the top dryer. (Tr. 264.)

Despite qualifications, both Donald and William Rosini essentially conceded that drying took place at the Carbon Plant. (See Tr. 403 (Donald Rosini described the operation of the rotary dryer); See Tr. 521 (William Rosini stated "we do a number of things . . . mostly drying and we do whatever the customer actually wants.")). Although Respondent's own expert also conceded the Carbon Plant "lowered" or "changed" the moisture contest of coal (Tr. 616, 637), his contentions that such an activity did not constitute drying were found by this Court not to be credible. It is uncontroverted that the Carbon Plant loads stored coal. This Court accepts Respondent's arguments that many facilities – hospitals, schools, steel mills, railroads and shipyards, foundries, private residences – store and load coal and would not reasonably be subject to MSHA. However, the nature of operations at such medical, educational, transportation,

and residential facilities, is markedly different from that of the Carbon Plant.

Much of Respondent's case, whether by pleading, testimony, cross-examination, argument or brief, has been directed to establishing that the Carbon Plant also utilizes non-mined materials and engages in manufacturing processes involving chemicals or non-coal carbons. This argument, however, misses the critical jurisdictional point of whether those substantial plant activities that do involve anthracite coal arguably bring the Carbon Plant within MSHA jurisdiction.[15]

The record *in toto* clearly establishes that a substantial portion of the material used by Respondent was anthracite coal.[16] The record further clearly reveals that Respondent engaged in activities whose nature and function arguably constituted the work of preparing the coal.

This Court specifically rejects the proposition that a claim of jurisdiction should be solely based upon the amount of coal used.[17] Further, this Court has found no case or statutory law that mandates the exercise of MSHA or OSHA jurisdiction purely based upon the percentage of mined or non-mined materials used or, indeed, based upon the percentage of manufacturing versus mining activities at a facility. However, this Court is persuaded that the extensive use of coal at a facility and the number and volume of coal-related activities would be legitimate factors in determining Mine Act coverage. Further, to the extent that Respondent has suggested that Carbon Plant's operations only involve a *de minimis* use of anthracite coal or *de minimis* involvement of coal-related activities, this Court rejects such as being belied by the record *in toto*.

This Court agrees with Respondent that a "*per se*" analysis should not be utilized in determining jurisdiction, but rather a "functional" analysis. (A functional analysis is one that determines whether the Mine Act covers a facility based upon the nature of the functions at the facility. *RNS Services, Inc. v. FMSHRC*, 115 F.3d 182, 184 (3d Cir. 1977). However, in applying a functional analysis to the subject facility, this Court finds that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use.

The Carbon Plant's operation/activities, as argued by the Secretary, closely resemble that of facilities found to be under MSHA jurisdiction. See *inter alia*: *Alexander Bros., Inc.*, 4 FMSHRC 541 (1981) in which the Commission sustained Mine Act coverage over a coal reclamation facility; *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428 (Dec. 1993) *aff'd* 37

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[15] This is especially so given, *inter alia*, the Congressional concern as enunciated in section 2 of the Act that "the first priority and concern of all in the coal or other mine industry must be the health and safety of its most precious resource – the miner" and given the clear Congressional mandate and interagency agreement directive for MSHA inclusion.

[16] The credibility of the Respondent's assertions otherwise will be discussed *infra*.

[17] See Respondent's argument at footnote 9 of its posthearing brief that MSHA implicitly suggests such.

F.3d 1487 (3d Cir. 1994) where the Commission found that the Mine Act covered the further preparation of coal refuse at a cogeneration plant before being used as fuel at the plant; *RNS Services*, 115 F.3d 188 (3d Cir. 1994) affirming *Air Products*. This Court further accepts as reasonable the Secretary's view that screening of coal at the Carbon Plant is a form of "sizing." (*See, i.e.*, Tr. 76-77 for Inspector Bierman testimony regarding such; *see also* Bureau of Mines, U.S. Dept. of Interior, A Dictionary of Mining, Mineral and Related Terms, 226, 976, noting that "screening" may be used as a synonym for "sizing.")

As to witness credibility and this Court's duty to assess such, this Court found the Respondent's chief witnesses to have offered contradictory, inconsistent, and suspect testimony. The Court specifically finds that there has been an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations.

At hearing, Donald Rosini testified that anthracite coal comprised only 20% of the products prepared at the Carbon Plant and that 70% of Respondent's products were some form of a coal and non-coal mixture. (Tr. 408.) However, an examination of the Shamokin Product Table (Ex. J-2) reveals that the tonnage of anthracite coal, in terms of actual product sold, was much higher than 20%. For example, over 6,000 tons of Respondent's product, "carb-o-cite," made of 100% anthracite coal, was sold in 2009, as compared to only a few tons of multiple products containing no coal or coal mixtures. On cross-examination, William Rosini expressed surprise regarding the "significantly higher" amounts of coal product versus non-coal product purchased in 2009, asserting such as "atypical." (Tr. 554-556.)

Emails from Respondent to customers also indicate higher percentages of anthracite coal usage than testified to. At hearing, the Secretary also presented a sworn declaration under penalty of perjury from another customer of Respondent, Rocky Rollins, who indicated that the Shamokin 585 product used in 2009 and 2010 was 100% anthracite coal (Ex. G-1) which, again, conflicted with the product mixture indicated by Shamokin in its product table. (Ex. J-2.)[18] Williams Rosini's attempts to explain away this discrepancy were found by this Court to be unpersuasive. (see *inter alia* Tr. 531-535.)

At hearing, Donald Rosini gave equivocal testimony as to his actual knowledge of the Carbon Plant's operations since 2004. At one point he stated that he did not know if there had been any changes in customer base, what customers were demanding, and the ratio of straight coal to blended and non-coal product at the Carbon Plant. (Tr. 411.) He further testified that he had not spoken with his father in detail about the plant's products. (Tr. 424.) On the other hand, he asserted that MSHA had painted a distorted picture of the plant's products/operations. (Tr. 424-425.)

[18] This hearsay statement standing alone would be assigned little weight by this Court. But, when considered in the context of the other evidence of record, discussed *intra*, indicating attempts by Respondent to conceal the true nature of its operations, said statement supported this Court's findings of lack of Respondent's credibility.

This Court noted that neither inspector Bierman or Farrell observed any mixing of coal with non-coal materials at the plant, such testimony being supported by the plant production reports which William Rosini alleged "surprise" over. The only bid sheets Respondent provided for it sales were for anthracite coal. (Tr. 567-568, Ex. G-5.) The Respondent's emails in anticipation of an MSHA inspection, again, can reasonably be construed as attempts to obfuscate the facility's actual operations.

This Court found William Rosini's descriptions of Respondent's past production manager as a "gofer," whose work primarily involved boosting morale on second shift to be unconvincing. This Court also found the Respondent's expert witness, Lawrence Gazdick, to be an unreliable, uninformed, and uncredible witness.[19] For example, Gazdick opined that the Occupational Safety and Health Act was better able to ensure the safety of Carbon Plant's employees than the Mine Act. However, on cross-examination, Gazdick conceded he did not know what OSHA guidelines and training were. (Tr. 638-639.)

Contrary to Respondent's arguments, the Carbon Plant's operation meets the definition of work of preparing the coal – a process usually performed by coal preparation facilities to make coal suitable for a particular use or to meet market specifications. *Oliver M. Elam, Jr., Company*, 4 FMSHRC 5, 8 (Jan. 1982). This Court essentially agrees with the rationale of the Government contained in exhibit G-7 that Carbon Plant is a surface facility processing coal to customer's specifications and for particular uses which meet the functional requirement of section 3(i) and the Elam analysis. *See also* Commission's statement at 4 FMSHRC 5, 7 (1982): "[A]s used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes **a process**, usually performed by the mine operator engaged in the extraction of the coal or by **custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications**. [emphasis supplied]"

This Court further accepts the Secretary's position that the activities at the Carbon Plant can properly and reasonably be interpreted as "milling" pursuant to Interagency Agreement provisions and pertinent case law. see *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 591 (5th Cir. 2000) (Congress expressly delegates to the Secretary . . . authority to determine what constitutes mineral milling). Indeed to the extent that there is any ambiguity or silence in the Mine Act and MOU terms discussed *intra*, this Court has found the Secretary's interpretation to be permissibly reasonably ones.[20]

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[19] Although this Court did deny the Secretary's motion to exclude the expert witness testimony of Mr. Gazdick, this Court did find some merit in the Secretary's argument that Gazdick's testimony should be barred to the extent he sought to opine on the ultimate issue of jurisdiction. (*See also* Secretary's Motion in Limine to Exclude Expert Witness Testimony.)

[20] The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local*

The Respondent garnered testimony at hearing stating that the storing, drying, screening, and loading coal can all individually be considered incidental to process being performed and, thus, fall outside the purview of MSHA. While this may be true, these processes cannot be viewed in isolation of one another. *Mineral Coal Sales, Inc.*, 7 FMSHRC at 620. "In examining the 'nature of the operation' performing work activities listed in Section 3(i), the operations taking place at a single site must be viewed as a collective whole." *Id.* at 620-21. When viewed collectively, the Respondent is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce. The fact that it is customizing the formulas to meet industry and customer specifications only strengthens the Secretary's position that the Respondent is operating a custom coal preparation facility and should, therefore, continue to be covered under MSHA's jurisdiction.

ORDER

Having found that Shamokin Filler Company is under the jurisdiction of the Mine Safety and Health Administration, it is **ORDERED** that the Respondent resume discussions with the Secretary concerning the underlying citations in this case.

John Kent Lewis
Administrative Law Judge

Union No. 1261, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. Chevron, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 11, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2009-600-M A.C. No. 40-03012-171882
v.	:	
HOOVER, INC., Respondent	:	Mine: Lebanon Quarry & Mill

DECISION

Appearances: Matthew Shepherd, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
G. Sumner R. Bouldin, Bouldin & Bouldin PLC, Murfreesboro, Tennessee, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Hoover, Inc. ("Hoover"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). This case involves six violations issued by MSHA under section 104(a) of the Mine Act at the Lebanon Quarry & Mill (the "mine" or "Lebanon Quarry") located in Lebanon, Tennessee. The parties presented testimony and documentary evidence at a hearing held on September 9, 2010, in Nashville, Tennessee. The parties took post-hearing deposition testimony of Respondent's mine superintendent on October 26, 2010, and submitted briefs in January 2011.

At the hearing, the parties agreed that four of the six violations had been settled. The terms of the settlement have been read into the record. As set forth below, the settlement is approved. Two citations are left for discussion, both of which involve alleged violations of the same ground control standard.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hoover, Inc. is the owner and operator of the Lebanon Quarry & Mill, a multi-bench surface pit rock quarry in Lebanon Tennessee. The mine drills and blasts (i.e., "pulls shots" or

"shoots") material from a highwall. The material is then loaded onto CAT haul trucks by a front end loader. The trucks dump the material into a crusher where it is processed, sized, and then sold on-site.

On October 28, 2008, Vernon Miller, an MSHA inspector in the Franklin field office at the time, traveled to the mine to conduct a regular inspection. During the course of the inspection, he issued Citation No. 6084500. Miller returned to the mine on November 13, 2008, and issued Citation No. 6484505.

Miller was employed by MSHA for approximately 12 years before retiring at the end of 2009. During his time with MSHA he held positions including coal mine inspector, metal/nonmetal inspector, and metal supervisor. Between 1965 and 1996, he worked for three different coal companies and held positions including shooter at an underground coal mine, driller at a surface mine, blaster, machine operator, section foreman, assistant mine manager, mine manager, and assistant superintendent. He is currently employed at Illinois Eastern Community College and is teaching mining courses on, among other things, ground control and accident prevention. Including his time as an educational instructor, Miller has almost 46 years of experience in the mining industry.

a. Citation No. 6084500

On October 28, 2008, Inspector Vernon Miller issued Citation No. 6084500 to Hoover for a violation of section 56.3200 of the Secretary's regulations. The cited standard requires the following:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200. The citation described the alleged violative condition as follows:

> The South West Pit High wall had loose unconsolidated material/rock. This rock ranged in size from powder to about 4 feet by 5 feet by 3 feet. The loose rock ranged about 150 feet long. There were overhangs about 3 to 5 feet at the top of the 40 foot wall the loose was from 10 feet to 40 feet above the mine floor. This area had been loaded to the toe. This condition created a hazard of a miner being struck by falling rock.

Miller determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was moderate. A civil penalty in the amount of $4,099.00 has been proposed for this violation.

i. Brief Summary of Testimony

Inspector Miller testified that during his inspection on October 28, 2008, he was accompanied by Bobby Lamb, the mine superintendent. (Tr. 16). While conducting the inspection Miller observed loose material near the top of the southwest bed highwall. (Tr. 18). The highwall is 40 feet tall and the loose material existed for approximately 150 feet along the wall. (Tr. 22, 24). According to Miller, the loose material included 8-10 rocks as large as three to five feet in diameter and up to two feet in thickness that were overhanging up to three to five feet, cracked, and "ready to fall". (Tr. 19, 22, 23); Sec'y Ex. 5, 6. Powdered material could be seen under some of the loose material. (Tr. 22). Miller stated that the powdered material is indicative of a lack of solid strata supporting the loose material above it. (Tr. 23). Miller testified that overhanging loose material, given its lack of support, can fall, hit the highwall below, and bounce outward. (Tr. 24). Miller testified that Sec'y Ex. 7 depicts cracks both underneath and behind a large overhang. (Tr. 25).

According to Miller, much of the loose material was near the top of the 40 foot highwall. (Tr. 25). Given the height of the loose materials, the falling object protective structures ("FOPS") on the mine equipment would be less effective in protecting those individuals in the equipment cabs from falling loose material. (Tr. 25). Moreover, Miller acknowledged that there have been instances where equipment cabs have been totally crushed by falling material. (Tr. 28). Miller observed equipment tracks which indicated that material had been "loaded to the toe", i.e., up to the face of the highwall, in the area below the loose material. (Tr. 67) He determined that a frontend loader had been operated in close proximity to the highwall. (Tr. 19, 25-27). Based on his observations, Miller concluded that the condition of the highwall created a hazard to person's working at the mine. (Tr. 27). Specifically, Miller testified that the operators of the frontend loader and haul trucks were exposed to the hazard of falling loose material coming through, or crushing, the cab of the equipment. (Tr. 27-28). While he did not observe any foot traffic in the area, a miner walking near the wall would be exposed to the hazard. (Tr. 28-29). Miller noted that it wouldn't take much to cause the loose material to fall. Bumping the highwall, inclement weather, or a blast in another area of the mine, could all cause loose material to fall. (Tr. 39).

Miller testified that, when a hazard exists such as the one described above, the cited standard requires that a berm, or some other barrier to prevent people from getting in the area, be constructed until corrective work is completed. (Tr. 29). There was no berm, barricade, or warning in the area at the time of the inspection. (Tr. 18, 29-30). Based on the above information, Miller issued Citation No. 6084500.

Miller determined that the violation was reasonably likely to result in a fatal injury due to the fact that previously shot material had been loaded to the toe under the loose material, the area had been left unbermed and, if the condition were allowed to exist, someone would be injured. (Tr. 31). He reasoned that, if the area were left unbermed, "anybody could walk out there, [and] somebody would be seriously hurt, probably killed" given the size and amount of the loose material. (Tr. 31, 33).

Miller determined that the operator's negligence was moderate because the violative condition was "absolutely" obvious, had existed for several shifts, and was in an area of the pit that would have been examined during a normal preshift. (Tr. 34). Moreover, while a berm was built after the citation was issued, the condition still had not been abated when Miller returned for a later compliance visit. (Tr. 35-36). Miller testified that he recommended to Lamb the use of CAT pads or miner ripper chains to scale the highwall, however, at some point Lamb notified Miller that the mine was not going to scale the highwall because they didn't need the material from the cited area. (Tr. 38). Miller testified that other quarries in the area utilize multiple methods to scale their highwalls. (Tr. 57). Miller subsequently returned to the mine with the intention of terminating the citation, however, he again found that the citation had not been abated and, as a result, issued a 104(b) order. (Tr. 50-51).

E.H. Hoover ("E.H."), a principal in Hoover Inc., testified that, generally, if there is very prominent loose material on the highwall the mine will try to correct the condition. (Tr. 71). However, removing loose material from the highwall is not standard procedure following the blasting of material. (Tr. 71). On cross-examination E.H. agreed that Sec'y Exs. 5 and 7 depicted loose material on a highwall, and Ex. 6 "possibly" depicted an overhang. (Tr. 80-81). E.H. acknowledged that the mine has never scaled the highwall at this mine. (Tr. 71-72). He avers that scaling is inherently dangerous and it is economically infeasible to remove all of the loose rock from the highwall. (Tr. 72-74). E.H. testified that, at one of the company's other mines in Mississippi, Hoover has an agreement with MSHA that the front loader will not load all the way to the toe, or face, and instead will only load "up to about 15 to 20 feet" from the toe. (Tr. 77). E. H. acknowledged that the Lebanon Quarry had not fully transitioned to this practice and had been loading to the toe until this violation was issued. (Tr. 77-78, 81). E.H. averred that loading to the toe takes the burden away from the face of the highwall and allows the dynamite to "do its job." (Tr. 78). However, on cross-examination he agreed that loose rock on a 40-foot-high highwall is hazardous. (Tr. 83).

Bobby Charles Lamb, the superintendent at the mine, was deposed after hearing. (Dep. 4). Lamb traveled with Inspector Miller on the day of the inspection. He testified that the bottom 35 feet of the southwest highwall was "pretty solid, while the top 5 feet was "unconsolidated," "kind of loose," and "broke[n] up more than the other 35 feet" of the highwall. (Dep. 11, 29). Some of the loose material was basketball or cantaloupe size, and the overhangs "may have been 3 feet." (Dep. 29, 30). Lamb explained that, when blasting, the drill holes are filled with explosives and then topped off with "stemming," i.e., crushed stone, for the top 4-5 feet of the hole. (Dep. 11-12). He opined that the stemming prevented the top of the highwall from breaking up, which, in turn, resulted in the overhanging material. (Dep. 12). Lamb did not believe that the condition of the highwall was "too bad" and stated that other inspectors had observed similar conditions but had never said anything about it. (Dep. 13, 14). Lamb agreed that the blasted material had been cleared to the toe, i.e., loaded to the base of the highwall, and that no warning, berm or barrier existed to impede access to the area. (Dep. 14, 30).

Lamb testified that, following the issuance of the citation, Hoover bermed the area and had its blasting contractor come out and try to remove the unconsolidated material at the top of the wall. (Dep. 15, 16). The shot failed to remove the material and, according to Lamb, Miller told him that the condition of the highwall still wasn't good enough. (Dep. 17, 20). Some time after the citation was issued, E.H. instructed Lamb to start leaving a 20 foot muck pile at the bottom of the highwall. (Dep. 18). Lamb testified that, on November 13th, Miller asked the mine to construct a berm, which it did. (Dep. 22). Miller returned again on the 18th and asked if the mine had scaled the wall, to which Lamb responded that it had not. (Dep. 22). Miller looked at the muck pile, which extended 15-20 feet out from the highwall, and told Lamb that it wasn't good enough. (Dep. 23). Lamb testified that Miller then removed the highwall from service. (Dep. 23). The highwall has been out of service since that day. (Dep. 24). Lamb stated that, in the time since the highwall was removed from service, he has observed very little material fall. (Dep. 26).

ii. The Violation

I find that the Secretary has established a violation of the cited standard. I rely primarily on the clear testimony of Inspector Miller, who observed loose, overhanging, and cracked, material on the southwest highwall. *See* Sec'y Exs. 5-7. The loose material had not been removed or supported and, based on equipment tracks in the area, it is clear that equipment had recently traveled near the highwall and under the loose material. The material was as large as three to five feet in diameter and up to two feet in thickness. Both of the Respondent's witnesses agreed that there was loose material on the highwall and that it was customary for the mine to load to the toe. Further, E.H. testified that Hoover had never scaled the highwall at this mine to remove loose material.

I also credit Inspector Miller that bumping the highwall, inclement weather, or a blast in another area of the mine could all have caused the loose material to fall. Given the size and condition of the loose material observed on the highwall, I find that the condition of the highwall presented a hazard to those individuals operating equipment at the face of, and in close proximity to, the southwest highwall. The area had not been bermed-off or barricaded, nor had any warning signs been posted.

The Respondent argues that it is difficult and expensive to scale the highwall. However, Inspector Miller provided a number of suggestions as to how other similarly situated quarries in the area scale their highwall. The mine owner testified regarding an alleged agreement with MSHA that does not require Hoover to scale at its other mines. However, it is not entirely clear what this agreement was, and there is no evidence that this agreement extended to the Lebanon Quarry. Moreover, even if the agreement did extend to this mine, the Respondent had failed to implement the allegedly agreed upon practice. Hoover also argues that a preponderance of the evidence does not exist to show that miners were at risk of injury. I find to the contrary for the reasons stated above and for the additional reasons stated in my S&S findings below.

The mine could have bermed-off or barricaded the area if it did not want to scale the highwall, however it failed to do so. I find that the Secretary has established a violation of the cited standard and that the moderate negligence attributed to the Respondent is appropriate.

iii. Significant and Substantial Violation

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to a discrete hazard, i.e., the hazard of rock and loose material falling and striking persons or the equipment being operated by persons. Third, it is more than reasonably likely that the hazard contributed to will result in an injury. Finally, given the size and amount of loose material, the injury would certainly be serious and potentially fatal.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Vibrations from machinery, working on the highwall, inclement weather conditions, and explosions in other areas of the mine, all greatly contribute to the likelihood of loose material falling and causing an injury. I credit Inspector Miller's testimony that falling loose material is capable to totally crushing the cabs of the mine equipment that were in use at this mine. There is no dispute that the mine had been loading to the toe under the loose material. There is no evidence that the operator took any specific precautions to mitigate possible hazards, i.e., remove loose from the highwall, nor did it take any steps to berm off, barricade, or post

warning signs regarding the hazards on the southwest highwall. I find that, when viewed in the context of continued mining operations, it is more than reasonably likely that loose material would have fallen and struck a miner or the equipment they were operating. I credit the inspector's testimony that falling loose material may strike the longwall and bounce outwards, thereby greatly increasing the area in which loose material may land and, in turn, increase the likelihood of an injury causing event. Further, I credit Inspector Miller's testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of which Inspector Miller observed, i.e., up to five feet in diameter and two feet thick. I find that any injury caused by the fall of such material would have been extremely serious or even fatal.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Miller qualifies, without question, as an experienced MSHA inspector. I find that the facts of this violation clearly establish that it was a significant and substantial violation. This citation is assessed a $5,000 penalty.

b. Citation No. 6084505

On November 13, 2008, Inspector Miller returned to the mine and issued Citation No. 6084505 to Hoover for a violation of section 56.3200 of the Secretary's regulations, i.e., the same section under which the October 28th citation was issued. The citation described the violative condition as follows:

> The upper East High wall which had been bermed had the Berm removed and cleaned up to the toe with loose material/rock in several areas of the High wall. The High wall was about 40 feet high and the loose rocks ranged in size from about 9 inches by 3 inches to about 5 feet by 5 feet by 1 foot thick. This practice created a hazard of Miners being struck by falling rock.

Miller determined that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, and that the negligence was high. A civil penalty in the amount of $6,624.00 has been proposed for this violation.

i. Summary of Testimony

During Inspector Miller's October 28th inspection, he noted that the upper east highwall, which was adjacent to the southwest highwall, also had loose material, but was properly bermed on that date. (Tr. 30). Miller returned to the mine on November 13, 2008, with the intention of terminating the citation for the southwest highwall. (Tr. 40). During his return trip, Miller noticed that the berm that had previously blocked access to the upper east highwall was no longer there, but the loose material on the highwall remained. (Tr. 40-41). Miller testified that

loose, overhanging material was present on the highwall. (Tr. 44); Sec'y Exs. 10, 11. Further, he determined that the highwall had, again, been loaded to the toe based on how little material was left against the face. (Tr. 44-45); Sec'y Ex. 12. Miller testified that the condition of the highwall had existed since his earlier trip to the mine. (Tr. 49)

The upper east highwall is roughly 40 feet tall and the loose material ranged in size from approximately nine inches in diameter, to five feet by five feet by four feet, with the larger pieces weighing over a couple hundred pounds. (Tr. 45-46). Miller determined that, like the above citation, the lack of a berm, barricade or warning, combined with loose, overhanging material, presented a hazard to anyone who went to the toe or walked in the area. (Tr. 46-47). Miller determined that the violation was reasonably likely to result in a fatal injury for the same reasons discussed above relating to the early citation. (Tr. 47). He testified that this violation was the result of high negligence because he had talked about the importance of preventing such conditions during his previous visit, yet, since then, the mine had taken down the berm that previously had kept it in compliance and then cleaned right up to the toe. (Tr. 48). Miller observed that the condition was, again, "absolutely" obvious, should have been detected on preshift, and had existed on the upper east wall since his previous trip to the mine. (Tr. 49, 50). According to Miller, Lamb told him that he had instructed the driller to clean the highwall, but had not instructed him to remove the berm or clean the area all the way to the toe. (Tr. 42). However, Miller testified that he doesn't believe that the driller would have done so without being directed to do so. (Tr. 50).

E.H.'s testimony regarding Citation No. 6084500 and the mine's practices and procedures is equally applicable to Citation No. 6084505. E.H. did testify that he agreed that Sec'y Exs. 10 and 11 showed loose rock, and Ex. 11 possibly showed an overhang. (Tr. 82).

Lamb testified that the upper east highwall was bermed off on October 28th because there was loose material on it. (Dep. 31-32). On cross-examination, Lamb stated that on the morning of November 13th the mine pulled a shot on the upper east highwall to knock down the loose. (Dep. 32-33). Further, at the instruction of Lamb, David Murphy, the mine's loader operator, removed some of the material from the shot, but did nor remove the fallen material that was under the loose material still hanging on the highwall. (Dep. 35-36). Lamb testified that, at some time before Inspector Miller returned to the Mine on November 13th, James Rogers, the mine's drill operator, used the front loader to remove the berm that blocked off the highwall. (Dep. 34-35). When presented with Sec'y Ex. 12 Lamb described the picture by stating that "[y]ou've got material in here, see. There's nothing back here." (Dep. 37). Lamb could not say for sure whether Sec'y Ex. 12 depicted the area directly under the upper east high wall. (Dep. 38). Lamb acknowledged that there were no warning signs in the area on November 13th. (Dep. 38).

Lamb testified that, just like the southwest highwall, the upper east highwall has also been out of service since Inspector Miller shut it down. (Dep. 26-27, 39). Lamb stated that the upper east highwall has been bermed off, and the loose material that has come down in the two years since it was closed is similar in size and amount to that which has fallen off the southwest

highwall, i.e., "smaller stuff, 3 inches" and some pieces as big as softballs. (Dep. 27, 39). Lamb testified that, generally, the mine pulls a shot every three days. (Dep. 40).

ii. The Violation

I find that the Secretary has established a violation of the cited standard. I again rely primarily on the clear testimony of Inspector Miller, who observed loose, overhanging, and cracked, material that created a hazard for miners working or traveling in the area below the wall. *See* Sec'y Exs. 10-12. Both of the Respondent's witnesses agreed that there was loose material on the highwall. The loose material had not been removed or supported and, based on the testimony of Miller and Lamb, equipment had been operated in close proximity to the wall. I again credit the testimony of Inspector Miller that loose material can, and does fall, strike the wall and bounce outwards. I also again credit his testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of the loose material that he observed, i.e., up to five feet in diameter and one foot thick. A berm that had previously blocked off the area had been removed and there was nothing to prevent miners from going under the loose material. I credit Inspector Miller's testimony and find that, despite Lamb's testimony that the entire bench may not have been loaded to the toe, at least one area underneath the loose material had been cleared to the toe. *See* Sec'y Ex. 12.

I also credit Inspector Miller that bumping the highwall, inclement weather, or a blast in another area of the mine could all have caused the loose material to fall. Given the size and condition of the loose material observed on the highwall, I find that the condition of the highwall presented a hazard to those individuals walking or operating equipment at or near the face of the southwest highwall. While a berm may have existed at a prior time, at the time of the inspection the area had not been bermed-off or barricaded, nor had any warning signs been posted.

The Respondent raises the same arguments here as it did with the earlier citation discussed *supra*. For the same reasons set forth above, I find those arguments to be without merit. I find that the Secretary has established a violation of the cited standard.

iii. Significant and Substantial Violation

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. I find, further, that the violation contributed to a discrete hazard, i.e., the hazard of rock and loose material falling and striking persons or the equipment being operated by persons. Third, it is more than reasonably likely that the hazard contributed to will result in an injury. Finally, given the size and amount of loose material, the injury would certainly be serious or even fatal.

The Commission has long held that a S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of continued mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Vibrations from machinery, working on the highwall, inclement weather conditions, and explosions in other areas of the mine, all contribute to the likelihood of loose

material falling and causing an injury. The mine had been loading material to the face of the highwall. The berm that existed on October 28th had been removed by November 13th, but the loose material remained on the highwall. In addition, there was no other barricade or warning in the area. I find that, when viewed in the context of continued mining operations, it is more than reasonably likely that loose material would have fallen and struck a miner or the equipment they were operating. I credit the inspector's testimony that falling loose material may strike the longwall and bounce outwards, thereby greatly increasing the area in which loose material may land and, in turn, increase the likelihood of an injury causing event. Further, I credit Inspector Miller's testimony that the FOPS on the equipment operating in the area would not have been sufficient to protect against falling material the size of which Inspector Miller observed, i.e., up to five feet in diameter and one foot thick. The individual who cleaned the bench up to the toe was in danger of being crushed by the loose material above him. Miller was aware of other instances where loose material had fallen on equipment and caused fatal injuries. I find that any injury caused by the fall of such material would have been extremely serious or even fatal.

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995). Inspector Miller qualifies, without question, as an experienced MSHA inspector. I find that the facts of this violation clearly lead to a finding that it was a significant and substantial violation.

iv. Negligence

I find that Inspector Miller appropriately designated this violation as high negligence. On October 28th, Miller discussed with the operator the exact hazard created by the condition cited on November 13th. During his inspection on the 28th, he commented to Lamb regarding the appropriateness of the upper east highwall berm that was erected at that time. When he returned on the 13th, he was surprised to see that the barricade had been removed in spite of that conversation. Moreover, in at least one area, it was clear that equipment traveled directly under the loose material and cleared the fallen material to the toe. I find that Lamb, the mine's superintendent, was obviously aware of what was required of the mine to be in compliance with the cited standard. Nevertheless, it is clear that either (1) this information was not properly communicated to the driller who removed the berm, (2) the driller was instructed to remove the berm, or (3) the mine was highly careless in failing to supervise the driller at the time the berm was removed. Given the obviousness of the condition of the highwall, the fact that the mine had been placed on notice regarding the condition, and the fact that the condition had existed for an extended period of time, each of these possibilities lends itself to a finding of high negligence. I find that this violation was the result of high negligence on the part of the Respondent.

Due to the high negligence finding and the failure to abate orders that were not considered in the Secretary's proposed penalty, I assess a penalty of $10,000.00 for this violation.

c. Settled Citations

The Respondent and the Secretary have agreed to the following settlement amounts for the remaining citations in this docket. Each of the settled violations was designated as a 104(a), non-S&S citation.

Citation No. 6084501	$334.00
Citation No. 6084502	$460.00
Citation No. 6084503	$207.00
Citation No. 6084504	$117.00
Total Settlement Amount	$1118.00

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

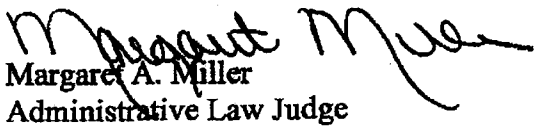
> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The conditions cited in both citations were not timely abated and, as a result, two 104(b) orders were issued. Rather than abate the citations, the operator chose to leave the 104(b) orders in place and not utilize those areas of the mine affected by the orders. The history is normal for this size operator. I accept the Secretary's findings of negligence as discussed above. Further, I find that the Secretary has established the gravity as described in the citations.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of $15,000.00 for the two citations discussed above. The parties' motion for settlement is **GRANTED**. Hoover, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of $16,118.00 within 30 days of the date of this decision.



Margaret A. Miller
Administrative Law Judge

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DENVER, CO 80202-2500
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March 18, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-030
Petitioner	:	A.C. No. 11-03141-161545-01
	:	
v.	:	Docket No. LAKE 2009-193
	:	A.C. No. 11-03141-170102-01
	:	
	:	Docket No. LAKE 2009-405
MACH MINING, LLC,	:	A.C. No. 11-03141-178166-02
Respondent	:	
	:	Mach #1 Mine

DECISION

Appearances: Sarah T. White, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Mach Mining, LLC ("Mach") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in St. Louis, Missouri.

Mach operates an underground coal mine in Williamson County, Illinois. This mine employed an average 165 people in 2008 and 173 people in 2009. These cases involve 13 citations issued under section 104(a) of the Mine Act, but the parties settled 7 of the citations prior to the hearing.

I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

A. Citation Nos. 6674679 and 6674680

On January 20, 2009, Inspector Bobby Jones issued Citation Nos. 6674679 and 6674680 under section 104(a) of the Mine Act, alleging violations of 30 C.F.R. § 75.400 as follows:

> Accumulations of loose coal saturated with oil, coal float dust, oil, and grease were allowed to accumulate, in active workings, on the Fletcher Roofbolting Machine Co. No. 1, located on the HG#3 (MMU-002) Active Section. The accumulations were found in the motor compartment, operator's controls compartment, on the frame and ranged in depth from a thin film to 2 inches in depth.

(Ex. 8). Citation No. 6674680 was identical to the previous citation except that it applied to the Fletcher Roofbolting Machine Co. No. 4. (Ex. 9). For both citations, the inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violations were significant and substantial ("S&S") and that the company's negligence was moderate. Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." The Secretary proposes a penalty of $1,530.00 for each citation.

Inspector Jones testified that accumulations of hydraulic oil and oil-soaked coal were on the No. 1 roofbolting machine, located in the working section area of Headgate 3. (Tr. 19, 20). The inspector determined that the violation was S&S because, if the condition were left uncorrected it would be reasonably likely it could lead to an accident or injury. (Tr. 25). Inspector Jones testified that the conditions surrounding Citation No. 6674680 were comparable to the conditions surrounding Citation No. 6674679. (Tr. 45-46, 47-48). He estimated that the machines were 300 to 400 feet apart at the time the citations were issued. (Tr. 46). When making his S&S determination, the inspector considered a multitude of factors including the location of the equipment and how it would affect the machine's operators. (Tr. 25-26). He testified that oxygen, fuel, and an ignition source ("triangle of fire") were all present, and that "moving parts, motors, [and] shafts" generate heat and can act as ignition sources. (Tr. 26). The inspector determined that the company's negligence was moderate because the section foreman, who is responsible for finding and abating such conditions, should have found the accumulations during an on-shift examination. (Tr. 27). The inspector was uncertain how long the condition had existed before the citation was issued, but estimated it had been there for a few days. (Tr. 28-29, 38). He testified that the accumulation could not have occurred over the course of only one shift. (Tr. 38).

During cross-examination, the inspector testified that the machine was not running at the time the citation was issued, but he believed it had previously been running with the accumulations present. (Tr. 33). Inspector Jones did not determine either the flashpoint of the accumulated material or the operating temperature of the equipment during the inspection. (Tr. 34-35). The machine is equipped with a fire suppression system, which provides coverage for the entire machine and must be manually activated by a miner in case of fire. (Tr. 35-36). Mach's roofbolters are also equipped with methane monitors that read 0.2 percent or less at the time of inspection. (Tr. 37).

Jim Henderson, the third-shift mine manager at the mine, testified on behalf of Mach. Henderson was present when Inspector Jones issued both citations. (Tr. 54). According to Henderson, the methane monitors on the roofbolters sound an alarm at 1 percent and shut down the machine at 2 percent. (Tr. 60). His testimony supported Inspector Jones's testimony regarding the methane levels in the cited area at the time of inspection, as well as the existence and function of the fire suppression systems. *Id.* Henderson stated that he did not see any evidence on any part of the machine indicating an ignition was reasonably likely to occur. (Tr. 61, 62, 63). Henderson contradicted the inspector, testifying that the accumulations could have accrued over only one shift. (Tr. 64).

On cross-examination, Henderson testified that his interpretation of reasonably likely is "a much higher percentage of happening." (Tr. 68). He also testified that the fire actuators, which activate the fire suppression system, are strategically located around the machines, making them easy for the operators to access in case of a fire. (Tr. 69).

Anthony Webb, the general manager at the mine, testified on behalf of Mach. When questioned about moving parts in the motor compartment that could potentially ignite accumulated material, Webb stated that:

> There's one coupling between the motor and the pump, and it is a plastic coupling, and it's internal with a guard. . . . [T]he only other moving part is one pulley with a belt, and it is high enough up off the floor to where two inches of material would not contact that pulley or belt.

(Tr. 76). In preparation for the hearing, Webb measured the operating temperature of the pump compartment and operator's compartment, two places where accumulations of hydraulic fluid are common, at about 140 to 145 degrees Fahrenheit. (Tr. 77). It is his understanding that this is consistent with the temperature at which most electric hydraulic equipment operates. *Id.* Webb also measured the operating temperature of the frame between 72 degrees and 76 degrees Fahrenheit. (Tr. 78). In comparison, the material safety data sheet ("MSDS") for the hydraulic oil being used in the machines indicates a flashpoint of 450 degrees Fahrenheit and the MSDS for the grease referred to in the citations indicates a flashpoint of 480 degrees Fahrenheit. (Tr. 79, 80). The Mach #1 Mine is in the Herrin No. 6 seam where an accumulation of coal has a flashpoint of 380 degrees. (Tr. 81). Webb testified that it is the production shift's responsibility to clean, grease, and service any equipment that needs to be taken care of. (Tr. 84). Webb's testimony also supported Henderson's description of the roofbolter's fire suppression system. (Tr. 82-84). Webb agreed with Henderson's opinion that an accident was not reasonably likely because there was no ignition source present. (Tr. 84). On cross-examination, Webb testified that the two inches of accumulation was not a large amount for one shift. (Tr. 92).

With respect to both citations, Mach stipulated that the accumulated materials existed in violation of § 75.400. Further, it agrees with the inspector's determination that, if an ignition

were to occur, any injury could reasonably be expected to result in lost workdays or restricted duty. (Tr. 49). However, Mach argues that the Secretary failed to establish the violations were S&S because she did not prove that an ignition was reasonably likely to occur. *Id.* Mach maintains that there was no evidence as to either the flashpoint of the cited material or the operating temperature of the machines. *Id.* Mach argues that the evidence it presented with regard to the material's flashpoint and the equipment's operating temperature leads to the conclusion that an accident or injury was unlikely to occur. (Tr. 310). Mach relies on *Highland Mining Co.*, 30 FMSHRC 1097 (Nov. 2008) (ALJ) and *AMAX Coal Co.*, 18 FMSHRC 1355 (Aug. 1996) to support the conclusion that when the evidence demonstrates that there is no ignition source present for the accumulation, the citation should be non-S&S. (Tr. 310).

Mach also argues that the company's negligence should be reduced to low for Citation Nos. 6674679 and 6674680. (Tr. 311). This argument is based on the fact that the section foreman and the machine operators have to rely on their personal experience and judgment when determining if the machines need to be cleaned. *Id.*

A violation is properly designated S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has elaborated on this standard, adding elements that the Secretary has the burden of proving. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The elements are:

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

Id. An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (August 1985). Finally, the Commission has held that, in determining if an ignition or explosion is reasonably likely, a judge must analyze a "confluence of factors," "including the nature of the mine involved." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988).

There are several factors in this case that indicate it was not reasonably likely that the hazard contributed to by the violation would lead to an injury. Although there is conflicting testimony as to how long the accumulations existed before the citation was issued, I credit the testimony of Henderson and Webb that the accumulations could have developed during a single shift. Because the machines were not operating at the time the citation was issued, there is no indication the machines had been in operation with the accumulations present. Furthermore, there was no ignition source present. I credit Webb's testimony that he measured the operating

temperature on various parts of the machines and found these numbers to be substantially lower than the flashpoints of the combustible accumulations. The machines were also in a safe operating condition, eliminating the possibility of ignition caused by hazardous wiring or other problems. According to Webb, assuming normal mining operations, the machines would have been cleaned by the time of the next production shift. Finally, the methane monitors used on the machines significantly decrease the likelihood of an accident and established that, at the time of inspection, methane levels in the area were low.

I have previously held that an operator's admitted violation of § 75.400 based on accumulations of loose coal, coal fines and float coal dust was not S&S because MSHA failed to prove it was reasonably likely that a fire would occur. *C.W. Mining Co.*, 17 FMSHRC 937, 943 (June 1995) (ALJ Manning). In *C.W. Mining*, material had accumulated in an area where a roof bolter was operating, and the Secretary argued the machine was a potential ignition source. *Id.* at 941. The Secretary did not explain how the machine could have ignited the combustible material and the evidence did not establish it was reasonably likely an injury causing accident would occur. *Id.* at 942-43. In *C.W. Mining*, it was also important that the accumulations would have been removed before mining resumed, thereby exposing miners to the hazard for only a short period of time. *Id.* at 943. Because of these factors, the citation was modified to delete the S&S designation.

In another case, the operator appealed a judge's decision that accumulations on the continuous miner were S&S. *AMAX*, at 1356. The operator argued that the judge failed to apply the proper test to determine if the violation was S&S. *Id.* at 1357. The operator's main contention was the judge applied the wrong legal standard under part three of the *Mathies* test, focusing on if an injury "could occur," rather than if it "will result." *Id.* The Commission agreed with the operator in this case and vacated the S&S determination. *Id.* at 1359. The Commission held that a judge should focus on if it is reasonably likely that the hazard contributed to *will* result in an injury or illness of a reasonably serious nature. *Id.* at 1358.

Based on these factors and Commission precedent discussed above, I find that, due to the lack of an ignition source, the Secretary did not establish that an ignition was reasonably likely to occur. The Secretary established that an injury was possible but not that an injury was reasonably likely. My findings in this regard are, of course, limited to the specific facts presented in this case. Therefore, the S&S determinations for Citation Nos. 6674679 and 6674680 are vacated. I find that the gravity of the violations was serious because, if an injury were to occur, it would likely result in lost workdays or restricted duty.

I find that the violations were the result of Mach's moderate negligence. Even though the roof bolting machines were not in use, the condition should have been detected during the on-shift examination. A penalty of $1,000.00 is appropriate for each citation.

B. Citation Nos. 6674879, 6674883, and 6674688

On July 29, 2008, Inspector Edward Law issued Citation No. 6674879 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

> Accumulations of combustible materials in the form of coal fines and loose coal are present at the slope belt tripper drive. The accumulations are in contact with the operating bottom slope belt. The accumulations are on the tripper drive framing and structure to the angle of repose for a distance of approximately 7 feet and underneath the tripper drive framing on both sides the same distance. The accumulations are approximately 7 to 18 inches in depth, 2 to 4 feet wide and 3 ½ to 4 [½] feet in length at the wiper contact area. The slope belt was removed from service by management until the contact areas were cleared.

(Ex. 4). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of $634.00 for this citation.

Inspector Law testified that he issued the citation because there were extensive accumulations of combustible materials on the upslope side of the tripper drive. (Tr. 203, 204). The inspector stated that the belt was running in coal and accumulations, creating a frictional heat source. (Tr. 207). The cited condition was adjacent to a frequently used travelway. (Tr. 208). The inspector testified that he believed the condition had existed for two to three shifts. (Tr. 210). The inspector also believed that under normal mining conditions, if this condition were allowed to continue, it would be reasonably likely a fire would occur. (Tr. 220).

On cross-examination, Inspector Law testified about factors that limited exposure to the hazard. There are carbon monoxide ("CO") monitors that detect carbon monoxide and, in the event of an increase in the CO level, the control center on the surface is alerted. (Tr. 222). There was also a fire suppression system and hose outlets at the drive, about ten feet away from the wiper. (Tr. 223). The inspector testified that the air at the cited location was flowing outby, so in the event of a fire smoke would flow directly to the surface. (Tr. 224). In this event, miners would be blocked from their normal exit thereby requiring them to use an escape capsule in a distinct air course. (Tr. 241, 243). The inspector agreed that accumulations on a mine floor, such as the one cited, can occur quickly under the right circumstances. (Tr. 228). However, he testified that the coal fines on the railing and the packed coal could not have accumulated between the preshift examination and the time he issued the citation. (Tr. 231). He stated that it is impossible for the belt to rub the coal fines that were located on the railing. *Id.* However, the inspector testified that, at the time of inspection, the belt running on a roller above the tripper drive frame was in contact with coal accumulations. (Tr. 232; Ex. M-13). According to the

inspector, the coal was dry where it was rubbing against the belt but he was unsure if other parts of the accumulation were wet or dry. (Tr. 226).

Chris England, a shift manager at the mine, testified on behalf of Mach. He testified that the slope where the belt is located is ventilated with neutral air that travels outby. (Tr. 246). England accompanied Inspector Law when the citation was issued. During this time he observed wet coal piled up to the bottom of the belt. (Tr. 248, 250). Because of the coal's wet condition, it was England's belief that the accumulations were the result of a washback. (Tr. 251). Washback happens when water-saturated coal slides down the slope belt to the area just outby the tripper drive. All the coal extracted at the mine exits the mine on this slope belt, which is at an angle. Because the slope belt exits the mine, rainwater can also run down the belt. The saturated material typically spills off just above the tripper drive, carrying coal fines and loose coal along with it. *Id.* England testified this accumulation looked "exactly" the same as washback accumulations he has seen in the past. (Tr. 252). Furthermore, England believes this condition could have occurred in a "split second," and it is his opinion this accumulation had not been there long. (Tr. 256, 260). England contradicted the inspector's testimony with regard to the roller. (Tr. 253). According to England, the roller in question no longer supported the belt after a new scraper was installed prior to the time this inspection took place. *Id.* England also testified that the fire suppression system would provide sufficient coverage to the cited area. (Tr. 257-59; Ex. M-10).

Dave Adams, an examiner at the mine, testified on behalf of Mach. Adams was responsible for examining the cited area on July 29. (Tr. 269; Ex. M-14). Adams testified that the cited accumulation was not present at the time of his preshift examination around 6:00 a.m. (Tr. 273). Adams also testified that accumulations such as this one can occur in a short amount of time. (Tr. 272). On cross-examination, Adams stated the tripper drive is well lit with the result that accumulations are easy to identify. (Tr. 276). He further testified that he would not overlook an accumulation as extensive as the one described in Inspector Law's citation. (Tr. 274-75).

On July 29, 2008, Inspector Law issued Citation No. 6674883 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1) as follows:

> A[n] inadequate preshift exam of the slope belt was made on the midnight (11 PM to 7 AM) shift, 7/29/2008. A hazardous condition existed on the slope belt at the tripper drive where an accumulation of combustible materials (coal fines and loose coal) were in contact with the operating belt. This area was on the travelway side of the belt. There was no record of this condition in the examiner books.

(Ex. 6). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined the violation

was S&S and that the company's negligence was moderate. Section 75.360(a)(1) provides that "[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." The Secretary proposes a penalty of $634.00 for this citation.

Inspector Law testified that there was an inadequate preshift examination because the preshift examiner did not identify the accumulated combustible material that is the subject of Citation No. 6674879. (Tr. 215; Ex. M-14). Although an examination was performed, the cited hazard was not listed and the records indicated the mine was safe. (Tr. 217; Ex. M-14). The inspector designated the citation S&S because it was written in conjunction with Citation No. 6674879. (Tr. 219). The inspector testified that this citation also should have been marked high negligence, instead of moderate. *Id.* On cross-examination, Inspector Law testified that he did not consult with the preshift examiner to discuss the condition of the mine. (Tr. 236). However, inspectors are not required to consult with examiners before issuing a citation under this section. (Tr. 238).

On January 26, 2009, Inspector Jones issued Citation No. 6674688 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

> Accumulations of rock, loose coal and coal float dust were allowed to accumulate under the HG#3 tripper drive and on both sides of the belt for a distance of 30 feet inby the drive. The accumulations measured approximately 2 inches to 7 inches deep, 2 feet to 6 feet wide, and 50 feet long. This condition existed from the outby end of the drive located at 80 cross cut in the #2 entry (alternate escapeway). Accumulations were also observed from 16 to 18 cross cut on the back side of the belt. These accumulations ranged from 2 inches to 6 inches in depth and 2 feet to 3 feet wide.

(Ex. 11). The inspector determined that an injury was reasonably likely and that any injury could be reasonably expected to result in lost workdays or restricted duty. He determined the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of $5,503.00 for this citation.

Inspector Jones testified that he issued this citation because accumulations between two and seven inches deep of rock, loose coal, and coal float dust were under the tripper drive extending outby for some distance. (Tr. 280, 281). He further testified that the belt was making contact with the accumulations. (Tr. 282). The inspector stated that he was unsure how long the condition had existed prior to issuing the citation. (Tr. 283). The inspector determined that the company's negligence was moderate because the condition should have been observed during a preshift examination. *Id.*

On cross-examination, the inspector testified that at the time of inspection, he mistakenly believed the air was traveling inby. (Tr. 285-86). In the inspector's opinion, the fact that the air was actually traveling outby would reduce the number of miners affected from ten to one. (Tr. 286). The inspector testified that the area was well rock-dusted and equipped with atmospheric monitoring devices, a fire suppression system, and firefighting equipment. (Tr. 286-87). Although it is the inspector's opinion that the accumulation existed during the preshift examination, he could not be certain. (Tr. 302).

England testified that he accompanied Inspector Jones at the time this citation was issued. (Tr. 292). He confirmed the inspector's testimony that the area was well rock-dusted. (Tr. 293). England also testified that the recovery rate in this area of the mine is a maximum of 50 percent. (Tr. 294).[1] Adams testified that he inspected the area around 4:15 a.m., at which time the Headgate 3 tripper drive area was idle, and he did not observe any hazards in the area. (Tr. 297, 298-99; Ex. M-12e).

The Secretary emphasizes that Mach has a history of § 75.400 violations. (Tr. 306). Furthermore, the Secretary argues it was reasonably likely that the accumulations could have caused fires leading to serious injuries because the triangle of fire was present in all cases. *Id.* The Secretary argues that because inspectors have discussed accumulation issues with Mach many times, Mach had notice of the problem. (Tr. 308). The Secretary stipulated that the number of miners affected by Citation No. 6674688 should be reduced from ten to one. (Tr. 307). The Secretary also points out that § 75.360 does not require the inspector to consult with the preshift examiner before issuing a citation for an inadequate preshift examination. (Tr. 308).

Mach emphasizes the fact that the cited areas are protected by atmospheric monitoring, fire suppression, and firefighting equipment. (Tr. 313). Furthermore, neutral air was traveling outby in both areas. *Id.* Mach argues that the credible testimony of Adams, who said that the accumulations were not present during his preshift examination, should be highly probative. (Tr. 315, 316). Mach also argues that, because the material was wet, it was likely fresh. (Tr. 315). Although the inspectors testified that they believed the accumulations must have been present during the preshift examination based on their experience, Mach believes that the evidence it presented established this type of accumulation can occur quickly. (Tr. 314).

With specific regard to the accumulation citation at the Headgate 3 tripper drive, Mach argues that the 50 percent recovery rate and Jones's testimony that the area was well rock-dusted should convince the Commission to reduce the citation to non-S&S. (Tr. 313-14). Regarding the slope belt tripper drive, the air only had to travel 1800 feet to the surface. (Tr. 313). Mach maintains it did not violate § 75.400 because this type of spillage can occur quickly and is routine under normal mining conditions. (Tr. 314, 315). Alternatively, if a violation of § 75.400 is found, Mach argues that it was non-S&S based on its location near the surface, the manner in

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[1] In this context, a recovery rate of 50% means that half of the material mined and transported on conveyor belts at the mine is non-combustible rock.

which it was ventilated, and the presence of atmospheric monitoring, fire suppression, and firefighting equipment. *Id.*

Finally, Mach argues that the negligence determination for both of the accumulation citations should be none because there was no evidence presented to indicate the accumulations were present at the time of the preshift examination. (Tr. 315-16). Furthermore, Adams testified the material was not present during his examination of the area. (Tr. 273, 297). Mach relies on *Enlow Fork Mining Co.*, 19 FMSHRC 5 (Jan. 1997) to support the conclusion that if a judge finds an examiner credibly testified that the cited condition was not present at the time of examination, the accompanying examination citation should be vacated. (Tr. 316).

In *Enlow Fork*, the Commission upheld a judge's dismissal of a citation for an inadequate preshift examination based on accumulations of loose coal and float coal dust in a longwall section. *Enlow Fork*, at 15. The judge made a credibility determination in favor of the operator's preshift examiner who testified that the accumulations were not present during his preshift examination. *Id.* at 14-15. However, in the same case, the Commission affirmed the judge's finding that the operator conducted an inadequate preshift examination based on coal dust and loose coal at a belt feeder. *Id.* at 18. For this citation, the judge made a credibility determination in favor of the MSHA inspector who testified the accumulations must have been present during the preshift examination based on the accumulation's heavy concentration. *Id.* at 17, 18.

In a case with similar factual circumstances to the case at bar, the Commission upheld an S&S designation for a citation for a violation of § 75.400. *AMAX Coal Co.*, 19 FMSHRC 846, 850 (May 1997). The Commission was not persuaded by the operator's argument that the presence of fire detection systems, self-contained rescuers, and firefighting equipment in the cited area minimized the risk of injury to miners from a fire. *Id.* Furthermore, the operator in *AMAX* had an extensive history of accumulation violations and had been counseled by MSHA numerous times regarding this problem. *Id.* at 847. However, *AMAX* is distinguishable in several key aspects. First, the cited accumulations were caused by spillage at the intersection of two major belts and were more extensive than the accumulations at issue here. *Id.* at 849. In fact, they were characterized as a "major spill" by the company's own shift manager. *Id.* Second, the judge found that the accumulations had built up over several days. *Id.* at 847. Third, it was undisputed that a 15 foot section of the main belt was running in contact with packed, dry coal and loose coal. *Id.* at 849. Finally, it was not disputed that the surface area of the accumulation was dry. *Id.*

In another case upholding an S&S designation for a § 75.400 violation, the Seventh Circuit Court of Appeals stated that the presence of fire safety measures "does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires." *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995). However, *Buck Creek* is also distinguishable from the case at bar. In *Buck Creek*, the inspector

issued a citation because a tail roller was turning in black coal fines, the color indicating to him "that the accumulation was not mixed with rock dust and therefore not of the proper incombustible content." *Id.* at 135. In the MSHA inspector's opinion, the cited accumulations had been present for at least three shifts, and the judge found they had been present for at least one prior shift. *Id.* at 136. Furthermore, the judge made a credibility determination in favor of the inspector who testified "that in the event of a fire, smoke and gas inhalation by miners in the area would cause a reasonably serious injury requiring medical attention." *Id.* After stating that "credibility determinations reside in the province of the ALJ," the court held the judge did not abuse his discretion in crediting the testimony of the MSHA inspector. *Id.*

I credit the testimony of Adams who stated that accumulations described by the inspector were not present during his preshift examinations. I also credit the testimony of England, supported by Adams, who stated that these types of accumulations can occur over a short period of time. Together, the testimony of Adams and England sustain a reasonable probability that the accumulations were not present during the preshift examination. For these reasons, Citation No. 6674883 alleging a violation of section 75.360 is vacated.

With regard to Citation Nos. 6674879 and 6674688, I find that the Secretary has established the violations of § 75.400. However, I also find that the violations were not S&S. The Secretary did not establish that, assuming continuing normal mining operations, the hazard contributed to by the violations would have been reasonably likely to result in an injury to a miner. I find, for several reasons, that miners were not exposed to the hazard that existed on the slope belt. I credit the testimony of Mach's witnesses that the material was wet and that the roller of concern was no longer in use. If the accumulations did begin to smolder, the CO monitoring system and the sprinkler system would have doused the area before a significant hazard was created. The cited area was near the surface and any smoke would have traveled away from the mine workings. I also credit the testimony of the company's witnesses that the material was wet and could have accumulated over a short period of time. I reach the same conclusion with respect to the accumulation at the HG #3 tripper drive for similar reasons. As stated by England, the recovery rate at the mine is no more than 50 percent, which means that at least half of the accumulated material was non-combustible rock. The area was well rock-dusted, CO monitors were in the area, and water sprays were also present. The only potential ignition source was the belt itself and I find that it was unlikely that the belt would generate enough heat to ignite the accumulation. Finally, the material could have accumulated in a relatively short period of time. I find that the gravity of both violations was serious because, if an injury were to occur, it would likely result in lost workdays or restricted duty.

I find that Mach's negligence was moderate. The mine has a history of accumulation violations and it had been put on notice that greater efforts must be made to eliminate accumulations. A penalty of $500.00 is appropriate for Citation No. 6674879 and a penalty of $1,000 is appropriate for Citation No. 6674688.

C. Citation No. 6674860

On July 17, 2008, Inspector Edward Law issued Citation No. 6674860 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1722(a) as follows:

> The DBT company #2 ratio feeder located in the #2 Headgate, 003-MMU working section cross cut #112 has the top cover over the chunk breaker missing exposing miners to moving machine parts. The missing cover is approximately 3 feet wide by 4 feet long, 24 inches in from the walkway and 4 and ½ feet up from the mine floor. There is also a side cover plate that is out of position exposing a miner to moving machine parts approximately 7 inches by 7 inches. The exposed revolving chunk breaker pick points are within easy reach of a working miner. The area was flagged off to prevent travel.

(Ex. 2). The inspector determined that an injury was reasonably likely and that any injury could reasonably be expected to be permanently disabling. He determined the violation was S&S and that the company's negligence was moderate. Section 75.1722(a) provides that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." The Secretary proposes a penalty of $946.00 for this citation.

Inspector Law testified that the offset side cover was four and a half feet up from the mine floor. (Tr. 101). The opening exposed miners on the rib side of the feeder to moving parts 24 inches away. *Id.* The inspector testified that there was enough room for a miner to travel between the exposed area and the rib. (Tr. 102). Although he did not observe any miners working in the area, he testified that the presence of shovels and grease guns were obvious signs people had been working in the area. (Tr. 104, 124). During the inspection, Mach management flagged the area and blocked the entrance and exit. (Tr. 105).

On cross-examination, Inspector Law testified that in order for an area to be citable under § 75.1722(a) it must satisfy a two-part test. (Tr. 109). Moving parts must be guarded if they might be contacted by persons *and* might cause injury to those persons. *Id.* The feeder that was cited has three different locations where shuttle cars can dump coal onto a moving conveyor chain. (Tr. 110). MSHA regulations do not require these areas to be guarded because in normal mining operations a miner would not work in this area. (Tr. 111-12). This particular feeder is also mounted on cats, allowing it to be moved every third shift as mining advances inby. (Tr. 115). Furthermore, the chunk breaker on this feeder is offset to the rib side of the machine. (Tr. 119, 121-22; Ex. M-7). The inspector's testimony is unclear regarding the distance from the uncovered chunk breaker to the rib. He first testified that the distance "was well more than two feet." He later stated that there were areas that were less than two feet but he could walk

through the area. (Tr. 123, 124). The inspector further testified that it is possible that the evidence he observed of workers in the area could have been there before the feeder was moved inby. (Tr. 125). Finally, the inspector testified that he does not believe the cited opening would expose a miner on the walkway side of the machine to moving parts. (Tr. 127; Ex. M-5, M-7).

Webb testified that the feeder is moved on the third shift a maximum of once a day. (Tr. 136). The tram is energized during the move but the conveyor chain and chunk breaker do not run. *Id.* Webb also testified that the cited feeder was purchased without a top guard over the chunk breaker and MSHA approved of the machine in that condition. (Tr. 138, 150). The cover was added only to control dust generated from the chunk breaker, not to protect miners from moving machine parts. (Tr. 138-39). To prepare for the hearing, Webb measured a distance of four feet from the walkway side of the machine to the missing cover. (Tr. 141; Ex. M-2, M-4). It is Mach's policy that miners may not access the rib side of the machine while the machine is operating. Webb testified that he has never seen a miner in violation of this policy under normal mining conditions. (Tr. 140). Webb's testimony also helped clarify the distance between the cited area of the machine and the rib. He testified that the cat track on the machine is adjacent to the chunk breaker and juts out toward the rib, so anyone walking in this area would be forced to walk sideways. (*See* Tr. 144-45). Past the cat track and chunk breaker the space opens up to about two feet allowing a person to walk normally. *Id.*

England testified that typically ten or eleven men work on one section at a time at the mine. (Tr. 173). Of these men, nine are operating equipment inby the feeder. *Id.* England testified that, during normal mining operations, there would be no reason for the other two miners to work in between the rib and the feeder. (Tr. 174). This particular feeder is different than most feeders in the mining industry. (Tr. 175). First, the chunk breaker on this feeder is offset from the center away from the walkway side so that the feeder can fit tighter against the rib. *Id.* Second, all the feeder's controls are on the walkway side of the machine. *Id.* Finally, the tailpiece is mounted directly on the feeder. (Tr. 179). England stated that, during mining operations, miners would only be on the walkway side of the feeder and it is against company policy to work on the rib side. (Tr. 178). England's testimony supported Webb's testimony regarding when the feeder is moved. (Tr. 180). He added that it is impossible to operate the caterpillars to move the feeder forward while operating the chunk breaker at the same time. (Tr. 181). Based on his measurements, the cited opening is approximately four feet from the walkway. (Tr. 195; Ex. M- 2). England also testified that he would expect spillage around the dumping point and tailpiece of the feeder, but there has never been spillage on the off side of this feeder at the chunk breaker. (Tr. 199-200).

Mach requests that Citation No. 6674860 be vacated because it does not believe it violated § 75.1722(a). (Tr. 311). Mach notes that the missing cover's function was to control dust, not to prevent miners from contacting moving parts. (Tr. 312). Mach argues that the unique nature of the modified feeder prevents miners from contacting moving parts. *Id.* Furthermore, it is Mach's policy that miners do not work on the rib side of the cited feeder when the chunk breaker is operating, and no evidence was presented to permit the conclusion that this

policy had been violated or that it would ever be violated. *Id.* Mach also argues that because the unguarded chain conveyor was not cited, the coal breaker in the feeder should also not have been cited. (Tr. 311-12). Mach relies on *Kingwood Mining,* 30 FMSHRC 943, 948 (Sept. 2008) to support the conclusion that a missing cover plate only marginally increases a feeder's inherent danger. (Tr. 312).

I credit the testimony of Webb and England that, under continued normal mining conditions, a miner would not be on the rib side of the feeder while the chunk breaker was operating. Therefore, the missing top cover and the cover on the rib side of the machine did not expose miners to the hazard of moving machine parts. Furthermore, because the chunk breaker is offset from the center of the machine, a miner could get no closer than four feet from the missing cover on the walkway side. It would be completely impossible for a miner to come into contact with moving machine parts from the walkway side. As a consequence, the Secretary did not establish a violation of section 75.1722(a). Accordingly, the citation is vacated.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Mach had 122 paid violations at the Mach #1 Mine during the 15 months preceding July 16, 2008. Mach is a large operator. The mine employed about 170 people at the time of the subject inspections. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Mach's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
LAKE 2009-030		
6674860	75.1722(a)	Vacated
6674879	75.400	$500.00
LAKE 2009-193		
6674883	75.360	Vacated

6674680	75.400	1,000.00
6674679	75.400	1,000.00
6674688	75.400	1,000.00
	TOTAL PENALTY	$3,500.00[2]

For the reasons set forth above, the citations are **MODIFIED** and **VACATED** as set forth above. Mach Mining, LLC is **ORDERED TO PAY** the Secretary of Labor the sum of $3,500.00 within 30 days of the date of this decision.[3] Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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[2] On February 24, 2011, I granted the Secretary's motion for partial settlement and Mach Mining was ordered to pay penalties totaling $6,409.00 for the seven settled citations in these dockets.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001-2021

March 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-309
Petitioner,	:	A.C. No. 15-17165-117359
	:	
v.	:	
	:	
STILLHOUSE MINING, LLC,	:	
Respondent.	:	Mine: Mine No. 1

DECISION

Appearances: Thomas A. Grooms, Esq., and Willow E. Fort, Esq.; U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner.

John M. Williams, Esq., and Marco J. Rajkovich, Esq.; Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary's Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815 (2006).[1] In dispute are a single section 104(d)(1) citation and three section 104(d)(1) orders issued to Respondent, Stillhouse Mining, LLC ("Stillhouse"), on December 3, 2006, at its Mine No. 1 operation.

I. Statement of the Case

Citation No. 6665036 charges Stillhouse with violating 30 C.F.R. § 75.313 for failing to follow mandated procedures after the shutoff of its mine fan.[2] Order No. 6665037 charges

[1] In this decision, Volume One of the hearing transcript, Volume Two of the hearing transcript, Petitioner's exhibits, and Respondent's exhibits are abbreviated as "Tr1.," "Tr2.," "Ex. P-#," and "Ex. R-#," respectively.

[2] After issuing the citation and orders at dispute in this case, the Secretary amended 30 C.F.R. § 75.313. *See* Refuge Alternatives for Underground Coal Mines, 73 Fed. Reg. 80,656, 80,697 (Dec. 31, 2008) (implementing section 13 of the Mine Improvement and New Emergency Response Act of 2006). Accordingly, unless otherwise indicated, all citations are to the 2007 edition of the Code of Federal Regulations, the provisions of which were in effect at the time of

Stillhouse with violating 30 C.F.R. § 75.324 for failing to follow specified procedures in intentionally changing its mine's ventilation by shutting off and turning back on its mine fan. Order No. 6665038 charges Stillhouse with violating 30 C.F.R. § 75.220(a)(1) for failing to follow its roof control plan. And Order No. 6665039 charges Stillhouse with violating 30 C.F.R. § 75.360 for failing to conduct an adequate preshift examination of its mine. The Secretary submits that all four alleged violations should be assessed as "flagrant violations" under 30 U.S.C. § 820(b)(2) and proposes a total civil penalty of $761,000.

The consolidated cases, including Docket No. KENT 2007-309 as well as Docket Nos. KENT 2006-121-R, KENT 2006-122-R, KENT 2006-123-R, KENT 2006-124-R, KENT 2006-125-R, KENT 2006-126-R, KENT 2006-128, and KENT 2006-488, were assigned to me on September 11, 2009. All but Docket No. KENT 2007-309 settled. I held a hearing in Big Stone Gap, Virginia, on July 27 and 28, 2010.[3] The Secretary presented the testimony of two officials from the Mine Safety and Health Administration ("MSHA")—Daniel Lynn Johnson, a field office supervisor at MSHA's District 7 office in Harlan, Kentucky, at the time of the issuance of the citation and orders (Tr1. 37:18–39:7), and William Craig Clark, a coal mine inspector (Tr2. 18:18–20, 22:6–9). Stillhouse called no witnesses and rested its case after the Secretary presented her witnesses. (Tr2. 88:9–16.) The parties submitted their post-hearing briefs on September 17, 2010. Stillhouse submitted a reply brief on October 4, 2010.

For the reasons set forth below, Citation No. 6665036 and Order Nos. 6665037, 6665038, and 6665039 are AFFIRMED as flagrant violations.

II. Background and Findings of Fact

A. The Operation at Mine No. 1

1. Coal Extraction at the Mine

Stillhouse operates Mine No. 1, an underground coal mine located near Cumberland, Kentucky.[4] (Ex. R-3.) Mine No. 1 is known as a "drift mine" because it was created by digging

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the alleged violations.

[3] The parties stipulated that I have jurisdiction over this matter under the Mine Act. (Tr1. 5:6–8; Resp't Prehr'g Report 1.) Specifically, the parties agreed that Stillhouse was the operator of Mine No. 1, that Mine No. 1 is a mine, and that Mine No. 1's production affected commerce, as defined by the Mine Act. (*Id.*)

[4] Appendix A at the end of this decision is a digitally scaled down reproduction of Respondent's Exhibit 3, the map of Mine No. 1. (Ex. R-3.) The parties stipulated that this map represents the post-inspection condition of the mine on December 3, 2006. (Tr1. 111:8–12.) The Secretary's witnesses made marks on the map during the hearing. I have inserted boxes around the areas of the mine at issue in this case and labeled them accordingly.

straight into the side of the mountain via coal exposed at the surface in an area known as an "outcrop." (Tr1. 176:1–16, Tr2. 63:24–64:17.) Stillhouse uses a large machine called a continuous miner to dig through the mountain and extract coal. (Tr1. 30:6–7.) A continuous miner makes long cuts through the mountain, some of which are known as "entries." (Tr1. 185:5–13.) Entries function like the main streets of a city (*id.*), as they allow miners, extracted coal, and ventilating air to pass through the mine (*e.g.*, Tr1. 89:16–18, 113:4–15, 114:19–115:9). Entries are identified by number, e.g., "Entry No. 1," which are assigned from left to right across the mine's entrance, looking into the mine toward the area where miners are extracting coal. (Tr1. 124:24–125:7.) The continuous miner also makes cuts perpendicular to the entries, known as "crosscuts." Crosscuts are similar to city cross streets in that they provide access to the mine's different entries. (Tr1. 185:5–13.) Crosscuts are also identified by number, e.g., "Crosscut No. 30," which are assigned in ascending order, starting at the mine entrance where entryways to the surface called "portals" are located. (Ex. R-3.) The coal and rock that remain between the entries and crosscuts form pillars that help support the mine's roof. (Tr1. 185:15–17.)

The front of the continuous miner features a rotating drum with metal bits, called a ripper, which removes coal from the layer of earth containing it, known as the seam. (Tr1. 44:14–24.) The continuous miner works at the last open crosscut in an area known as the "face." (Tr1. 36:15–17.) This machine is operated by a miner who stands approximately thirty to thirty-five feet behind the ripper and uses a remote control to advance the apparatus through the mine. (Tr1. 237:18–238:5.) Once the continuous miner has moved approximately ten to thirty feet and the area behind it has been cleared, other miners working as roof bolters secure the roof. (Tr1. 57:24–58:7.) Stillhouse uses double-headed roof bolters in Mine No. 1, which are operated by two miners. (Tr1. 50:6–11.)

Coal extracted by the continuous miner is loaded into a shuttle car, a piece of transportation equipment that takes the coal to the belt feeder and dumps it into the belt feeder's hopper. (Tr1. 29:10–17, 131:5–15.) Miners use another piece of equipment, a scoop, to remove loose coal from the mine floor and mine ribs and take it back to the face where it is swept up by the continuous miner's ripper. (Tr1. 50:19–51:7.) Collectively, the set of equipment mining coal at the face is known as the mechanized mining unit, or "MMU." (Tr. 41:20–42:3.) MMU's are designated by number, such as "002 MMU," and are often referred to by section, such as "002 section." (Tr. 41:5–10, 41:23–42:3, 122:6–8.) On the day the citation and orders in this case were issued, Stillhouse was operating a continuous miner, two or three shuttle cars, a double-headed roof bolter, two scoops, a belt feeder, and belt lines at the 002 MMU. (Tr1. 42:10–15.)

The belt haulage system at Mine No. 1 delivers coal out of the mine where it exits through the belt portals to the surface. (Tr1. 114:16–115:9.) Each flap of belt along the belt haulage system consists of a head drive and tailpiece. (Tr1. 194:18–23.) The belt runs across the top of the head drive and tailpiece and comes around the bottom of the unit. (*Id.*) The head drive is an electrical installation featuring a motor operated by a controller and a power center that delivers the appropriate amount of electrical voltage to the head drive. (Tr1. 195:4–10.)

The top belt upon which the coal sits has three "top rollers" along every six feet of belt. (Tr1. 195:11–13.) These groups of rollers form a "V" or "U" shape in the belt and prevent coal from falling off by keeping the coal in the middle of the belt. (Tr1. 195:22–196:1.) The belt line also features single "bottom rollers" located every twelve feet. (Tr1. 195:13–15, 196:1–2.)

The belts run through Entry No. 4 through most of the mine. (Ex. R-3.) However, they do not exit at the main entrance. At Crosscut No. 30, the belts turn, head through a different section of the mine, and exit at the belt portals across from the main entrance.[5] (Tr1. 114:16–23; Ex. R-3.)

2. Ventilation System

Stillhouse uses a mine fan to circulate fresh air through Mine No. 1. (Tr1. 86:14–17.) The mine fan sits at the mine entrance in the portal to Entry No. 1. (Tr1. 87:12–13, 88:1–23.) The fan blows air out of, rather than into, the mine and is therefore known as an exhausting fan. (Tr1. 86:18–21.) The fan creates suction that pulls fresh air into the mine (Tr1. 86:22–25), circulating it past the places where the miners are working (Tr1. 123:17–19), provided that appropriate controls are in place to direct the air through the mine (Tr1. 87:15–23, 133:4–136:3). The fan moves approximately 230,000 cubic feet of air per minute ("CFM"). (Tr1. 88:4–6.)

Entry Nos. 1 and 2 at the entrance to Mine No. 1 serve as courses for air to exit the mine, which is known as "return air." (Tr1. 87:15–16.) Return air is air that has passed the last working place in the mine and is accordingly directed out of the mine to remove contaminants such as dust and methane gas. (Tr1. 123:20–124:13.) This air cannot be used to ventilate areas where miners are working or where equipment operates that can spark mine fires, such as the belt haulage system. (Tr1. 123:20–124:2.) To prevent return air from reentering the mine, a tube brings the return air directly to the mechanical fan, and another tube diverts the return air away from the mine portals so the contaminated air does not get circulated through the mine again. (Tr1. 88:1–89:6.) Permanent block stoppings separate Entry Nos. 2 and 3 to ensure that return air and fresh air do not comingle. (Tr1. 87:16–18.)

Entry Nos. 3 and 4 are ventilated by the same current of air. (Tr1. 113:10–114:3.) The fan draws fresh air through these entries, but this air is not used to ventilate the face. (Tr1. 87:18–20, 113:11–22.) Entry No. 3 serves as the path for the man trip roadway miners use to enter and exit the mine. (Tr1. 113:11–22.) The belts run through Entry No. 4 until they turn at

[5] Appendix B at the end of this decision shows the location of the belt portals. The Secretary's witness Daniel Johnson, who inspected Mine No. 1 on December 3, 2006, drew the arrow shown in the upper left-hand corner of the diagram identifying the belt portals, the location where the conveyor belt delivers coal out of the mine. (Tr1. 114:7–115:14.) The location of the belt turn at Crosscut No. 30 is shown in Appendix C at the end of this decision. Johnson circled the location of the belt turn and marked it with his initials. (Tr1. 118:6–17.)

Crosscut No. 30 and run toward belt portals in a separate area of the mine. (Tr1. 114:16–23; Ex. R-3.)

The remaining entries at the mine entrance provide intake courses for the air drawn in by the mine fan for use at the face and other areas where the miners are working. (Tr1. 87:20–21; Ex. R-3.) This air is known as "intake air." (Tr1. 123:17–19.) Intake air enters the mine through the No. 4 main intake portal and the No. 5 main intake portal at the mine entrance. (Tr2. 26:10–27:21; Ex. P-15, at 3; Ex. R-3.)

At the time of the alleged violations, the ventilation system at Mine No. 1 was set up to ventilate two MMU's located in separate areas of the mine. The main current of air drawn in by fan was supposed to split at the location of the 003 MMU. (Tr1. 134:14–15.) Part of the air was to flow to the 003 MMU, and the remaining air was to flow to the 002 MMU. (Tr1. 134:15–16.) The 002 MMU, the furthest MMU from the mine entrance, was located approximately 27,000 feet, or about five miles, away from the mine entrance. (Tr1. 116:21–24; Ex. P-15, at 10.) As a result, air circulating through the 002 section was to travel approximately ten miles—five miles to the section and another five miles to exit the mine. (Tr1. 134:7–135:4.)

Maintaining proper ventilation is vital to ensuring a safe environment in the mine. Circulating fresh air provides oxygen to miners. (Tr1. 147:23–148:1.) The fresh air flow dilutes methane gas, rendering it harmless, and carries it out of the mine. (Tr1. 153:13–15.) Methane is explosive if its concentration is between five to fifteen percent of a given volume of air. (Tr1. 47:7–20.) Consequently, operators are required to take precautionary measures when methane concentrations of at least one percent are detected. 30 C.F.R. § 75.323. Methane enters Mine No. 1 through a variety of sources. Methane is released when the continuous miner extracts coal from the seam. (147:14–19.) Methane also naturally seeps out of the coal seam, which is exposed throughout the interior of the mine. (Tr1. 146:4–15.) Another coal seam, the Imboden seam, lies 100 to 120 feet below the Mine No. 1 operation and provides another source of methane. (Tr1. 146:18–147:13.) Additionally, water has a tendency to trap methane and not allow it to escape aboveground. (Tr1. 201:25–202:4.) Mine areas below the water table have an increased susceptibility to methane accumulations. The three quarterly measurements of Mine No. 1's methane emission rate taken prior to December 2006 ranged between 128,455 and 187,006 cubic feet of methane per day.[6] (Tr1. 105:14–106:22; Ex. P-8.)

The ventilation system also removes dust from the mine. (Tr1. 147:23–148:6.) Dust is generated by Stillhouse's mining activities as well as by the belts that deliver coal out of the mine. (*Id.*) Concentrated quantities of methane and airborne coal dust ("float coal dust") can be explosive. (Tr1. 47:7–20, 155:15–156:1.) The presence of float coal dust lowers the concentration of methane necessary to create an explosive mixture of air. (*Id.*)

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[6] Those measurements were 187,006 cubic feet on March 6, 2006; 159,646 cubic feet on June 19, 2006; and 128,455 cubic feet on September 12, 2006. (Ex. P-8.)

Air contaminated with float coal dust and methane cannot be used to ventilate areas with non-permissible equipment. (Tr1. 123:20–124:2.) Non-permissible equipment lacks safeguards to contain sparks generated by its electrical components. (Tr1. 35:24–36:14.) Exposing non-permissible machinery to air contaminated with coal dust and methane can cause deadly mine explosions. (Tr1. 30:21–31:10.) In contrast, permissible equipment is designed to contain sparks generated by its electrical components. (Tr1. 34:1–35:23.)

To prevent these hazards and ensure proper ventilation, each underground mine operator must develop and follow a ventilation plan that has been approved by MSHA. 30 C.F.R. § 75.370; (Tr1. 95:1–7.) Whenever an operator plans to change its mine's ventilation, such as by digging new cutouts from an underground area to the surface, it must submit an amendment to its ventilation plan and receive MSHA's approval. (Tr1. 93:20–95:13); 30 C.F.R. § 75.370(d). At the time of the alleged violations, Stillhouse had an MSHA-approved ventilation plan in place at Mine No. 1. (Tr1. 95:8–10.)

3. Roof Support

The prevention of roof collapses at Stillhouse's mining operation is governed by its roof control plan. (Ex. P-21.) As with Stillhouse's ventilation plan, its roof control plan must be approved by MSHA. 30 C.F.R. § 75.220. The roof control plan in place at Mine No. 1 at the time of the alleged violations was MSHA-approved. (Ex. P-21.)

Stillhouse installs roof bolts to secure the ceiling of Mine No. 1. (Tr1. 48:24–49:3.) To install roof bolts, a miner uses a roof bolting machine to drill a hole into the mine roof. (Tr1. 54:22–23.) The miner then inserts pre-measured packaged resin, basically glue, into the hole, followed by the actual roof bolt. (Tr1. 54:22–25.) As the miner slides the roof bolt into the hole, he or she checks for "seep back," a small amount of resin flowing out of the hole that lets him or her know that the hole is completely full of resin. (Tr1. 54:25–55:4.) Completely filling the hole with resin ensures that the roof bolts are entirely surrounded by glue, which provides anchorage along the full length of the bolt. (Tr1. 55:7–25.) Stillhouse also used cable bolts at Mine No. 1, which are roof bolts made out of stranded steel cable like the kind used to support bridges. (Tr1. 75:20–76:3.)

The amount of support necessary to secure the mine roof varies with its strength, as measured by the roof's hardness. (Tr1. 56:5–18.) A roof's hardness is evaluated by how often the roof bolt operator must change the drilling machine's drill bit; the material comprising harder roofs wears out the drill bit at a faster rate than the material comprising softer roofs. (Tr1. 56:6–15.) Because soft roofs have a less stable composition, they are more likely to collapse than hard roofs. (Tr2. 72:24–25.) To secure soft roofs, miners must use roof bolts longer than the ones used in hard roofs in order to reach through the softer layer of roof material into harder material. (Tr1. 75:2–8.) If the roof conditions are especially poor and the layers of rock comprising the ceiling are cracked and separated, then crossbars or steel beams are required to lend additional strength to the roof. (Tr1. 181:22–182:9.) These standing supports feature

horizontal bars spanning across the width of the mine ceiling that contribute to the prevention of roof falls. (Tr. 182:5–9.)

The width of the entries in Mine No. 1 also influences the mine roof's strength. The narrower the entries, the stronger the roof, as smaller entry widths reduce the area of the mine roof needing support. (Trl. 185:25–186:7.) Underground areas near where the coal is exposed to the surface, called the outcrop, are known to have much weaker roofs than areas in other parts of the mine. (Trl. 186:17–22.) Developing an area for the miners to cut out to the surface from underground requires drilling and blasting to expose the coal seam to the surface. (Tr. 186:17–187:2.) These man-made stressors, as well as the natural erosion of the mountain's outside surface, weaken the mine roof at the outcrop. (*Id.*) Many times no roof falls occur when making cuts to the outside. (Trl. 236:25–5.) However, it is not uncommon for the roof to collapse when cutting from underground to the surface. (Trl. 237:6–10.) Narrowing the entries reduces the risk of roof falls. The deaths of most underground miners are caused by roof falls, so maintaining proper roof control is vital to ensuring the health and safety of miners. (Trl. 187:10–18.)

B. MSHA's Inspection on December 3, 2006

1. Complaint Prompting the Inspection

At approximately 10:40 p.m. on Saturday, December 2, 2006, the other field supervisor at MSHA District 7, Robert Rhea, called fellow field supervisor Daniel Johnson with a report from a miner concerning the roof conditions at Mine No. 1. (Trl. 52:1–16.) The miner had contacted Rhea at his home, and Rhea recorded the following complaint: "(1) Mine cutting to surface. Roof broken up and glue running away from rods in holes. Roof very soft and hazardous. Mining all weekend. Please check tomorrow (Sunday) Dec. 3, 2006." (Ex. P-17.) Johnson was alarmed at the news that Stillhouse was cutting to the surface, that is, digging from the underground area out to the surface. (Trl. 58:22–59:1.) At the time, Johnson did not know how far from the surface Stillhouse was. (Trl. 212:9–12.)

Johnson planned to inspect the mine first thing the next morning on Sunday. (Trl. 59:15–19.) As an MSHA supervisor responsible for overseeing Mine No. 1 (Trl. 39:22–40:8), Johnson had not known Mine No. 1 to produce coal during the third-shift, which ran between midnight and 7 a.m. (Trl. 59:13–14, 212:5–6). Johnson was aware that miners often perform tasks other than coal mining during third-shift at Mine No. 1, such as roof bolting. (Trl. 212:13–213:2.) Based on the time of the call, Johnson concluded that the miner had contacted Rhea at the end of second-shift, so Johnson thought that the miner wanted the mine inspected before he returned to work the next day. (Trl. 59:11–19.) Johnson did not believe the call raised concerns of an imminent danger warranting immediate attention, such as a falling mine roof or gassed off sections of the mine. (Tr. 59:21–60:10.) Following his conversation with Rhea,

Johnson called Coal Mine Inspector William Craig Clark and requested that Clark inspect Mine No. 1 with him on Sunday morning.[7] (Tr1. 67:14–16; Tr2. 68:11–69:7.)

At about the same time as Rhea's call to Johnson, the second-shift crew at Mine No. 1 was preparing to leave. (Ex. P-15, at 9–10.) When the second-shift section foreman left the mine at about 10:45 p.m., the third-shift crew had yet to go underground. (*Id.*) At Entry Nos. 1 and 2 in the 002 section, where Stillhouse was cutting to the surface, the miners were approximately fourteen to twenty-two feet from breaking through to the outside of the mountain. (Ex. P-15, at 9.)

2. The Inspectors' Arrival – Mine Fan Status

Johnson arrived at Mine No. 1 at approximately 6:10 a.m. on Sunday, prior to the start of first-shift. (Tr1. 91:5–8; Ex. P-16, at 1.) Johnson spoke with Ray Young, a roof bolt operator whom Johnson had known for a number of years. (Tr1. 74:9–13.) Young explained to Johnson that he had been a roof bolt operator on the 002 section during the first-shift and that the roof on this section was soft. (Tr1. 74:13–17.) Rather than standard four-foot roof bolts, Stillhouse had been installing six-foot bolts and cable bolts, and Young believed that adequate roof support was being provided. (Tr1. 74:17–20. *See* Ex. P-21, at 5 (setting forth the minimum roof bolt lengths).)

After speaking with Young, Johnson approached the mine office and realized he did not hear the loud noise of the mine fan. (Tr1. 76:4–14.) Noticing that the mine fan was off, Johnson went to it and checked the fan chart documenting the fan's operational activity. (Tr1. 76:15–17.) Johnson's examination of the chart revealed the fan had been off for several hours. (Tr1. 76:16–18.)

Clark, who arrived a short time after Johnson (Tr1. 67:23–25; Tr2. 23:2–3), immediately noticed the mine fan was off as well (Tr2. 22:14–18). Clark also checked the fan chart and noted that the mine fan had been shut off. (Tr1. 80:9–15; Tr2. 23:22–24:1; Ex. P-15, at 1.) Clark observed that the fan blades were still.[8] (Tr2. 47:10–16.) Moreover, Clark did not see anything

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[7] Clark was not the inspector assigned to Mine No. 1, but he had been previously assigned to the mine and was very familiar with it. (Tr1. 67:8–17.) The then-current inspector assigned to Mine No. 1 was out of town at the time. (Tr1. 67:8–14.)

[8] It is unclear from Clark's testimony whether he was at the mine portals while the mine fan was off. In explaining why he did not measure the air movement at the mine fan prior to the fan being turned back on, Clark testified "I was actually going over to check the intake portals, to see if there was any type of air movement at all." (Tr2. 24:13–18.) However, Clark also testified that he left the portals after he heard the fan start back up: "Then I heard the fan start, and I went back, left the portals and went back to see [who turned on the fan] . . . ." (Tr2. 24:21–25:1.) Because Clark was at the portals when the fan came back on, he had to be at the portals for some period of time before the fan restarted.

blowing in the portals, though he speculated on cross-examination that wind outside the portals could have been blowing an object hanging in one of them. (Tr2. 47:17–48:1.)

The fan chart was admitted at the hearing as Petitioner's Exhibit 7. (Tr1. 12:8–10.) The chart tracks the operational status of the mine fan by plotting the pressure of the fan over time along a rotating circular graph. (Tr1. 78:2–10; Ex. P-7.) The chart reveals the fan had been shut off for six hours while miners were underground (Tr1. 78:18–19), and the parties stipulated to this fact (Tr1. 5:21–23; Resp't Prehr'g Report 2). The parties further stipulated that the fan was turned off at some point between midnight and 12:30 a.m., Sunday, December 3, 2006, after the miners had made their first cut to the surface at the 002 section. (Tr2. 17:2–21.)

Remembering that the mine fan sounds an alarm when turned off, Johnson questioned the security guard, who said the fan was shut off at about 12:30 a.m. by Eugene Johnson. (Tr1. 78:20–79:14.) Daniel Johnson asked the security guard as to who instructed Eugene Johnson to turn off the fan, but the guard did not know. (Ex. P-16, at 3.) At the hearing, Daniel Johnson stated that someone in Stillhouse's management instructed Eugene Johnson to turn off the mine fan. (Tr1. 149:6–11.) Through their interviews with Stillhouse's miners, MSHA's Daniel Johnson and Clark were told that Eugene Johnson had brought his children to watch the miners cut to the surface from underground. (Tr1. 149:1–5; Ex. P-15, at 10, 16.)

After discovering that the fan was off, Daniel Johnson asked a miner standing outside the mine to telephone the miners working underground. (Tr1. 79:22–80:7.) The miner requested to speak with the foreman, and Johnny Osborne answered. (Tr1. 80:25–81:3.) At the hearing, Johnson recalled saying, "'Johnny, do you know the fan's off?'" (Tr1. 81:17.) Johnson testified that Osborne said, "'I've got good air coming in [from the cutout]'" to which Johnson replied, "'Well, Johnny, the fan's off, the fan's been off for a long time. Get your mine—, get your men and come out of the mines.'" (Tr1. 81:18–21.) Osborne also told Johnson that the miners had been cutting out to the surface. (Tr1. 82:12–13; Ex. P-15, at 1.) Johnson asked where he could find Ira Sergent, the third-shift foreman. (Tr1. 82:18–24.) Osborne told Johnson that Sergent had been working on the 002 section and was on his way out of the mine. (Tr1. 82:24–83:12.) Osborne also said Sergent had been gone for a couple of hours, which did not surprise Johnson, who thought Sergent might be conducting a preshift inspection. (Tr1. 82:24–83:6.)

After speaking with Osborne, MSHA Field Office Supervisor Daniel Johnson called his supervisor at MSHA, John Pyles, from the mine office based on what he perceived to be the

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Further evidence helps resolve Clark's testimony. As noted above, the evidence establishes Clark checked the mine fan chart when he realized that the fan was off, the mine chart was located at the fan, and the fan was located at the mine entrance. Furthermore, Johnson testified that the fan chart was not changed out of the fan until after the fan was restarted. (Tr1. 78:10–12.) Because Clark checked the mine fan chart while the fan was off and the chart was located at the fan at that time, Clark visited both the portals and the fan while the fan was off.

serious nature of the situation. (Tr1. 82:3–6, 83:24–84:1.) During that conversation and about ten to twenty minutes after speaking with Osborne, Johnson noticed a man trip, a diesel powered personal transportation device, emerge from the mine carrying Sergent. (Tr1. 84:3–85:17; 100:6–9.) Johnson then heard the mine fan start. (Tr1. 85:10–11.) Following his conversation with Pyles, Johnson spoke with Sergent, who had turned on the fan. (Tr1. 85:14–17; Tr2. 24:10–12.) Johnson testified that he remembered asking, "'Ira, did you know the fan was off?'" (Tr1. 85:19–20.) Johnson believed that Sergent reacted evasively to his question, stating something to the effect of, "'Well, I, I didn't turn it off, and I wouldn't have turned it off. I would have just opened the doors.'" (Tr1. 85:21–23.) Opening the fan doors "short circuits" the air flow by allowing the fan to draw air from the area surrounding it rather than allowing the fan to pull air through its usual circuitous course through the mine. (Tr1. 85:25–86:7.) The result of opening the fan doors is lower airflow through the mine. (Tr1. 85:25–86:7.) Had Stillhouse been running the fan at full capacity when it cut through to the surface, it would have created improper airflow in the mine, as discussed below. *See* discussion *infra* Part II.B.4.

Clark's notes from the inspection also document statements made by Sergent when he emerged from the mine. (Ex. P-15, at 4–5.) Sergent said he did not know who turned off the fan. (*Id.* at 4.) Sergent also said he was going to open the fan doors, but the miners on the section said it had been taken care of. (*Id.*) According to Sergent, the ventilation had not been hurt. (*Id.*) As noted by Clark, Sergent stated that when he checked the ventilation on the 002 section he found an airflow rate of 40,000 CFM. (*Id.* at 5.) Sergent also told Clark that he had gone to the 003 section and found plenty of air movement from natural ventilation. (*Id.*)

Minutes after Johnson's conversation with Sergent, Mine Superintendent Lonnie Moore arrived to work at the mine. (Tr1. 90:10–25.) Moore asked Johnson whether anyone was hurt. (Tr1. 91:9–11.) Johnson said "'No, there, there's no one hurt. . . . Did you know your mine fan was off all night?'" (Tr1. 91:12–13.) According to Johnson, Moore replied along the lines of "'[w]ell, they turned it back on after they cut, after they cut through, didn't they?'" (Tr1. 91:14–16.) Johnson told Moore that was not the case, and the fan had been off for six hours. (Tr1. 91:16–18.) Moore offered no further explanation of the miners' activity at the cutout. (Tr1. 97:4–9.) Johnson testified that Moore did not seem surprised by the fan shutoff. (Tr1. 96:25–97:3.) Moore stopped talking to Johnson after this exchange. (Tr1. 91:21–22.)

Approximately fifteen to thirty minutes after Sergent had restarted the fan, Clark took measurements of the airflow at the intakes. (Tr2. 25:5–16.) Clark found that air was flowing into the No. 4 main intake portal at 54,180 CFM and into the No. 5 main intake portal at 41,625 CFM, for a total rate at the two intake portals of approximately 96,000 CFM. (Tr2. 27:14–21, 28:7–11; Ex. P-15, at 3.) Clark's review of the weekly examiner's record showed that over the prior few weeks, the total rate of air flowing into the two intake portals had been between 203,000 and 213,000 CFM. (Tr2. 28:3–6.) Additionally, Clark found that air was flowing into the entry for the neutral roadway at a rate of 30,523 CFM. (Tr2. 29:14–19; Ex. P-15, at 3.) Clark did not factor this air current into the 96,000 CFM intake rate because the neutral roadway is a complete, separate entry under Stillhouse's MSHA-approved ventilation plan (Tr2. 29:20–25),

and air flowing through it does not ventilate the face (Tr1. 113:10–22). Rather, this air current ventilates the man trip roadway and the belt entries. (Tr1. 113:10–114:3.) Clark also took bottle samples at the mine fan to check for methane. (Tr2. 48:16–19; Ex. P-16, at 6.) The samples were sent for analysis, but the resulting report indicated that the bottles were empty. (Tr2. 49:15–18.)

Johnson and Clark determined that seven miners were underground when Sergent turned the fan back on. (Tr1. 97:17–100:4; Ex. P-15, at 2.) The miners exited the mine about an hour after Johnson ordered Osborne to evacuate. (Tr1. 100:21–24, 101:11–13; Ex. P-15, at 3–4.) In order to clear any gases that may have accumulated in the mine while the fan was off, Johnson let the mine fan run for about an hour after it had been turned on and the miners had exited the mine. (Tr1. 102:2–16.) Johnson was to accompany first-shift Section Foreman Philip Gilbert while Gilbert performed a preshift examination from the mouth of the 003 section to the 002 section. (Tr1. 109:19–21, 248:20–25.) Clark was to accompany miner Earl Gilliam while Gilliam conducted a preshift examination from the portals to the 003 section. (Tr1. 109:17–19, 248:20–25.) These preshift examinations were necessary in light of the fact that the fan had been shut off for six hours. (Tr1. 109:22–110:1.) Johnson, Clark, Gilbert, and Gilliam traveled through the mine via the main man trip roadwayin Entry No. 3.[9] (Tr1. 112:23–113:15.)

3. Preshift of the Wet Area

The preshift investigation at issue in this case concerns a part of the mine known as the "Wet Area."[10] (Tr1. 189:15–16.) A creek passes over this location (Tr1. 201:23), and the Wet Area's name derives from the fact that it is very wet there, as it lies under the water table (Tr1. 196:14–16, 202:5–12). The Wet Area spans from Crosscut No. 30 in the main entryway—the thirtieth crosscut from the mine entrance—up through an area separate from the main entries that goes toward the belt portals. (Tr1. 189:16–20.) At Crosscut No. 30, the belts turn from Entry No. 4 and head out toward the belt portals through a separate area of the mine. (Tr1. 189:17–20.)

Four coal belts pass through the Wet Area on the way to delivering coal to the belt portals. (Tr1. 191:22–25.) As the belts go from Crosscut No. 30 and up through the Wet Area, they keep turning. (Tr1. 192:5–7.) Because the belts must lie straight, a transfer point is located at each place where the direction of the belts shifts. (Tr1. 192:7–9.) Coal is moved from one belt to another at these points. (Tr1. 192:11–15.) Each transfer point features a belt drive unit with

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[9] Appendix B at the end of this decision identifies the location where the events discussed in this section took place. (Ex. R-3.) Entry No. 1 is on the far right of the illustration, Entry No. 2 is to the left of it, and so on. Entry No. 3 is identified on the map as "Travelway Neutral." (*Id.*)

[10] The portion of the mine map in Appendix C at the end of this decision shows the location of the Wet Area along with Johnson's notations from the hearing. Johnson identified the Wet Area by marking the mine map with an arrow and writing the last four digits of the order concerning the preshift examination, 5039. (Tr1. 189:21–190:6; Ex. R-3.)

one or two motors that pull the belt. (Tr1. 192:18–25.) The transfer points also have a belt controller with a circuit breaker that allows the belt to go at different speeds and directions. (Tr1. 192:25–193:4.) These areas have transformers that adjust the voltage to deliver the appropriate amount of power to the equipment. (Tr1. 193:4–17.) This equipment was non-permissible and had the capability to spark a mine explosion should it have been exposed to air contaminated with methane or float coal dust. (Tr1. 191:9–194:17.)

When Clark and Gilliam arrived at the Wet Area, Clark found no dates, times, or initials at the belt power centers for the No. 1, No. 2, No. 3, or No. 4 belts or for the electrical distribution boxes. (Tr2. 32:13–19, 33:4–9.) Clark determined that no preshift examination had been performed in these areas. (*Id.*) Clark noted that the last date, times, and initials were from December 1, meaning that preshift examinations were not performed prior to all three shifts on December 2. (Tr2. 33:11–18, 33:24–34:7.) When Clark entered the mine, he thought that the power was off, as he was not able to hear the mine's underground electrical equipment from the surface. (Tr2. 57:15–19.) However, as Clark inspected the belt line in the Wet Area, he discovered that the power was still on (Tr2. 57:20–23) and noted that the belts were still running (Ex. P-15, at 5).[11] Clark continued his examination of the area and did not turn off the power, in spite of the regulation forbidding the restoration of electrical power to areas affected by a ventilation change, because he believed that any methane in the mine had been cleared out, as he had let the fan run for an hour before entering the mine. (Tr2. 57:2–58:7.)

After the completion of the preshift examination, Clark and Gilliam returned to the main entries and traveled to the 002 section, stopping at the 003 section along the way. (Tr2. 34:16–20, 35:3–8.) At the 003 section, Clark issued a citation for coal accumulations. (Ex. P-15, at 6.) He found float coal dust on the mine roof and the mine floor. (*Id.*) The mine floor had accumulations of loose coal of up to ten inches thick. (*Id.*) Clark found that air was moving in the proper direction in the 003 section, and he detected no methane. (*Id.*) Proper preshift examinations had been conducted in the 003 section, as well. (*Id.*)

4. Air Reversal at the Intake/Return Split

Meanwhile, as Johnson and Gilbert traveled to the 002 section, their man trip experienced mechanical difficulties at the mouth of the 003 section, near Crosscut Nos. 167 and 168, where the preshift examination was going to begin anyway. (Tr1. 119:22–23, 121:4–23.) At the time, Johnson had been informed by Sergent that the 003 section was not being mined. (Tr1. 122:9–14.) As the preshift examination began, Johnson noticed that the air was coming the wrong way. (Tr1. 122:25–123:3.) Instead of blowing at his back toward the 002 section, the air

[11] Johnson testified that he was unsure whether the belts were running between the time he entered the mine and the time he ordered the power to be shut off. (Tr1. 203:5–9.) Clark's notes from the inspection, however, noted that the belts were running. (Ex. P-15, at 5.) Because Clark's notes were written during the inspection itself, I find that the belts were running when Clark and Johnson entered the mine.

was blowing directly in Johnson's face. (Tr1. 123:3–6.) The ventilation had reversed. (Tr1. 123:9.)

Specifically, in this part of the mine, fresh air was supposed to course through Entry Nos. 3 through 6 toward the face, and Entry Nos. 1 and 2 were to function as courses for return air. (Tr1. 125:11–18.) Instead, return air from the 002 section was blowing through the man trip roadways in Entry No. 3 and the belt lines in Entry No. 4 at a rate of 15,000 CFM toward the mine entrance. (Tr1. 127:14–128:1.) Fresh air should have been coursing through Entry Nos. 3 and 4 toward the 002 section. Moreover, the fresh air that should have been flowing through the entries for use at the working faces had come to a standstill. (Tr1. 127:8–13.) Johnson did not find any methane in this area. (Tr1. 128:2–6.) Johnson called Moore and told him to cut the power going to the 002 section because the air was reversed. (Tr1. 128:7–15.) Cutting the power required sending a certified person underground to Crosscut No. 77. (Tr1. 128:19–129:4.) Once Johnson reached the 002 section, he confirmed that the power had been shut off.[12] (Tr1. 129:5–19.)

5. 002 Section – Air Flow and Mining Activity

When Johnson arrived at the 002 section with Gilbert, in an area known as the Maggard Branch (Tr1. 115:23–116:5), Johnson discovered that Entry No. 1 was cut out to the surface but the mine roof was not bolted back, and Entry No. 2 was cut out to the surface but the roof had fallen in. (Tr1. 129:22–130:3.) The continuous miner was located in Entry No. 3, which was partially cut. (Tr1. 130:14–23.) Johnson observed a double-headed roof bolter, two or three shuttle cars, some of which were loaded, two scoops, the belt feeder, which was partially loaded, and the belt lines. (Tr1. 42:12–15, 130:24–131:4.) The belt feeder was located approximately four or five crosscuts from the face. (Tr1. 131:19–22.) Stillhouse had been extracting coal in the section. (Tr1. 130:6–7.) The belt scale report, which measures the output of Mine No. 1, shows that Stillhouse mined nearly seven hundred tons of coal and other material while the fan was off.[13] (Tr1. 107:24–108:19; Ex. P-9.) That coal came exclusively from the 002 section, as the 003 section was inactive during that time period. (Tr1. 122:9–14.)

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[12] Appendix D at the end of this decision shows the mouth of the 003 section where Johnson first determined the air flow had reversed. (Tr1. 119:20–120:7.) During the hearing, Johnson circled the location where he stopped and marked it with his initials. (*Id.*) Johnson also marked the location of the 003 MMU. (Tr1. 136:4–15.)

[13] The time period of the report actually spans from 12 a.m. to 7 a.m. (Ex. P-9.) The fan was turned off at some point between midnight and 12:30 a.m. (Tr2. 17:2–21), and mining without the fan continued until Johnson discovered the fan was off and ordered Osborne and his crew out of the mine (Tr1. 79:22–81:21). Thus, virtually all of the coal shown on the belt scale report had to have been produced while the fan was off.

As for the ventilation conditions, Johnson found that air was flowing into the mine from the cutouts to the surface in Entry Nos. 1 and 2 of the 002 section. (Tr1. 132:24–133:3.) Johnson testified that the air coming from outside the mine was insufficient to ventilate the mine. (Tr1. 133:4–7.) The air current from these entries reversed the air flow in the belt entries, which prevented air from moving in the proper direction. (Tr1. 133:9–14.) Rather than flowing from the main portals to the 002 section and back, air was entering the cutouts and going toward the 003 section. (Tr1. 135:20–24.) Johnson explained that the air traveled in this direction because the distance from "the cutouts to the 003 MMU is much shorter than the distance from the original portals to the 003 MMU." (Tr1. 135:25–136:2.) In other words, the exhaust current generated by the fan at the entrance was pulling air from the cutouts at the 002 section straight to the main portals, instead of from the main portals to the 002 section and back. (Tr1. 175:22–25.) The mine was insufficiently ventilated because air was uncontrollably flowing from the cutouts through the 002 section in the wrong direction. (Tr1. 133:9–15.)

Clark and Gilliam arrived at the 002 section after Johnson and Gilbert. (Tr2. 35:2–8, 35:15–20.) Clark measured the direction of the airflow in the entries using chemical smoke. (Tr2. 36:1–4; Ex. P-15, at 6–7.) Clark determined that return air was flowing from the 002 section back toward the mine entrance through the man trip roadway entry, the belt entry, and the intake entries. (*Id.*) Indeed, the airflow had reversed so that potentially contaminated air passed through areas where miners worked and equipment operated. Intake air should have been flowing toward the working face, sweeping across the area, and then exiting out the return air course. (Tr2. 38:19–23.) Clark detected no methane in the area.[14] (Tr2. 39:10–15.)

6. 002 Section – Roof Control

In addition to investigating the mining activity and air flow at the 002 section, MSHA's Johnson and Clark analyzed the roof conditions. They observed the roof to ensure nothing would fall as they worked. (Tr1. 132:18–21; Tr2. 41:24–42:4.) Their observations corroborated those in the miner's telephone complaint prompting the investigation. (Tr1. 179:14–18.) The mine roof was soft. (Tr1. 179:16–17.) Glue was "running away from the . . . rods" (Tr1. 179:17–18), meaning that the roof bolts were not fully anchored into the mine ceiling (Tr1. 55:8–25). Roof fractures were discovered, and a roof fall had occurred in Entry No. 2, spanning the entire width of the entry and measuring about four-feet thick. (Tr1. 180:1–5; Ex. P-15, at 9.) The roof had sagged in numerous places (Tr1. 180:6), and water was coming from the mine roof in several locations (Ex. P-15, at 9). Stillhouse had installed roof bolts in the entries of the 002 section, and Johnson testified that Stillhouse's installation of the roof bolts was in compliance with the roof control plan, in that the bolts were of the proper length and were properly spaced. (Tr1.

[14] Appendix E at the end of this decision shows the area of the Maggard Branch cutouts and the 002 section. At the hearing, Clark circled the location of the 002 section and marked it with his initials. (Tr2. 36:5–37:8.) Clark drew an arrow to the last open crosscut, labeling it "Air Measurements," and testified that he took the chemical smoke measurements across the area to detect the direction of the airflow. (*Id.*)

244:7–14.) The roof bolt installations on the 002 section included ten-foot cable bolts in all five entries. (Tr2. 74:17–75:6; Ex. P-15, at 9.)

Johnson and Clark found cracks at twenty-four and forty-nine inches in Entry No. 3. (Tr1. 180:6–12; Ex. P-15, at 9.) Johnson and Clark measured the cracks by inserting a standard metal measuring tape into a test hole and checking where the lip at the edge of the tape caught on the rock. (Tr1. 180:6–12.) Johnson acknowledged that the cable bolts supporting the cracks appeared to be functioning properly. (Tr1. 245:15–246:11.)

Additionally, Johnson and Clark observed "hill seams" in Entry No. 3. (Tr1. 180:22–24; Ex. P-15, at 9.) Hill seams are natural vertical cracks in the layers of rock, or "strata," above the mine, which create free areas where the roof can fall. (Tr1. 181:1–7.) Stillhouse had used thin metal straps to support the hill seams rather than the minimum T2 steel channel dictated by its MSHA-approved roof control plan. (Tr2. 45:5–18.) Clark issued a citation for insufficiently supported hill seams in Entry No. 3, which is not at issue in this case. (*Id.*) At the hearing, Johnson noted that because Stillhouse used straps to secure the hill seams, it actually should have narrowed the width of Entry No. 3 to sixteen feet. (Tr1. 244:23–245:14, 261:4–14.)

Johnson and Clark checked the width of the entries near the "outcrop," the area Stillhouse had created for the cutouts where coal was exposed to the surface. (Tr1. 258:15–259:11; Tr2. 43:25–44:6, 64:5–13.) Johnson and Clark testified that Stillhouse's roof control plan required the widths of the entries to be no wider than 18 feet within 150 feet of the outcrop. (Tr1. 258:9–14; Tr2. 43:9–44:4.) Prior to measuring the entries, Johnson could tell by naked eye that the entries exceeded eighteen feet. (Tr1. 241:12–24.) Johnson and Clark measured the width of the entries at the Maggard Branch cutouts between the last open crosscut and the end of those entries. (Tr1. 187:19–188:8; Tr2. 41:14–18; Ex. P-15, at 11.) Clark used the foreman's mount, a device showing distances underground, to confirm that this area was within 150 feet of the outcrop. (Tr2. 44:14–18.) Clark further noted that Philip Gilbert's mine map showed the distance from the last open crosscut to the surface was 110 feet. (Ex. P-15, at 11.)

Clark recorded in his notes the measurements of the entry widths in the outcrop area. (Tr1. 188:3–5; Tr2. 42:7–43:8; Ex. P-15, at 11.) He and Johnson determined that Entry No. 1 was between 17.5 feet and 20 feet wide; Entry No. 2 was between 18.5 feet and 19.5 feet wide; Entry No. 3 was between 19.1 feet and 20 feet wide; Entry No. 4 was between 17.1 feet and 19.6 feet wide; and Entry No. 5 was between 18.3 feet and 18.9 feet wide. (Ex. P-15, at 11.)

During cross examination, Johnson commented on whether the roof fall in Entry No. 2 could have been prevented had Stillhouse complied with its roof control plan's eighteen-foot width requirement. According to Johnson, the roof fall would have occurred even if the width of Entry No. 2 was eighteen feet. (Tr1. 236:8–16.) Once Johnson and Clark measured the width of the entries in the 002 section, they required Stillhouse to install posts to supplement the roof in the outcrop area of the 002 section to abate the violation. (Tr1. 240:12–21.)

C. MSHA's Other Communications With Stillhouse

At the hearing, Johnson and Clark recalled conversations with Stillhouse's management about the company's intent to cut out to the surface prior to December 3, 2006. Johnson became aware of Stillhouse's intent sometime in January or February 2006. (Tr1. 92:12–23.) Johnson reviewed Stillhouse's mining activity and mine maps, and asked Lonnie Moore, the mine superintendent, whether he planned to cut out to the surface. (Tr1. 93:2–13.) Moore confirmed that he planned to do so. (Tr1. 93:12–13.) Johnson told Moore that he needed to submit a ventilation plan for the cutouts because, in his opinion, making the cutouts would "destroy" the mine's ventilation and cut the mine's intake by half. (Tr1. 96:1–18.) Johnson predicted that the cutouts would short-circuit the airflow through the mine by allowing the fan to pull air through the cutouts in the 002 section instead of through the main intake portals at the mine entrance. (Tr1. 104:6–17.) At that time, Johnson did not believe that the cutouts would send air from the 002 section in the wrong direction toward the 003 section. (Tr1. 104:17–18.) Johnson did not recall how Moore replied to his statement about the ventilation plan. (Tr1. 96:19–22.) Prior to the December 3, 2006, Stillhouse never filed with MSHA an amendment to its ventilation plan describing how it would ventilate the mine after cutting to the surface in the 002 section. (Tr1. 95:14–16.)

Clark also testified about Stillhouse's plans to cut to the surface at the 002 section. Clark was aware that Stillhouse had dug an area called a "box cut" on the surface of the Maggard Branch for the 002 section continuous miner to emerge from the underground. (Tr2. 62:13–23.) As early as September 2006, Clark spoke with Moore about Stillhouse's intent to cut to the surface at that location. (Tr2. 62:25–63:7.)

D. Citation and Orders at Issue in this Proceeding

1. Citation No. 6665036 – Failure to Follow Mandated Procedures After Shutoff of Mine Fan

Clark issued Citation No. 6665036 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.313.[15] (Ex. P-11.) The citation's narrative states:

> Evidence from the fan recording chart and witness statement indicates that the main mine fan had been turned off for over 6 hours while miners were underground running coal making a cut through to the surface. When I arrived on site at 06:20 the fan was off and 8 miners were underground. Evidence underground indicated they were producing coal from the 002 section located 26,900 feet underground from the main portal. This mine often produces 100,000 plus cubic feet of methane in 24 hours. The main mine fan had been stopped so the 002 section could cut out side [sic] because when the cut through was made

[15] The parties stipulated that the citation and orders in dispute were issued on the dates indicated on each of the forms generated by Clark. (Tr1. 5:6–9; Resp't Prehr'g Report 1.)

the ventilation system was interrupted causing the ventilation current in the intake airway entries, belt entry, and neutral roadway entry to reverse direction of travel after the fan was restarted. The main mine fan had been intentionally stopped at 00:30 on Sunday morning.

(*Id.* at 1–2.) Clark asserted that eight people were affected by this condition and that fatal injuries were highly likely. (*Id.* at 1.) Clark charged Stillhouse with reckless disregard in violating § 75.313 and determined that the alleged violation was significant and substantial ("S&S").[16] (*Id.*)

2. Order No. 6665037 – Failure to Follow Mandated Procedures in Intentionally Changing Mine's Ventilation by Shutting Off Mine Fan

Clark issued Order No. 6665037 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.324. (Ex. P-12.) The order's narrative states:

The operator made a major change in ventilation on the 002-0 MMU while miners were underground and power was on underground. The operator stopped the main mine fan for over 6 hours while miners were underground and cut the 002-0 MMU to the surface. Two entries were mined to the surface and the main mine fan was restarted with power underground and 7 miners were left underground when 1 miner exited the mine and restarted the fan. The 002-0 MMU intake airway entries, belt entry, and neutral roadway entry experienced a reversal of the direction of the ventilation current when the main mine fan was restarted. This mine is 26,900 feet deep to the point of the cut through and often produces 100,000 plus cubic feet of methane in 24 hours as indicated by air bottle samples. The operator did not submit a plan to the District Manager for the cut out [sic] to the surface and made the cut out [sic] between midnight and 06:20 Sunday morning.

(*Id.* at 1–2.) Clark asserted that eight people were affected by this condition and that fatal injuries were highly likely. (*Id.* at 1.) Clark charged Stillhouse with reckless disregard in violating § 75.324 and determined that the alleged violation was S&S. (*Id.*)

3. Order No. 6665038 – Failure to Follow Roof Control Plan in 002 Section

Clark issued Order No. 6665038 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.220(a)(1). (Ex. P-13.) The order's narrative states:

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

> The mine operator is not following the approved roof control plan for the 002-0 MMU. The 002-0 MMU had cut out to the surface in #1 and #2 entries and had mined #3, #4, and #5 entries to within 40 feet of the surface and had not followed the initial development part of the approved roof control plan. The initial development part requires when mining within 150 feet of the out crop [sic] the entry widths be limited to 18 feet. Entries were measured to be 18.5 feet to 20.5 feet wide in all 5 headings and the last open cross cut. This area also had hill seams and cracks in the mine roof at 24 inches and 49 inches in the #3 entry, and water coming out of the mine roof in several locations. The #2 entry had a roof fall approximately 4 feet thick when cut to the surface.

(*Id.* at 1.) Clark asserted that two people were affected by this condition and that fatal injuries were highly likely. (*Id.*) Clark charged Stillhouse with reckless disregard in violating § 75.220(a)(1) and determined that the alleged violation was S&S. (*Id.*)

4. Order No. 6665039 – Failure to Conduct Adequate Preshift of Wet Area

Clark issued Order No. 6665039 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.360. (Ex. P-14.) The order's narrative states:

> An adequate pre-shift examination was not made of the entire mine before miners entered the mine to run coal. The last date[,] time and initials found on the main line belt power boxes number 1, 2, 3, and 4 was 12/1/2006 at 11:05 am. The mine ran coal both sections on 12/2/2006 1st and 2nd shifts and 12/3/2006 on 002 MMU on 3rd shift. This is a [sic] isolated part of the mine where the main line belts run away from the rest of the mine toward the prep plant. Time[,] date and initials were found at the outby power centers through the regularly traveled part of the mine.

(*Id.*) Clark asserted that eight people were affected by this condition and that permanently disabling injuries were highly likely. (*Id.*) Clark charged Stillhouse with reckless disregard in violating § 75.360 and determined that the alleged violation was S&S. (*Id.*)

E. Criminal Pleas of Stillhouse Employees for Violation of Mandatory Safety Standard

Three Stillhouse supervisory employees—Ira Sergent, Johnny Osborne, and Reggie Raleigh—each pled guilty to one criminal count under 30 U.S.C. § 820(c), for knowingly authorizing, ordering or carrying out a violation of a mandatory health or safety standard for underground coal mines under federal mining laws, and 18 U.S.C. § 2, for aiding and abetting. (Ex. P-4; P-5; P-6.) The elements of the offense admitted by the defendants that are relevant to this decision are:

(a) That at all times relevant to this Indictment, the Defendant was an agent of Stillhouse Mining LLC, operator of Stillhouse Mining No. 1 Mine, in Harlan County, Kentucky, in that the Defendant was charged with responsibility for the operation of all or a part of the mine, and (being a foreman) he supervised the miners at the mine;

(b) That on or about December 3, 2006, the main mine fan was stopped in excess of 15 minutes (approximately six hours) and the miners were not withdrawn from the mine, and the Defendant authorized, ordered or carried out such violation, or aided and abetted his co-defendants in so doing;

(c) That in committing the charged mine safety violation the Defendant's actions were deliberate and intentional (which is to say not accidental), or that he recklessly disregarded the requirements of the mine safety standard;

(Ex. P-4, at 2; Ex. P-5, at 2; Ex. P-6, at 2.) These facts underlie a violation of 30 C.F.R. § 75.313(c)(1), stating: "If ventilation is not restored within 15 minutes after a main mine fan stops—(1) Everyone shall be withdrawn from the mine." (Ex. P-1, at 2.) The parties stipulated to the fact that Sergent, Osborne, and Raleigh were indicted and entered the above-noted guilty pleas and that the pleas pertained to Citation No. 6665036. (Tr1. 5:9–21; Resp't Prehr'g Report 2.)

F. Credibility of the Secretary's Witnesses

1. Daniel Johnson, Field Office Supervisor, MSHA District 7 Field Office

The Secretary's witness Daniel Johnson was the field office supervisor of MSHA's District 7 field office in Harlan, Kentucky, at the time of the issuance of the citation and orders in this case. (Tr1. 37:18–39:7.) Johnson entered the underground coal mining industry immediately after high school when he began working at the Blue Diamond Coal Company's Scotia Mines in 1970. (Tr1. 27:2–6.) Starting out as an apprentice, Johnson eventually became a section foreman. (Tr1. 27:6–8.) As a section foreman, Johnson supervised a crew of men on underground coal production and was responsible for ensuring their health and safety. (Tr1. 28:5–8, 25:18–20.) Johnson was charged with instituting the ventilation plan in his area of the mine, which meant ensuring that the proper amount of air was being delivered to where his crew was producing coal. (Tr1. 28:20–25.) Johnson was a section foreman at Blue Diamond from 1974 to 1978. (Tr1. 30:10–13.) Besides a short seven-month stint as a miner at U.S. Steel following the explosion at the Scotia Mines, Johnson remained at Blue Diamond until 1982 when he took a position with MSHA. (Tr1. 37:4–17.)

As an employee of MSHA, Johnson worked as a regular inspector for ten years. (Tr1. 38:1–4.) Johnson then served as a roof control specialist for five years. (Tr1. 38:4–6.) As a roof control specialist, Johnson evaluated roof control plans, followed up on roof fall accidents, and investigated accidents. (Tr1. 38:10–17.) Additionally, Johnson evaluated mining conditions to ensure that an operator's roof control plan was adequate. (Tr1. 38:15–17.) After working as a roof control specialist, Johnson was promoted to be a field office supervisor, a position he held for ten years. (Tr1. 38:6–9.) As supervisor, Johnson was charged with ensuring that inspections were carried out properly in all of the mines assigned to his work group. (Tr1. 38:18–39:3.) In addition to these qualifications, Johnson is a certified electrician. (Tr1. 193:17–194:1.)

At the hearing, Johnson acknowledged that he was not an expert in "flames and forces," the cause and effect of fire (Tr1. 49:21–24, 205:3–10), a fact highlighted by Stillhouse (Resp't Br 8–9). Nor did Johnson work as a ventilation supervisor or specialist at MSHA. (Tr1. 204:22–25.) Although he lacked these credentials, Johnson testified that through his experience in the industry and at MSHA, he has dealt with ventilation plans and ventilation systems. (Tr1. 205:11–21.) Johnson underwent the same training given to ventilation specialists. (Tr1. 205:17–19.) While working in the coal mining industry and at MSHA, Johnson aided in the recovery efforts at three different mines following explosions at those operations, gaining an understanding of the causes of those disasters. (Tr1. 156:5–157:25.) Despite the fact that Johnson did not work as a ventilation specialist, I still credit his testimony on ventilation issues based on the significant experience he gained working on these issues in the coal mining industry and at MSHA.

Based on Johnson's candid demeanor at the hearing and on his extensive experience in underground coal mining, particularly with regard to roof control and ventilation issues, I afford great weight to his testimony.

2. William Clark, Coal Mine Inspector

The Secretary's other witness was William Clark, the coal mine inspector who issued the citation and orders in this case. (Tr2. 18:18–20, 22:6–9; Exs. P-11, P-12, P-13, P-14.) Clark worked nine years in the underground coal mining industry, mainly for smaller operators. (Tr2. 21:15–22:2.) He held the positions of general laborer, equipment operator, maintenance man, and foreman. (Tr2. 22:3–5.) During the time that Clark worked in private industry, he took courses at Southeast Community College on underground coal mining concerning mining laws, electricity, roof control, ventilation, and maintenance. (Tr2. 20:24–21:14.) Clark joined MSHA in 1999 and had approximately seven years of experience working for the agency at the time the citation and orders were issued in this case. (Tr2. 19:5–10.)

Compared to Johnson, Clark has fewer years of experience working in the coal mining industry and MSHA. At the same time, Clark has an educational background in ventilation and roof control issues and experience in evaluating them as a coal mine inspector. Moreover, at the time the citation and orders were issued in this case, Clark had been the inspector previously

assigned to Mine No. 1 and was very familiar with the operation. (Tr1. 67:9–17.) Clark also had a candid demeanor at the hearing, and based on his educational background and experience in the coal mine industry and MSHA, I afford significant weight to his testimony.

III. Principles of Law and Statutory Analysis

A. General Principles Governing Interpretation of the Statutory Definition of a Flagrant Violation

The Secretary argues that all four alleged violations at issue in this case should be assessed as "flagrant." (Pet'r Br. 22–23, 32, 40, 50–51.) Section 110(b)(2) of the Mine Act sets forth the parameters for concluding that a violation is flagrant and provides for the assessment of enhanced civil penalties:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

The question of whether an alleged violation is "flagrant" under section 110 of the Mine Act presents a case of first impression for this Administrative Law Judge and the Commission. The threshold issue in any case involving statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, then the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In analyzing whether Congress expressed a specific intent on a particular issue, "courts utilize traditional tools of construction, including an examination of the 'particular statutory language at issue, as well as the language and design of the statute as a whole.'" *Twentymile Coal Co.*, 30 FMSHRC at 750 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The statute's legislative history and purpose, as well as related judicial precedent are also relevant to this analysis. *Twentymile Coal Co.*, 30 FMSHRC at 750–52; *Emery Mining Corp.*, 9 FMSHRC 1997, 2001–04 (Dec. 1987).

The examination of whether the statute expresses such a clear congressional intent is commonly referred to as a "*Chevron* Step One" analysis. *Coal Emp't Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Thunder Basin Coal*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). If the statute is ambiguous or silent on the point in

question, a second inquiry, commonly referred to as a "*Chevron* Step Two" analysis, is required to determine whether an agency's interpretation of the statute is a reasonable one. *Coal Emp't Project*, 889 F.2d at 1131; *Thunder Basin Coal*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining*, 16 FMSHRC at 13. In conducting a *Chevron* Step Two analysis, a court may impose its own interpretation of a statute only in the absence of an administrative interpretation. *Chevron*, 467 U.S. at 843.

B. Whether Congress Has Expressed a Clear Intent on the Definition of a Flagrant Violation

1. Whether the Mine Act Demonstrates Congress's Clear Intent

Chevron Step One analysis requires an evaluation of whether Congress has expressed a clear intent concerning the meaning of a flagrant violation. *Chevron*, 467 U.S. at 842. The flagrant violation statutory provision uses words such as "reckless," "repeated," "failure," and "reasonable efforts to eliminate." 30 U.S.C. § 820(b)(2). Given the subjective nature of these terms, an analysis of whether a flagrant violation exists raises threshold questions such as, what standard should govern the determination of reckless conduct? What actions constitute "reasonable efforts to eliminate?" Application of these terms also requires a fact-intensive analysis of the operator's conduct to resolve issues such as whether an operator committed a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard" under 30 U.S.C. § 820(b)(2). The statutory provision does not provide any guidelines for interpreting or applying these terms. *Id.*

Sections 3 and 318 of the Mine Act set forth definitions relevant to underground coal mining. 30 U.S.C. §§ 802, 878. Neither of these sections defines any of the terms in the definition of a flagrant violation. *Id.* Nonetheless, the portion of the definition of an "imminent danger" concerning the risk of harm is similar to the language used in the flagrant violation provision: "'imminent danger' means the existence of any condition or practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated." § 802(j) (emphasis added). However, unlike the definition of a flagrant violation, the expected level of harm of an imminent danger is qualified by the caveat that such harm must be reasonably expected "before such condition or practice can be abated." *Id.* A flagrant violation is concerned with harms already resulting from the violation, as well as reasonably expected ones. § 820(b)(2). The definitional sections of the Mine Act do not clarify the inherent ambiguity of the definition of a flagrant violation.

Section 104(d)(1) of the Mine Act directs the Secretary to make certain findings of negligence and gravity, where warranted. 30 U.S.C. § 814(d)(1). Citations issued under section 104(d)(1) shall include a negligence finding that the operator committed an "unwarrantable failure to comply with [a] mandatory health or safety standard[]." *Id.* Such citations shall also include a gravity finding that the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard

[S&S]." *Id.* The quoted statutory language is quite different from the language that defines a flagrant violation. *Compare id. with* 30 U.S.C. § 820(b)(2) (requiring, for example, a "reckless or repeated failure to make reasonable efforts to eliminate a known violation"). The unwarrantable failure and S&S language of section 104(d)(1) of the Mine Act does not elucidate Congress's intent on the meaning of a flagrant violation.

Finally, section 110 of the Mine Act provides for the imposition of sanctions for certain violations involving conduct that has been committed "knowingly." 30 U.S.C. § 820(c), (d), (f), (h). These subsections describe "knowing" conduct in the commission of the violation, which is somewhat different than the conduct described by the flagrant violation, which involves a reckless failure to make reasonable efforts to eliminate a "known" violation. *Compare id. with* 30 U.S.C. § 820(b)(2) (concerning the "failure to make reasonable efforts to eliminate a known violation"). Although these subsections may help illuminate the meaning of "known" in the definition of a flagrant violation, they do not illuminate the other legal terms in the definition. These sections cannot support the conclusion that Congress has definitively spoken on the definition of a flagrant violation, either.

Based on the above considerations, I determine that neither the definition of the flagrant violation itself nor the other parts of the Mine Act demonstrate Congress's clear intent on the definition of a flagrant violation.

2. Whether the Legislative History of the Statutory Provision Demonstrates Congress's Clear Intent

Congress created the "flagrant" violation, providing for enhanced civil penalties, when it passed the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). MINER Act, Pub. L. No. 109-236, § 8, 120 Stat. 493, 501 (codified as amended at 30 U.S.C. § 820(b)(2)). According to the Senate Report accompanying the MINER Act, Congress passed this law "to further the goals set out in the [Mine Act] and to enhance worker safety in our nation's mines." S. Rep. No. 109-365, at 1 (2006). Congress intended to accomplish several objectives, including "increase[ing] enforcement and compliance to improve mine safety." *Id.* The MINER Act came in response to the unusually high number of mining fatalities that occurred in the first half of 2006 at the Sago, Alma, and Darby mines. *Id.* at 2. Based on those incidents and a concurrent rise in coal production, Congress was concerned that mining accidents could become more frequent. *Id.*

The Senate Report accompanying the MINER Act simply restates the definition of a flagrant violation and the statutory cap on the civil penalty amount for that violation. S. Rep. No. 109-365, at 14. That information does not clarify how a flagrant violation should be determined. Nonetheless, the comments of the law's sponsors offer some perspective on the purpose of the flagrant violation penalty. The penalty targets "'bad actors,'" who fail to take their safety responsibilities seriously by providing an increased maximum penalty for flagrant violators. 152 Cong. Rec. S4619 (daily ed. May 16, 2006) (statement of Sen. Michael Enzi). *See also* 152

Cong. Rec. E1071 (daily ed. June 8, 2006) (statement of Rep. Jerry F. Costello) (supporting "stiffer penalties for flagrant violations of the law"). Upon signing the MINER Act into law, President George W. Bush stated: "[T]o ensure compliance with the law, the MINER Act will increase the maximum penalty for flagrant violations of mine safety regulations nearly four-fold." Presidential Statement on Signing the Mine Improvement and New Emergency Response Act of 2006, 2006 U.S.C.C.A.N. S27 (June 15, 2006).

The legislative history of the MINER Act yields no specifics on the meaning of the language of section 110(b)(2). The only thing that is apparent from the legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety. That general intent, however, is not sufficient to constitute a clear statement by Congress as to the specific definition of a flagrant violation.

Because neither the statutory flagrant violation provision, the Mine Act, nor the legislative history of the MINER Act offers a clear statement on the specific meaning of a flagrant violation, I determine that the statute is ambiguous and that analysis under *Chevron* Step Two is required.

C. Whether the Secretary Has Provided an Interpretation of a Flagrant Violation

No regulatory guidance dictates how the statute should be applied to this case.[17] In arguing that the citation and orders at issue are flagrant, the Secretary quotes the statutory definition of a flagrant violation and proceeds to argue how the facts support her position. (Pet'r Br. 22–23, 32, 40, 50–51.) The Secretary does not advance a particular interpretation of the flagrant violation provision. (*Id.*) If neither congressional intent nor an administrative interpretation bears on the meaning of a statutory provision, its interpretation is reserved for the courts. *Chevron*, 467 U.S. at 843.

[17] The Secretary implemented the flagrant statutory provision at 30 C.F.R. § 100.5(e), which did not become effective until April 23, 2007, after the issuance of the citation and orders in this case. Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 (Mar. 22, 2007). The Commission has expressed reservations over the retroactive application of the Secretary's regulations. *Drummond Co.*, 14 FMSHRC 661, 691–92 (May 1992) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Neither party cites § 100.5(e) in briefing whether the citation and orders in this case constitute flagrant violations. (Pet'r Br.; Resp't Br.; Resp't Reply Br.) Even if these considerations did not weigh against application of the regulation, the regulation merely restates the statutory definition of a flagrant violation. *Compare* 30 C.F.R. § 100.5(e) *with* 30 U.S.C. § 820(b)(2) (containing same language in statutory provision as in regulatory provision). Accordingly, my analysis is restricted to consideration of the statutory language.

Here, "[i]n the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008) (citing *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987–88 (Dec. 2006)). The statute's plain meaning is the linchpin of this analysis. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); *Emery Mining*, 9 FMSHRC at 2001 (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). As noted above, other considerations, such as the statute's purpose, are relevant to statutory interpretation as well. *Twentymile Coal*, 30 FMSHRC at 750–52; *Emery Mining*, 9 FMSHRC at 2001.

The interrelationship of the flagrant violation provision with the other sections of the Mine Act is also an important consideration. In setting forth its interpretation of the unwarrantable failure language, the Commission observed that the Mine Act's enforcement scheme promotes mining operators' compliance with its requirements by providing "'increasingly severe sanctions for increasingly serious violations or operator behavior.'" *Emery Mining*, 9 FMSHRC at 2000 (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981)). In *Emery Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of this scheme of escalating sanctions. *Emery Mining*, 9 FMSHRC at 2000–04. Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to $220,000 per violation. 30 U.S.C. § 815, 820(b)(2). Because the flagrant violation provision's context in the Mine Act is relevant to its interpretation, application of the provision should comport with the other sections of the Mine Act and the case law interpreting those sections.

D. Plain Meaning of the Definition of a Flagrant Violation

Based on the plain language of the statutory provision, the following four elements comprise a flagrant violation:

(1) Reckless or repeated failure to make reasonable efforts to eliminate
(2) A known violation of a mandatory health or safety standard
(3)(a) That substantially and proximately caused or
(3)(b) Reasonably could have been expected to cause
(4) Death or serious bodily injury

30 U.S.C. § 820(b)(2).

Here, I credit Stillhouse's argument that the alleged violations were isolated incidents, as opposed to repeated occurrences of similar past conduct. (Resp't Br. 6–7.) The Secretary does not dispute this contention. This case also does not involve any injuries. Therefore, in analyzing whether the violation was flagrant, I consider only whether Stillhouse committed a "reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety

standard that reasonably could have been expected to cause death or serious bodily injury." 30 U.S.C. § 820(b)(2). I now turn to determining the plain meaning of the statutory terms at issue in this case.

1. Reckless Failure to Make Reasonable Efforts to Eliminate a Known Violation of a Mandatory Health or Safety Standard

a. Reckless

In the absence of clear congressional intent on the meaning of the statute or an administrative interpretation, application of the statute must begin with the plain meaning of its terms. *Meyer*, 510 U.S. at 476; *Twentymile Coal*, 30 FMSHRC at 750. "Reckless" is commonly understood as "without thinking or caring about the consequences of an action." *The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). As a legal term, "reckless" has been described as conduct—

> [c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash. . . . Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.

Black's Law Dictionary 1298 (8th ed. 2004). For comparative purposes, in torts—

> a person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Restatement (Third) of Torts: Phys. & Emot. Harm § 2 (2010)

Based on the common meaning of the word "reckless," an operator is "reckless" for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.[18] The risk of harm is "unjustifiable" if the burdens of

[18] In their arguments, the parties rely on the definition of "reckless disregard" at 30 C.F.R. § 100.3, Table X, which is described as "conduct which exhibits the absence of the slightest degree of care." (Pet'r Br. 21, 30, 38, 49; Resp't Br. 7, 15.) The parties' focus on § 100.3 is misplaced, as the purpose of 30 C.F.R. part 100 is to enable the Secretary to arrive at the civil penalty amount she believes is appropriate. The Commission, not the Secretary, is charged with the authority of assessing all civil penalties under the Act. 30 U.S.C. § 820(i). The Commission may assess penalties by operation of law or in the cases brought before it. *E.g.*, 30 U.S.C.

ameliorating the risk are so slight relative to the risk that the operator's failure to take precautions demonstrates indifference to the risk. Restatement (Third) of Torts § 2.

The term "reckless" should not be interpreted in isolation from the remaining elements of the violation. "It is a tenet of statutory interpretation that [words should be interpreted] 'in their aggregate [to] take their purport from the setting in which they are used.'" *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). In interpreting the term "unwarrantable failure," the Commission explained:

> With regard to the phrases "lack of due diligence" and "lack of reasonable care" also appearing in these sources [defining the term "failure"], we recognize that the phrases, if considered in isolation, can be viewed as referring to an ordinary negligence test. However, ascribing such a meaning to "unwarrantable failure" cannot be reconciled with either the purpose of unwarrantable failure sanctions or with the ordinary meaning of the term unwarrantable failure itself.

Emery Mining, 9 FMSHRC at 2004.

A flagrant violation involves an operator's reckless failure to eliminate the violation "substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). The statute's text plainly states that the risk involved in a flagrant violation is the reasonable risk of death or serious bodily injury. Therefore, an operator is reckless for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury in failing to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.

b. Failure to Make Reasonable Efforts to Eliminate

"Failure" is commonly understood as "lack of success" and "the omission of expected or required action." *The New Oxford American Dictionary, supra,* at 604. In the legal context, the definition of failure is nearly identical, meaning "1. Deficiency; lack; want. 2. An omission of an expected action, occurrence, or performance." *Black's Law Dictionary, supra*, at 631. "Reasonable" has been understood by laypersons and lawyers as "having sound judgment; fair and sensible" or "as much is appropriate or fair [under the circumstances]; moderate." *Black's Law Dictionary, supra*, at 1293; *The New Oxford American Dictionary, supra,* at 1411. "Effort" means a "vigorous or determined attempt." *The New Oxford American Dictionary, supra,* at 540. And "eliminate" means to "completely remove or get rid of (something)." *Id.* at 548.

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§ 815(a), (d). Given that the regulatory term "reckless disregard" is used in the context of the Secretary's own formulation of proposed penalties, rather than the Commission's disposition of her proposals, the term bears limited relevance to interpreting the statutory definition of a flagrant violation.

The term "reasonable efforts" necessarily refers to some standard by which the operator's conduct is measured. The law of torts has thoroughly explored the concept of the reasonableness of an actor's conduct and evaluates it according to the standard of care followed by the reasonably prudent person. Restatement (Third) of Torts § 3 cmt. a. For the purposes of imposing civil penalties, the Commission uses the reasonably prudent person test to determine whether, in light of the facts and circumstances surrounding the operator's conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to comply with an ambiguously worded mandatory health and safety standard. *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008) (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

In a case involving an alleged flagrant violation, the question is whether the operator failed "to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard." This question is analogous to a case involving the reasonably prudent person test. Both types of cases require analysis of whether the operator was subject to a legal duty to take certain actions in operating its mine. In applying the reasonably prudent person test to the flagrant violation provision, the question becomes "whether, in light of the facts and circumstances surrounding the operator's conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to eliminate the known violation." *Phelps Dodge*, 30 FMSHRC at 656. If an operator had a legal duty to take certain steps to eliminate the known violation, then the next step in establishing a flagrant violation is to show that the operator's failure to eliminate the known violation was reckless.

Under the commonly accepted definitions of the terms of the flagrant violation provision, an operator commits a "failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard" when, in light of all the facts and circumstances of the violation, it does not take the steps a reasonably prudent person would have taken to correct the violation. As stated by the Commission, a reasonably prudent person is "familiar with the mining industry and the protective purposes of [a given health or safety] standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). The reasonably prudent person test is objective and accounts for all of the facts and circumstances surrounding the operator's conduct. *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC at 656 (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)); *Alabama By-Products Corp.*, 4 FMSHRC at 2129 .

Based on the foregoing analysis of the plain meaning of 30 U.S.C. § 820(b)(2), a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard" occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.

c. Known Violation of a Mandatory Health or Safety Standard

As for the second element of a flagrant violation, the Secretary must show that the operator recklessly failed to make reasonable efforts to eliminate a "known violation of a mandatory health or safety standard." 30 U.S.C. § 820(b)(2). To "know" means to "be aware of through observation, inquiry, or information." *The New Oxford American Dictionary*, *supra,* at 937. In the legal context, "knowledge" may be understood as "actual" or "constructive." *Black's Law Dictionary*, *supra*, at 888. Actual knowledge may be "express," which is "[d]irect and clear knowledge," or it may be "implied," which is "[k]nowledge of such information as would lead a reasonable person to inquire further." *Id.*

The Commission has interpreted "knowingly" under section 110(c) of the Mine Act. Section 110(c) holds "any director, officer, or agent of [an operator] who *knowingly* authorized, ordered, or carried out such violation, failure, or refusal" liable for "civil penalties, fines, and imprisonment." 30 U.S.C. § 820(c) (emphasis added). The Commission has explained "[t]he proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition." *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)). Under this inquiry, "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" *Cougar Coal*, 25 FMSHRC at 517 (quoting *Kenny Richardson*, 3 FMSHRC at 16). The Commission's understanding of "knowingly" under section 110(c) embraces the concepts of implied and express actual knowledge. The plain meaning of "known" accords with the commonly understood meaning of "knowingly" under the Mine Act.

The meaning of "known" may even embrace the concept of constructive knowledge, which is "[k]nowledge that one using reasonable care or diligence should have."[19] *Black's Law Dictionary*, *supra*, at 888. However, in this case, the Secretary argues that Stillhouse failed to

[19] In contrast to implied actual knowledge, a person's constructive knowledge of a particular matter derives solely from his or her duty to have acquired that knowledge. *Black's Law Dictionary*, *supra*, at 888. Implied actual knowledge merely concerns a person's awareness of circumstances that give rise to a duty to inquire about a particular matter. *Id.* Holding an operator responsible for constructive knowledge has been recognized under the Act. *See, e.g.*, *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 364 (D.C. Cir. 1997) ("The Commission's interpretation of section 110(c), as we understand it, is a fair interpretation of the statutory language. In essence, the Commission has defined 'knowledge' for purposes of section 110(c) to include both actual and constructive knowledge of a violative condition."); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1767–69 (Nov. 1997) (concluding that to establish an underground coal mine operator's violation of 30 C.F.R. § 75.323 for failure to take mandated actions in response to a one percent methane concentration in certain areas of the mine, the Secretary needs to establish that the operator had constructive knowledge of the methane concentration).

eliminate violations it actually knew about. (Pet'r Br. 23, 32, 40, 50–51.) The question of whether "known" under 30 U.S.C. § 820(b)(2) embraces constructive knowledge of a violation is not before me. Based on the plain meaning of the statute, the reference to a "known violation" refers to the operator's express or implied actual knowledge of the violation.

The only adjective modifying "violation" is "known." 30 U.S.C. § 820(b)(2). The plain text of the statute does not require the violation to have already been cited by MSHA. *Id.* The flagrant violations at issue in this case had not yet been cited by MSHA during the time Stillhouse allegedly committed them.

Before concluding that a prior citation from MSHA is not required, the flagrant violation's location under section 110(b) of the Mine Act, entitled "Civil penalty for failure to correct violation for which citation has been issued," must be addressed.[20] 30 U.S.C. § 820(b). The Supreme Court has stated that "[t]he caption of a statute . . . 'cannot undo or limit that which the [statute's] text makes plain.'" *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Trainmen v. Baltimote & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947)). Indeed, a statute's overall construction should be considered. *Twentymile Coal Co.*, 30 FMSHRC at 750. Section 110(a) of the Mine Act provides a civil penalty when an "operator . . . fails to correct a violation for which a citation has been issued . . . within the period permitted for its correction." 30 U.S.C. § 820(b)(1). Section 110(b) does not expressly require a flagrant violation to have been previously cited by MSHA. *Id.* A court should presume that when Congress includes specific language in one section of a statute but not in another section, it meant to do so. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16 (1983)). Given that Congress expressly omitted the requirement that section 110(b) involve a cited violation, the known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it.

2. Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

Finally, the third and fourth elements of a flagrant violation require the Secretary to show that Stillhouse's "reckless . . . failure to make reasonable efforts to eliminate a known violation *. . . reasonably could have been expected to cause . . . death or serious bodily injury.*" 30 U.S.C. § 820(b)(2) (emphasis added). As noted above, "reasonable" is what is fair or sensible under a particular set of circumstances. *Black's Law Dictionary, supra*, at 1293; *The New Oxford American Dictionary, supra,* at 1411. To "expect" means to "regard (something) as likely to happen." *The New Oxford American Dictionary, supra*, at 593. As understood by the legal

[20] In promulgating the regulation implementing the statutory definition of a flagrant violation, which is not at issue in this case, *supra* note 17, the Secretary explained her position that a flagrant violation need not involve a violation that has been cited by MSHA, Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592, 13,622 (Mar. 22, 2007). Stillhouse did not raise the issue of whether a flagrant violation needs to have been previously cited by MSHA and thus has conceded this point.

community, an "expectation" is "[t]he act of looking forward," "anticipation," or "[a] basis on which something is expected to happen." *Black's Law Dictionary, supra*, at 1293. To "cause" is "[t]o bring about or effect." *Id.* at 235; *see The New Oxford American Dictionary, supra*, at 272 (defining cause as to "make (something) happen"). Based on the plain meaning of the statute's terms, for the purposes of establishing a flagrant violation, an operator's conduct "reasonably could have been expected to cause death or serious bodily injury" when, based on all of the facts and circumstances surrounding the operator's reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator's conduct was likely to bring about death or serious bodily injury.

IV. Legal Analysis, Further Findings of Fact, and Conclusions of Law

A. Citation No. 6665036

1. Issues Presented

Citation No. 6665036 alleges a violation of 30 C.F.R. § 75.313, a mandatory safety standard. Stillhouse stipulated to the fact of the violation in Citation No. 6665036. (Tr1. 5:21–22; Resp't Prehr'g Report 2.) The parties presented the following issues in regard to Citation No. 6665036:

a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2);

b. Whether Stillhouse acted with reckless disregard in committing the violation;

c. Whether the violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.313;

d. Whether the violation was highly likely to result in fatal injuries to eight miners; and

e. Whether the gravity of the violation of 30 C.F.R. § 75.313 was S&S.

(Pet'r Prehr'g Report 2–3; Resp't Prehr'g Report 2.)

2. The Parties' Arguments

a. The Secretary

The Secretary argues that Stillhouse intentionally shut off its mine fan and continued to produce coal underground while it cut to the outside of the mountain at the 002 section. (Pet'r Br. 12–14.) According to the Secretary, when Stillhouse cut to the outside, it destroyed the mine's ventilation system and inhibited the ventilation system's ability to clear methane and coal dust from areas where miners were working. (*Id.* at 19.) She believes these conditions created a high likelihood that eight miners working underground during the fan shutoff would suffer significant injury or death from a mine explosion. (*Id.* at 14–16, 18–21.) She also states these conditions exposed the miners to hazards associated with reduced visibility and black lung disease. (*Id.* at 15–16, 20–21.)

Relying primarily on the guilty pleas of three of Stillhouse's supervisors to criminal charges arising from the facts underlying this violation, the Secretary argues that Stillhouse "exhibited absolutely no care for the health and safety of the eight miners underground when it directed them to continue mining when the mine fan had been turned off." (Pet'r Br. 21.) These guilty pleas underlie the Secretary's assertions that Stillhouse showed reckless disregard in committing this violation and committed an unwarrantable failure to comply with 30 C.F.R. § 75.313. (*Id.* at 20–21.)

As for the Secretary's assertion that Stillhouse's violation was flagrant under 30 U.S.C. § 820(b)(2), she emphasizes her position that Stillhouse intentionally shut down the mine fan, disabled the mine fan alarm, and continued to mine coal. (Pet'r Br. 23.) The Secretary believes that Stillhouse would not have ceased its violation but for the intervention of Johnson and Clark's inspection of the mine. (*Id.* at 23.) Because Stillhouse's violation was highly likely to cause death or serious injury, the Secretary asserts that the violation was flagrant. (*Id.* at 23.)

b. Stillhouse

Stillhouse asserts that the Secretary's case relies on the erroneous assumptions that Mine No. 1 had no ventilation while the fan was off and that the miners were exposed to dangerous levels of dust and methane. (*Id.* at 5, 8–11; Resp't Reply 3–4.) According to Stillhouse, the Secretary has presented no proof on the underground conditions of the mine while the fan was off. (Resp't Br. 7.) Stillhouse highlights the statements of two of its foremen, who asserted that Mine No. 1 had adequate airflow from natural ventilation. (Resp't Br. 7; Resp't Reply 3.) Stillhouse also asserts that the Secretary has not shown why the fan was turned off or who ordered it turned off. (Resp't Br. 7.) Stillhouse argues that none of its management knew that the air had reversed when the mine fan was restarted. (*Id.* at 7.) Stillhouse further criticizes the Secretary's case based on Johnson's and Clark's actions during their inspection. (Resp't Br. 11.)

As for whether this violation is flagrant, Stillhouse notes that little guidance has been provided on this issue. (Resp't Br. 6.) Stillhouse points out that it had not previously violated 30 C.F.R. § 75.313 and that Citation No. 6665036 constituted an isolated incident. (Resp't Br. at 6–7.) It argues that in order to establish a flagrant violation, the Secretary must establish "(1) reckless conduct, and (2) reckless conduct which could reasonably be expected to cause death or serious bodily injury." (*Id.* at 7.) Based on the preceding considerations, Stillhouse argues that the Secretary has not satisfied her burden as to the gravity and negligence of this violation. (*Id.* at 7–11.)

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.313

At approximately midnight on December 3, 2006, Stillhouse cut to the outside of the 002 section of Mine No. 1 and deliberately shut down its mine fan, disabling the only mechanical device ventilating the mine. (Tr1. 256:11–24.) The fan's voluminous airflow, typically around 230,000 CFM, ceased. (Tr1. 166:17–24.) The lack of air movement was visibly evident—upon Inspector Clark's discovery of the fan shutoff he saw, at most, negligible air movement at the fan. The measurable, significant reduction in air flow resulting from the fan shutoff severely compromised the circulation of fresh air through Mine No. 1.

The mandatory safety standard at 30 C.F.R. § 75.313 required Stillhouse to take several steps following the mine fan shutoff. When the fan stopped, Stillhouse was required to turn off the equipment in the 002 section and to withdraw miners from the area. § 75.313(a). By the time the fan had been shut down for fifteen minutes, Stillhouse was required to have withdrawn all of its miners from the mine and to have turned off all of the underground electrical circuits and equipment, except equipment and electrical circuits necessary to bring miners to the surface. § 75.313(c). Stillhouse followed none of these steps. Rather, Stillhouse continued to mine coal, extracting nearly 700 tons of coal and other materials from the 002 section.

Ample sources of methane were present in the mine during the six hours the mine fan was off, e.g., the coal exposed in the miles of entries in Mine No. 1, the Imboden seam lying under the mine, and the continuous miner's extraction of coal at the cutouts. Three air samples taken over a nine-month period preceding December 3, 2006, revealed daily emission rates between 128,455 and 187,006 cubic feet per day. (Tr1. 105:14–106:22; Ex. P-8.) The Mine Act requires spot inspections when a mine's methane emissions rate reaches 200,000 cubic feet per day. 30 U.S.C. § 103(i). Although the methane emissions levels at Mine No. 1 did not reach this threshold, they came close and remained quite high. Mine No. 1 had a history of emitting highly significant quantities of methane.[21]

[21] The amount of methane released by the extraction of coal at the cutouts was expected to be less than the amount of methane released deeper inside the mine. (Tr1. 222:14–19.) The air measurements taken in Mine No. 1 during the nine-month period prior to December 3, 2006, showed a trend of decreasing methane emissions, a point highlighted by Stillhouse. (Resp't Br.

In addition to methane, Stillhouse's mining activities supplied significant sources of float coal dust, the presence of which lowers the concentration of methane necessary to create the risk of a mine explosion. Stillhouse operated a continuous miner. It also delivered coal out of the mine via its extensive belt haulage system, which spans for miles through the mine.

Between January 6, 2006, and December 3, 2006, Stillhouse received twenty section 104(a) citations under 30 C.F.R. § 75.400 for accumulations of combustible materials, such as coal dust. (Ex. P-10, at 4.) Four of these were designated S&S, including the one issued by Clark during his inspection on December 3, 2006, for float coal dust on the mine roof and the mine floor of the 003 section. (*Id.*) On cross-examination, Johnson referenced this citation (Tr1. 223:9–14) in support of his determination that dust was a problem in Mine No. 1 during the fan shutoff (Tr1. 226:9–11). Evidence of past hazards is relevant to assessing the gravity of a violation. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1263–64 (Aug. 1992) (affirming the Administrative Law Judge's decision that the operator committed an unwarrantable failure to comply with a mandatory safety standard, which relied, in part, on the operator's history of past violations); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (affirming the Administrative Law Judge's decision, which relied, in part, on prior mine inspections' findings of non-explosive concentrations of methane). These violations underscore the significant risk of float coal dust accumulations in Mine No. 1.

Numerous sources of methane and float coal dust were present in Mine No. 1 during the fan shutoff on December 3, 2006. With no effective, controlled ventilation system circulating fresh air through Mine No. 1, the six-hour long mine fan shutdown provided a sufficient amount of time for methane to build up in the mine. (Tr1. 227:15–21.) The evidence in this case more than adequately establishes the presence of a high risk of explosive accumulations of methane and float coal dust during the early morning hours of December 3, 2006. Indeed, even Stillhouse only goes so far as arguing that "[a]t most, [the gravity of this violation] should have been considered only 'reasonably likely.'" (Resp't Reply 4.)

Many potential ignition sources were present in the hazardous underground conditions created by Stillhouse. During the fan shutdown, Stillhouse operated non-permissible equipment throughout Mine No. 1, which has electrical components that can ignite air contaminated with methane and float coal dust. (Tr1. 143:14–22, 144:8–21, 154:15–24.) Stillhouse's pumping

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9.) The amount of methane emitted by a coal mine may indeed vary. (Tr1. 106:23–107:1.) Nonetheless, the mere three data points on Mine No. 1's methane emissions taken over a nine month period do not constitute a preponderance of evidence establishing a definite trend in the methane emissions rate at Mine No. 1. Mine No. 1's methane emissions rate could have been higher or lower than the readings in the record. What is true of all of Mine No. 1's methane emissions readings is their indication that Mine No. 1 released significant volumes of methane. Given the substantial number of methane sources in Mine No. 1 and its history of elevated methane emissions, the evidence establishes a very high likelihood that Stillhouse was emitting a significant amount of methane on December 3, 2006.

equipment was non-permissible. (Tr1. 154:20–22.) The feeder and belt line, including the drive units at each location where the direction of coal delivery out of the mine changes, were non-permissible pieces of equipment. (Tr1. 132:8–13, 192:1–194:6.) The power centers running the continuous miner and shuttle cars on the 002 section were non-permissible. (Tr1. 46:14–18.) Stillhouse acknowledges that this equipment could have sparked a mine explosion. (Resp't Br. 9.)

Mine No. 1's belt haulage system provided another ignition hazard. The belt haulage system has thousands of rollers, and any number of them could have become jammed with coal or mud, creating friction between the belt and stuck roller. (Tr1. 194:16–17, 196:2–8.) These jams are not unusual, and the heat generated by friction between the belt and stuck roller is a potential ignition source. (Tr1. 196:2–9.) Belt haulage systems are a major source of underground coal mine fires. (Tr1. 194:15–16.) The thousands of rollers of Stillhouse's belt haulage system provided thousands of potential contact points for friction fires.

Finally, Stillhouse mined in the 002 section, and the sparks generated by the continuous miner's ripper and the roof bolter striking rock could have ignited methane or float coal dust. (Tr1. 45:25–46:4, 49:4–24.) During the mine fan shutoff, Stillhouse ran non-permissible equipment, an extensive belt haulage system, and spark-generating mining equipment, all of which constituted potential ignition sources. Potential ignition sources were abundant throughout Mine No. 1 during the fan shutoff.

The fan shutoff also compromised the carbon monoxide monitoring system at Mine No. 1 used for fire suppression. Normally, should a fire occur in the mine, the air current generated by the fan passes smoke from the fire over the system's sensors, warning the miners. (Tr1. 197:5–11.) These sensors are located 1000 feet apart. (Tr1. 197:12–13.) Without air moving properly through the mine to blow the mine fire's smoke over one of the sensors, a significant fire could have developed before the system alerted the miners. (Tr1. 197:11–14.) For example, the man trip roadway passed the Wet Area, the location where the coal belts turn. Each turn of the belts requires separate belt lines and equipment, all of which are potential ignition sources. A fire could have developed in this area and gone undetected until the miners reached it on their way out of the mine at the end of their shift. By impairing the carbon monoxide monitoring system's ability to detect fires, the fan shutoff further compounded the risk of death or serious injury.

When Stillhouse shut off the mine fan and continued to mine coal, it created a high likelihood that combustible mixtures of methane and coal dust would accumulate in the mine. The mine teemed with potential ignition sources, and the compromised carbon monoxide monitoring system compounded the chances that miners would encounter a mine fire. Stillhouse's failure to rectify its violation of 30 C.F.R. §75.313 by continuing to mine coal for six

hours during the fan shutoff created the high likelihood of a deadly mine explosion and exposed the eight miners working underground to the high risk of death.[22]

Stillhouse's main argument is that the Secretary did not show specific evidence of a buildup of combustible methane or dust in the mine on December 3, 2006. (Resp't Br. 8–9.) Clark attempted to take an air sample at the fan to check for methane, but the sample was lost. Neither Johnson nor Clark detected methane during their underground inspection of the mine.

The negative air samples relied upon by Stillhouse do not undercut the high risk of death or serious bodily injury created by its violation. Clark took an air sample at the mine fan, which draws air from the entire mine. Yet Clark did not take this sample until after foreman Ira Sergent had switched the mine fan back on. Even if Clark had successfully taken a sample, it would have revealed the methane concentration of air drawn from all areas of the mine, not any information about localized areas of high methane concentrations that may have formed during the six hours Stillhouse mined without the fan.

Also, Johnson and Clark took their underground methane measurements after Stillhouse had ceased its mining activities and restarted the mine fan. The cessation of mining once the fan restarted reduced the number of methane sources in Mine No. 1, as coal mining releases methane. Johnson and Clark also let the mine fan circulate fresh air through the mine for an hour to clear methane accumulations before conducting their underground inspection. Johnson and Clark did not enter Mine No. 1 until they had determined it was safe to do so. (Tr1. 231:5–14; Tr2. 57:20–58:7.)[23] Through the mitigation of one source of methane and by allowing the mine fan to circulate large volumes of air through the mine, it is not surprising that Johnson and Clark

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[22] The Secretary relies on evidence that mining with the fan off created the risk that float coal dust would impair the miners' ability to see underground, which could have resulted in injuries, such as being struck by equipment. (Tr1. 151:9–153:4; Pet'r Br. 15–16, 20–21, 23.) The Secretary also points to the heightened risk of black lung disease arising from increased coal dust exposure. (Tr1. 176:21–177:23; Pet'r Br. 16, 20–21, 23.) Stillhouse disputes the Secretary's characterization of these particular risks. (Resp't Br. 11.) Given Mine No. 1's compromised ventilation and the numerous sources of float coal dust during the mine fan shutoff, Stillhouse's actions created a reasonable risk of exposure to heightened levels of float dust. This risk, however, stands in contrast to the immediate, serious chance of death or severe bodily injury from a mine explosion created by Stillhouse's conduct. Moreover, the evidence establishing this risk is much less extensive than the evidence establishing the risk of a mine explosion. The risks of impaired vision and black lung disease created by Stillhouse's conduct contribute to, but standing alone are insufficient to satisfy, a finding of a flagrant violation in this case.

[23] Clark testified that once he discovered the underground power was on during his inspection, he remained underground because he had determined that the methane had been cleared from the mine. (Tr2. 57:20–58:7.)

did not encounter methane during their subsequent inspection. Johnson and Clark's failure to find methane does not obviate the great risks associated with Stillhouse's violation.[24]

Stillhouse also disputes the fact that the fan shutoff compromised the ventilation in Mine No. 1. (Resp't Br. 9–10.) It points to the hearsay statements of foremen Johnny Osborne and Ira Sergent that the mine had adequate ventilation during the shutoff. (*Id.* at 10.) It argues that the Secretary has not put forth evidence disputing these statements. (*Id.*) Yet Osborne and Sergent reacted evasively to Johnson's inquiries about the fan shutoff, not admitting any involvement with it. Osborne and Sergent subsequently pleaded guilty to criminal violations of the Mine Act resulting from their failure to withdraw miners from Mine No. 1 during the fan shutoff. In so pleading, they admitted that their conduct was at least reckless with regard to the fan shutoff. Osborne's and Sergent's lack of candor about the fan shutoff and felony pleas for their conduct during that event greatly diminish the credibility of their statements about the mine's conditions. Moreover, as discussed above, I have determined that even had air been flowing in through the cutouts, Mine No. 1's ventilation still would have been severely compromised. Consequently, I conclude that Osborne's and Sergent's statements do not undermine the conclusion that the fan shutoff severely compromised Mine No. 1's ventilation system.

Stillhouse points to Johnson's and Clark's acknowledgments that Mine No. 1 could have had "natural ventilation" through air flowing into the mine from the cutouts while the fan was shut off.[25] (Tr1. 148:20–21; Tr2. 47:2–9; Resp't Br. 10.) As far as when Johnson and Clark observed the exterior of the mine during the mine shutoff, air was not moving from the 002 section to the entrance, as Clark noticed negligible air movement at the portals, at best.

When the fan was subsequently turned back on, air did flow through the cutouts into the mine. The problem is that the airflow through the cutouts did not follow the carefully prescribed route dictated by Stillhouse's MSHA-approved ventilation plan. Fresh air was supposed to circulate via a specified ten-mile round trip course from the mine's entrance to the 002 section and then back again. Instead, potentially contaminated air passed over numerous possible

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[24] Johnson's and Clark's precautionary measures prior to entering the mine undermine Stillhouse's contention that their actions suggest a lower gravity than that alleged by the citation. Stillhouse also points to Johnson's failure to instruct Stillhouse foreman Osborne to turn off the underground power when Johnson instructed the miners to evacuate. (Resp't Br. 11.) Johnson admitted that the thought of cutting the power had not crossed his mind when he spoke with Osborne. (Tr1. 217:10–12.) However, at the same time, Johnson had observed that nothing happened when the mine fan was switched back on, and he did not want to change the mine's conditions until the miners had safely reached the surface. (Tr1. 216:3–217:12.)

[25] Stillhouse criticizes Johnson for contradicting his interrogatory statement that "[n]o other means of ventilating the mine workings were available" because he acknowledged the possibility of natural ventilation in Mine No. 1. (Ex. R-1, at 6; Resp't Br. 10.) As evidenced by Johnson's hearing testimony, he was merely referring to the fact that the only mechanical means of ventilating the mine had been shut down. (Tr1. 256:17–24.)

ignition sources, and the miners' only viable escape route, as it coursed from the 002 section cutouts through the belt and man trip roadway entries toward the mouth of the 003 section. No fresh air flowed through the intake entries to ventilate the face. Indeed, at the 002 section, potentially contaminated air was flowing through the intake entries toward the mine entrance. The central fallacy of Stillhouse's argument about the possibility of natural ventilation in Mine No. 1 is that air blowing through the cutouts at the 002 section, as it asserts, would have produced the same dangerous breach of Stillhouse's MSHA-approved ventilation plan as it did when it turned the mine fan back on.

A further problem with natural ventilation is that it did not allow Stillhouse to manage airflow through the mine because environmental factors beyond Stillhouse's control, such as the temperature and barometric pressure outside the mine, can affect air movement through the mine. (Tr1. 225:14–22.) Under Stillhouse's MSHA-approved ventilation plan, air was supposed to move through the mine in a controlled fashion. Stillhouse did not amend its ventilation plan to permit the natural ventilation it purportedly used on December 3, 2006. Having cut out to the surface and shut down its mine fan, air could have been flowing in any direction in Mine No. 1. The mere fact that air could have been flowing into Mine No. 1 does not obviate the conclusion that the ventilation in Mine No. 1 was severely compromised during the fan shutoff.

Stillhouse also asserts that Mine No. 1 has no prior history of methane ignitions. Prior to December 3, 2006, Mine No. 1's past operations presumably bore little resemblance to the massive ventilation change and concomitant risk of significant methane and float coal dust accumulations precipitated by mining during the fan shutoff. Stillhouse never sought MSHA's approval to amend its ventilation plan to permit its conduct during the early morning hours of December 3, 2006, so the lack of past ignitions at Mine No. 1 is of limited relevance to this particular case. Based on the evidence before me, Stillhouse's commission of this violation was an isolated aberration yet great deviation from its normal operations. The lack of past ignitions does not detract from the great risks associated with Stillhouse's conduct.

The theme of Stillhouse's arguments is that the Secretary did not show the existence of any immediately harmful conditions, such as the accumulation of an explosive concentration of methane gas. A flagrant violation involves conduct that "reasonably could have been expected to cause . . . death or serious bodily injury." 30 U.S.C. § 820(b)(2). Thus, to establish a flagrant violation the facts and circumstances surrounding the violation must demonstrate that the operator's conduct was likely to bring about death or serious bodily injury. *See* discussion *supra* Part III.D.2. Stillhouse's narrow interpretation of the statutory text ignores the facts in this case demonstrating that Stillhouse subjected eight miners to the high risk of death.

In Russian roulette, the player spins the cartridge of a six-round revolver loaded with a single bullet, holds the gun to his or her head, and pulls the trigger. No reasonable person would look at the mere fact someone has survived a round of this game and conclude that the player did not take a serious risk of death: "Would we not assess the risk associated with playing Russian roulette by considering the potential for harm involved in holding a loaded gun to one's head and

pulling the trigger, rather than by considering what happened after the trigger was pulled?" *Manalapan Mining Co.* (*Manalapan Mining II*), 18 FMSHRC 1375, 1396 (Aug. 1996) (Jordan & Marks, Comm'rs, concurring). When Stillhouse completely shut down the only device moving air through its extensive mine and extracted coal for six hours, it created an environment ripe for the occurrence of a fatal explosion. Just because Stillhouse averted disaster does not mean its violation did not create the high risk of such an event.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

To satisfy the first and second elements of the flagrant violation, the evidence must demonstrate that Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of the mandatory safety standard at 30 C.F.R. § 75.313. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D. These two elements are met when, in light of all the facts and circumstances surrounding the violation, the Secretary demonstrates that Stillhouse did not take the steps a reasonably prudent operator would have taken to correct the known violation of a mandatory health or safety standard and consciously or deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. *See* discussion *supra* Part III.D.1.b. Here, a violation is "known" to the operator when it has express or implied actual knowledge of it. *See* discussion *supra* Part III.D.1.c.

Stillhouse had ample notice of the consequences of cutting to the surface at the 002 section. Almost a year before December 3, 2006, Johnson and Clark learned from Stillhouse's management that Stillhouse intended to cut to the outside of the 002 section. Johnson told Stillhouse's management that cutting to the surface at the 002 section would destroy Mine No. 1's ventilation. Johnson reminded Stillhouse's management of its duty to file a revised ventilation plan with MSHA. Stillhouse never sought approval for an amendment to its ventilation plan, much less informed MSHA of its imminent actions, prior to making the cutouts in the 002 section. Indeed, Stillhouse does not contend its changes to Mine No. 1's ventilation were approved by MSHA. (Resp't Br. 9.) Stillhouse also does not dispute that its miners should not have remained underground. (*Id.*)

At the time of the violation, Stillhouse knew the consequences of its conduct. During Johnson and Clark's investigation, foremen Johnny Osborne and Ira Sergent revealed that they would have "opened the mine fan doors," reducing the fan's ability to pull air through the mine. As Johnson and Clark discovered, once the cutouts were made, running the fan at full power pulled air through the belt entry and man trip roadway entry in the wrong direction through the mine and ceased the flow of intake air between the mouth of the 002 section and the 003 section. In light of these consequences and the notice Stillhouse had already received about the cutouts' potential effect on Mine No.1's ventilation, Sergent's and Osborne's admissions underscored their knowledge that the cutouts would have a detrimental impact on the mine's ventilation. Subsequently, Osborne and Sergent each pleaded guilty to a criminal violation of the regulation underlying this violation for failing to withdraw miners during the mine fan shutoff. I conclude

that Stillhouse shut down its mine fan in a reckless, misguided attempt to correct the cutouts' destruction of its ventilation plan. In light of this conclusion, the Secretary's failure to produce evidence explicitly stating Stillhouse's rationale for the mine fan shutoff is immaterial, contrary to Stillhouse's assertions otherwise.

Stillhouse demonstrated minimal care for the safety of its miners. At virtually the stroke of midnight on December 3, 2006, Stillhouse secretly cut to the surface of the 002 section, turned off its mine fan, and proceeded to mine coal—all during the third-shift when it normally does not produce coal. Stillhouse disabled the alarm sounding the shutoff. The miner who turned off the mine fan reportedly brought his children to the Maggard Branch to watch Stillhouse's mining equipment emerge from underground. That this miner felt like it was appropriate to treat the event like a trip to the circus with his children underscores the lack of seriousness Stillhouse paid to its obligation to protect the safety of its miners. Stillhouse mined coal for six hours with its fan shut down, failing to withdraw miners in violation of 30 C.F.R. § 75.313. Three of Stillhouse's supervisory employees pleaded guilty to criminal violations of 30 C.F.R. § 75.313 in relation to this conduct.

The unusual circumstances in which Stillhouse made the cutouts demonstrate a concerted effort to evade the mining regulations. Rather than making any attempt to comply with its obligations to submit an amended mine ventilation plan or to otherwise properly ventilate the mine, Stillhouse forged ahead with its plan to cut to the outside of the 002 section. As evidenced by the fact that Stillhouse disabled the mine fan shutoff alarm, Stillhouse then proceeded to purposely and knowingly disobey its requirements under 30 C.F.R. § 75.313. Stillhouse's conduct only became known to MSHA when at the end of second-shift a concerned miner called an MSHA supervisor at his home to report dangerous roof conditions where Stillhouse was cutting to the surface. Stillhouse grossly deviated from its regulatory obligations gambling that it would not get caught until MSHA's inspection arrived on site at the end of third-shift.

A reasonably prudent mine operator would have submitted an amended ventilation plan or, at the very minimum, taken reasonable precautions to reduce the risks associated with cutting to the surface. If, as in this case, the reasonably prudent operator breached the mine walls to the surface, it would have immediately shut down production and complied with 30 C.F.R. § 75.313 by evacuating its miners from underground and powering down its electrical circuits and equipment. Nothing in the record before me suggests another course of action was appropriate. Stillhouse evaded its obligations under 30 C.F.R. § 75.313 for no immediate benefit other than the revenue generated from 700 tons of coal.[26] Stillhouse's violation created the high risk of death to eight miners. *See* discussion *supra* Part IV.A.3.a. Thus, for purposes of this flagrant analysis, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate its known violation of 30 C.F.R. § 75.313 and deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. Accordingly, Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a

[26] Once completed, the cutouts would provide an alternative entrance to Mine No. 1 located far closer to the working face. (Tr2. 63:9–20.)

mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1. In light of my conclusion that Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury in committing this violation, I also conclude that Stillhouse acted with reckless disregard.

Finally, as discussed above, Stillhouse's conduct in failing to eliminate this violation was highly likely to bring about fatal injuries to eight miners. Accordingly, Stillhouse's reckless failure to make reasonable efforts to eliminate its known violation of 30 C.F.R. § 75.313 reasonably could have been expected to cause death or serious bodily injury, thus establishing the third and fourth elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. I conclude that all of the elements of a flagrant violation of 30 C.F.R. § 75.313 are established in this case. Citation No. 6665036 is AFFIRMED as a flagrant violation.

4. Conclusions on Other Issues

a. S&S

Though Stillhouse disputed whether this violation was S&S prior to the hearing, it stipulated in its post-hearing brief that this violation was S&S. (Resp't Br. 4.) Nevertheless, in light of the novel nature of this case, it is worth discussing the S&S character of this violation. Section 104(d) of the Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum Co.*, 3 FMSHRC at 825. To establish an S&S violation under *National Gypsum*, 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) (citation omitted); *accord Buck Creek Coal v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The parties agree that Stillhouse violated 30 C.F.R. § 75.313, a mandatory safety standard. As discussed above, Stillhouse's decision to shut off its mine fan and extract coal created an environment ripe for the accumulation of explosive mixtures of methane and coal dust. *See* discussion *supra* Part IV.A.3.a. Amidst these conditions, Stillhouse mined coal and

failed to shut down its underground electrical circuits and equipment. *See* discussion *supra* Part IV.A.3.a. These activities created the high risk of a mine explosion, a discrete safety hazard. *Id.* Though a mine explosion did not actually occur, should Stillhouse have continued its violation—and there was every indication that the remaining three entries would have been cut out to the surface—and these risks persisted, a mine explosion would have been highly likely. Given the nature of this hazard, fatal injury was highly likely. This violation satisfies all four of the *Mathies* criteria, and Citation No. 6665036 is AFFIRMED as S&S.

b. Unwarrantable Failure

The unwarrantable failure terminology derives from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conducted constituting more than ordinary negligence. 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal*, 14 FMSHRC at 1261; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

As discussed above, Stillhouse's violation created the high risk of fatal injury. *See* discussion *supra* Part IV.A.3.a. Stillhouse's violation persisted over a period of six hours. It mined coal during the fan shutoff, failed to withdraw its miners, and did not turn off its underground electrical circuits and equipment, all in violation of 30 C.F.R. § 75.313. Its management pleaded guilty to criminal charges of violating 30 C.F.R. § 75.313, and as discussed above, Stillhouse was well aware of this violation. *See* discussion *supra* Part IV.A.3.b. Months prior to committing this violation, Stillhouse knew that it was obligated to submit a ventilation plan to address the cutouts it planned to make at the 002 section because the cutouts would significantly alter Mine No. 1's ventilation. Stillhouse ignored its obligation to address these

risks in violation of 30 C.F.R. § 75.313. Each of the aggravating factors typically considered in determining an unwarrantable failure is present in this case. Citation No. 6665036 is AFFIRMED as an unwarrantable failure to comply with 30 C.F.R. § 75.313.[27]

5. Penalty

Under Section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in determining an appropriate civil penalty:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties stipulated that the penalties proposed in this case are appropriate to the size of Stillhouse's business, that they will not affect Stillhouse's ability to continue its business, and that Stillhouse demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Tr1. 6:5–16, 7:15–25.) I have also considered the Assessed Violation History Report. (Ex. P-10.) Generally, Stillhouse does not have an excess history of violations, and it has no previous violations of this particular standard.

Nevertheless, Citation No. 6665036 involves Stillhouse's flagrant violation of 30 C.F.R. § 75.313. Here, Stillhouse acted with reckless disregard, creating the high likelihood that eight miners would suffer death or serious bodily injury. Short of an actual fatality, this violation involves nearly the highest level of negligence and gravity conceivable under the Mine Act. The maximum penalty permitted by the Mine Act is $220,000. 30 U.S.C. § 820(b)(2). The Secretary has proposed a penalty of $212,700, and in light of the facts and circumstances in this case, I hereby assess a civil penalty of $212,700 for this violation.

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[27] I reach this conclusion notwithstanding Stillhouse's general objection that the Secretary failed to allege unwarrantable failure as to the violations in this case. Stillhouse's reliance on *Cyprus Emerald Resources* is inapposite to this case. (Resp't Br. 18.) In *Cyprus Emerald Resources*, the Commission vacated the Administrative Law Judge's unilateral modification of two section 104(a) citations to 104(d) citations. *See id.* at 819 (vacating the Administrative Law Judge's modifications in *Cyprus Emerald Res. Corp.*, 17 FMSHRC 2086, 2103–04, 2107 (Nov. 1995) (ALJ)). Any violation cited under section 104(d)(1) of the Mine Act must include an allegation of unwarrantable failure. Here, the Secretary issued the citation and orders in this case under section 104(d)(1), thus alleging unwarrantable failure as to every violation in this case. Stillhouse's contention has no merit.

B. Order No. 6665037

1. Issues Presented

Citation No. 6665037 alleges a violation of 30 C.F.R. § 75.324, a mandatory safety standard. Stillhouse stipulated to the fact of the violation in Citation No. 6665037. (Tr1. 5:21–22; Resp't Prehr'g Report 2.) The parties presented the following issues in regard to Citation No. 6665037:

a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2);

b. Whether Stillhouse acted with reckless disregard in committing the violation;

c. Whether the violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.324;

d. Whether the violation was highly likely to result in fatal injuries to eight miners; and

e. Whether the violation of 30 C.F.R. § 75.324 was S&S.

2. The Parties' Arguments

a. The Secretary

The Secretary argues that this standard prohibits intentional changes in a mine's ventilation unless certain procedures are followed. (Pet'r Br. 27.) Should such a change take place, it requires the mine's electrical circuits to be shut down and its equipment to be turned off. (*Id.* at 29.) As with Citation No. 6665036, the Secretary reiterates her concern over a mine explosion resulting from Stillhouse's mining operations during the fan shutoff. (*Id.* at 28–29.) The Secretary additionally points to the dangers related to Stillhouse's decision to turn the mine fan back on while its miners were exiting the mine. (*Id.* at 29–30.) Noting that Stillhouse never shut down its electrical circuits or belt haulage system, the Secretary argues that when Stillhouse restarted the mine fan it furthered the risk of a mine explosion. (*Id.*) The cutouts at the 002 section destroyed Mine No. 1's ventilation system and allowed the mine fan to draw contaminated air the wrong way through the mine. (*Id.*) That air could have swept explosive accumulations of dust and methane over energized non-permissible equipment or the belt haulage system, sparking a catastrophic mine explosion. (*Id.*) Because Stillhouse intentionally caused this violation and failed to eliminate it, the Secretary argues that it should be found to be flagrant. (*Id.* at 32.)

b. Stillhouse

Stillhouse points out that the facts and issues underlying this violation essentially track those at issue in Citation No. 6665036. (Resp't Br. 6; Resp't Reply 2.) Both violations involve Stillhouse's mining operations surrounding the initial shutdown and subsequent turning back on of the mine fan. Accordingly, Stillhouse's arguments concerning Citation No. 6665036 apply to Order No. 6665037, as well. (Resp't Br. 6; Resp't Reply 2.) *See* discussion *supra* Part IV.A.2.b.

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.324

The mandatory safety standard at 30 C.F.R. § 75.324, sets forth, in part:

> (b) Intentional changes [to mine ventilation] shall be made only under the following conditions:
>
> (1) Electric power shall be removed from areas affected by the ventilation change and mechanized equipment in those areas shall be shut off before the ventilation change begins.
>
> (2) Only persons making the change in ventilation shall be in the mine.

30 C.F.R. § 75.324(b)(1)–(2).

Stillhouse violated this standard by intentionally changing its mine ventilation not once but twice during the same shift. First, in the early morning hours of December 3, 2006, Stillhouse shut down its mine fan for six hours, ceasing the flow of over 200,000 CFM of air through the mine. Stillhouse did not shut down its underground electrical circuits or equipment. Eight miners remained underground, as Stillhouse mined 700 tons of coal for six hours during the fan shutoff. As admitted by Stillhouse, this conduct violated the requirements of 30 C.F.R. § 75.324(b)(1)–(2). I have discussed how Stillhouse's mine fan shutdown, in conjunction with its mining activities, made it highly likely its eight miners would suffer deadly injuries. *See* discussion *supra* Part IV.A.3.a. Stillhouse did not address the serious risks posed by its conduct. Rather, Stillhouse's failure to correct its initial violation of § 75.324 exposed eight miners to the high risk of death.

However, shortly after Johnson ordered foreman Osborne and his men to leave the mine, foreman Sergent, who had been underground with the other miners, emerged from underground and turned the mine fan back on. The full force of the mine fan came back online, moving significant quantities of air throughout Mine No. 1's extensive network of entries and crosscuts. Stillhouse yet again initiated a significant change in its mine ventilation. Again, it did so with miners underground and the electrical power on in contravention of 30 C.F.R. § 75.324.

With two cutouts in place at the end of the mine opposite from the mine fan, the suction of the mine fan drew air directly from the 002 section instead of pulling it from the entrance, out to the 002 section, and back again. Stillhouse's mining activities during the six-hour mine fan shutoff created the high likelihood of that explosive concentrations of methane and coal dust would come into contact with the many ignition sources in Mine No. 1. *See* discussion *supra* Part IV.A.3.a.

The mine fan was turned on ten to twenty minutes after Johnson ordered the miners to leave the mine, but the miners did not emerge from underground until an hour after they were requested to do so. When Johnson gave the order to evacuate the mine, the miners were working at the cutouts of the 002 section, just a little over five miles from the mine entrance. Foreman Osborne admitted as much when Johnson gave the order to evacuate the mine, as Osborne claimed he had "good air" coming through the cutouts. Given the timing of the sequence of events in this case, had the miners left the 002 section at the exact moment they were ordered to do so, they would have progressed only one- to two-sixths of their way to the mine entrance by the time the fan was turned on. At that rate of travel, the miners would have advanced approximately 1.6 miles from the 002 section, at most, by the time the mine fan was restarted, placing them in the danger zone between the 002 and 003 section. (Ex. R-3.) As noted above, once Sergent turned the fan back on, potentially contaminated air from the 002 section flowed up the man trip roadway in the same direction as the miners' travel out of the mine. With the belts still running in the mine and the attendant risk of an ignition, the miners, rather than escaping the risk of a mine explosion, instead traveled through potentially combustible air as they made their way toward the mine entrance. This second intentional change in ventilation comprising Stillhouse's violation of 30 C.F.R. § 75.324 also exposed these seven miners remaining underground to the risk of a deadly mine explosion.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Above, I concluded that Stillhouse knew of the implications of cutting to the surface of the 002 section. *See* discussion *supra* Part IV.A.3.b. Stillhouse knew it was obligated to submit an amendment to its ventilation plan prior to making these cutouts. *Id.* While committing this violation, Stillhouse knew the highly detrimental impact its conduct had on its MSHA-approved ventilation plan. *Id.* Rather than attempting to follow the ventilation plan, Stillhouse misguidedly attempted to reduce the danger of its conduct by purposefully shutting down the mine fan. *Id.* Proper ventilation is vital in underground coal mining, so Stillhouse knew that it committed this violation of 30 C.F.R. § 75.324 in turning the mine fan off and back on again. The circumstances surrounding this violation demonstrate a concerted effort by Stillhouse to avoid the safety obligations owed to its miners. *Id.* Stillhouse's knowledge that the cutouts on the 002 section would destroy Mine No. 1's ventilation system, alone, counseled against its actions. Stillhouse's argument that its negligence should be reduced because the Secretary did not demonstrate that mine management knew about the air reversal in the mine is unavailing. The only immediate benefit to come out of Stillhouse's conduct was 700 tons of coal.

Given the nature of the risks involved in Stillhouse's conduct, a reasonably prudent operator would not have purposefully altered the mine ventilation as Stillhouse did in this case. Even if the reasonably prudent operator incorrectly determined that shutting the mine fan was appropriate, it would have at least taken the precautions of moving the miners not associated with the shutdown to the surface and shutting down its underground electrical circuits and equipment. The reasonably prudent mine operator also would not have turned its fan back on with miners and energized equipment underground. Stillhouse's violation created the high risk of death to eight miners. *See* discussion *supra* Part IV.B.3.a. Stillhouse did not take the steps of a reasonably prudent mine operator to eliminate its known violation of 30 C.F.R. § 75.324 and deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1.

Moreover, in light of my conclusion that Stillhouse's reckless failure to eliminate its violation of 30 C.F.R. § 75.324 was highly likely to bring about death to eight miners, I determine that the third and fourth elements of a flagrant violation are also satisfied. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. Because I conclude all the elements of a flagrant violation are established in this case, Order No. 6665037 is AFFIRMED as a flagrant violation.

4. Disposition of Other Issues

a. S&S

As with the violation in Citation No. 6665036; Stillhouse initially disputed whether this violation was S&S prior to the hearing but later stipulated in its post-hearing brief that this violation indeed was S&S. (Resp't Br. 4.) Again, due to the unique nature of the legal issues before me, I briefly note why this violation is S&S.

Order No. 6665037 concerns the violation of 30 C.F.R. § 75.324, a mandatory safety standard. I have concluded above that Stillhouse's commission of this violation directly contributed to the risk of a deadly mine explosion. *See* discussion *supra* Part IV.B.3.a. I have also concluded above that such an explosion was highly likely during the commission of the violation. *Id.* Stillhouse's violation directly compromised its mine ventilation system, and the continuation of its operation in this manner would have furthered the high risk of such an event. Given the nature of a mine explosion, fatal injuries were highly likely to occur to eight miners. Having met all four of the *Mathies* criteria for an S&S violation, Order No. 6665037 is AFFIRMED as S&S.

b. Unwarrantable Failure

Several factors bear on the determination of whether Stillhouse committed an unwarrantable failure to comply with 30 C.F.R. § 75.324. As with Citation No. 6665036, this

violation involved the high risk of fatal injury. Indeed, the intentional ventilation changes in this case took place in conjunction with Stillhouse's decision to mine 700 tons of coal during the six-hour fan shutoff. Stillhouse was well aware of its violation of 30 C.F.R. § 75.324. Stillhouse knew of its obligations to properly ventilate Mine No. 1 as well as the implications of its failure to make plans to do so following the cutouts on the 002 section. Together, these aggravating factors weigh in favor of my conclusion that Stillhouse committed an unwarrantable failure to comply with 30 C.F.R. § 75.324. Order No. 6665037 is AFFIRMED as an unwarrantable failure to comply with 30 C.F.R. § 75.324.

5. Penalty

As noted above, the parties have stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that the proposed penalty will not affect Stillhouse's ability to continue its business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. Stillhouse has no prior violations of the standard at issue in this order. (Ex. P-10.) However, as I have noted in detail, the gravity and negligence of Stillhouse's violation of § 75.324 was severe. *See* discussion *supra* Part IV.B.3–.4. Based on these considerations, and particularly on the severity of the violation's gravity and negligence, I conclude that the Secretary's proposed civil penalty of $212,700 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of $212,700.

C. Order No. 6665039

1. Issues Presented

Citation No. 6665039 alleges a violation of 30 C.F.R. § 75.360, a mandatory safety standard requiring Stillhouse to conduct safety inspections prior to each shift.

Stillhouse stipulated to the fact of the violation in Citation No. 6665039. (Tr1. 5:25–6:3.) The parties present the following issues in regard to Citation No. 6665039:

a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2).

b. Whether Stillhouse acted with reckless disregard in committing the violation.

c. Whether the violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.360;

d. Whether the violation was highly likely to result in permanently disabling injuries to eight miners; and

e. Whether the violation was S&S.

2. The Parties' Arguments

a. The Secretary

In this violation, Stillhouse failed to conduct a preshift examination at the belt power centers in the Wet Area of the mine for three shifts prior to the events on December 3, 2006. (Pet'r Br. 41–42.) The Secretary asserts that Stillhouse had a deliberate plan to turn off the mine fan and make the cutouts at the 002 sections. (*Id.* at 50.) The Secretary argues that in doing so, Stillhouse failed to make efforts to identify potential fire or methane hazards. (*Id.* at 46–49.) According to the Secretary, the gravity of Stillhouse's failure was compounded by the fact that miners must travel through this area to exit the mine, increasing the likelihood of exposure to the dangerous conditions created by Stillhouse. (*Id.* at 46.) Because Stillhouse deliberately disregarded the known risks of failing to conduct a preshift examination of the Wet Area, the Secretary argues that the violation was flagrant. (*Id.* at 50–51.)

b. Stillhouse

Stillhouse argues that Order No. 6665039 is "[t]he most curious violation." (Resp. Br. 15.) Stillhouse stresses that the Secretary has not even shown the existence of the discrete safety hazard necessary to establish an S&S violation. (*Id.* at 16.) Stillhouse points to the fact that once a preshift examination was conducted in the Wet Area, no hazardous conditions were found. Stillhouse relies on the Administrative Law Judge's decision in *Manalapan Mining Co.* (*Manalapan I*), 16 FMSHRC 1669 (Aug. 1994) (ALJ), in support of its position. (*Id.*) According to Stillhouse, the Judge in *Manalapan Mining* determined that the failure to conduct a preshift violation was not S&S because subsequent investigation of the area revealed no hazards. (*Id.*) Similarly, because no hazards were discovered in this particular case, Stillhouse argues the violation cannot be S&S, much less flagrant. (*Id.*)

Stillhouse also argues that because the preshift examinations of the Wet Area should have been conducted prior to the fan shutdown, they would not have revealed any of the risks associated with the ventilation change. (Resp't Br. 16.) Stillhouse further asserts that its ventilation changes have no relationship with this violation. (Resp't Reply 9.) Stillhouse concludes that the Secretary cannot show any factual predicate for her determination on the gravity of its violation. (Resp't Br. 16–17.) Finally, Stillhouse contends its negligence as to this violation is obviated by its diligence in conducting preshift examinations in the other parts of the mine. (*Id.* at17.)

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.360

The gravity of Stillhouse's violation must be assessed in light of its mining operations during third-shift on December 3. As discussed above, Stillhouse was reminded about its safety obligations nearly a year in advance of cutting to the surface of the 002 section. *See* discussion *supra* Part IV.A.3.b. Indeed, during that time Stillhouse had revealed to Johnson and Clark that it would cut to the outside of the 002 section. Stillhouse's mining operation apparently continued to advance ceaselessly until it broke to the outside at the 002 section. When Stillhouse cut outside of the mine, it did not have a proper ventilation plan in place to handle the cutouts' severely compromising effect on the mine's ventilation system. Instead Stillhouse completely shut down the mechanical device ventilating the mine. These actions created a high risk of a mine explosion throughout Mine No. 1, including in the Wet Area. *See* discussion *supra* Part IV.A.3.a. Such an explosion could have been precipitated by transient hazards, such as methane, present in the Wet Area where Stillhouse's belt haulage system was located. Preshift examinations in this area would have detected problems associated with the belt haulage system, which had numerous potential ignition sources associated with its electrical components and belt rollers. (Tr1. 198:21–200:6.)

Amidst this scheme to breach its MSHA-approved ventilation plan and mine coal under extremely dangerous underground conditions, Stillhouse failed to conduct a preshift examination in the Wet Area. Stillhouse did not miss performing just one preshift examination. Stillhouse did not perform preshift examinations prior to any of the shifts on December 2, 2006. The Wet Area also lies under the water table. Water inhibits methane's escape out of the mine to the surface, increasing the probability of methane accumulations in this area. That this area was wet did not reduce the risk of methane ignitions. The belts hung from the ceiling in the Wet Area. (Tr1. 250:18–21; Tr2. 85:2–4.) Being above the water, coal still could have stuck in the belt rollers, thus allowing for the possibility of ignitions precipitated by the friction of the belt. (Tr1. 250:22–251:2.)

It is true that the Wet Area's location relatively close to the mine entrance meant that a mine explosion in this area would have been less likely to impact the miners working on the 002 section during the fan shutdown. However, miners must pass the Wet Area to exit the mine. Moreover, Mine No. 1's carbon monoxide system was compromised during the mine fan shutdown. The carbon monoxide system's reduced ability to alert miners to the dangers of a mine fire in the Wet Area significantly heightened the miners' chances of receiving little or no notice of encountering a mine fire as they exited the mine. The risks associated with the violation primarily concerned the miners' risk of encountering a mine fire rather than being in the midst of a mine explosion. I determine that the risk of serious bodily injury, and not necessarily death, is appropriately associated with this violation. Serious bodily injuries may include permanently disabling injuries, such as being severely burned or lung damage from smoke inhalation. This violation was highly likely to result in permanently disabling injuries to eight miners.

Stillhouse believes that, in accordance with "well-settled law," the Administrative Law Judge's decision in *Manalapan I* supports its argument that Order No. 6665039 was not even

S&S. (Resp't Reply 8.) It argues that because no hazardous conditions were found upon MSHA's inspection of the Wet Area, the violation was not S&S. However, as a threshold matter, the decisions of the Commission's Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.69(d). More important is the Commission's actual precedent on this issue. In *Manalapan Mining II*, four commissioners joined in vacating the conclusion of the Administrative Law Judge relied upon by Stillhouse. 18 FMSHRC at 1382 (Holen & Riley, Comm'rs, concurring); 18 FMSHRC at 1396 (Jordan & Marks, Comm'rs, concurring). The Commissioners unanimously agreed that it is incorrect as a matter of law for a Commission Administrative Law Judge to determine that a preshift violation is not S&S based on a post-violation preshift inspection that failed to disclose any hazards. *Id.* The Commission recently relied upon the rule in *Manalapan Mining II*, in part, to affirm a Commission Administrative Law Judge's decision that a preshift violation was S&S. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (citing 18 FMSHRC at 1382, 1396). The Commission explained that "because preshift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined." *Id.* Thus, the Administrative Law Judge's decision in *Manalapan I* is not entitled to any persuasive weight on this issue. Stillhouse's assertion that its preshift violation was not S&S because the post-violation inspection of the area revealed no hazards is incorrect as a matter of law.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Here, even assuming that a reasonably prudent mine operator made the mistaken conclusion that turning off its mine fan and producing coal for nearly an entire shift was warranted, Stillhouse's failure to conduct a preshift exam of the Wet Area was not warranted. Stillhouse indicated its intention to cut to the surface of the 002 section nearly a year before December 3, 2006. MSHA provided Stillhouse ample notice of the implications of its decision to make the cutouts. *See* discussion *supra* Part IV.A.3.a. Stillhouse's management was aware that cutting to the surface at the 002 section would not comply with its MSHA-approved ventilation plan. Stillhouse had long-standing plans to cut to the surface of the 002 section, and it had long-standing notice that these actions would be harmful. A reasonably prudent mine operator would have at least conducted a proper preshift examination of the Wet Area. The Wet Area had multiple potential ignition sources. Ensuring a safe environment was vital in light of Stillhouse's conduct on the night of December 3, 2006. As recognized by the Commission, "[t]he preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground. . . . It is common knowledge that the preshift examination must be completed and recorded at the surface before miners are allowed to enter a mine." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Stillhouse's failure to conduct these examinations was known to it.

Stillhouse believes that its failure to conduct a preshift examination of the Wet Area is mitigated by the fact that the examination would not have revealed the risks associated with the

mine fan shutdown. Here, Stillhouse acknowledges that the gravity of the this violation was connected to the ventilation changes in Mine No. 1, contrary to its assertion otherwise. Johnson did recognize at the hearing that a preshift examination would not have revealed hazards associated with the mine fan shutdown. (Trl. 250:2–14.) However, Stillhouse's argument ignores how the preshift examinations of the Wet Area could have at least revealed the hazards associated with normal mining operations, such as the accumulation of methane gas. The circumstances surrounding Stillhouse's extraordinary changes to Mine No. 1's ventilation compounded the risk of a dangerous mine explosion in this area. *See* discussion *supra* Part IV.C.3.a. If anything, the risks associated with Mine No. 1's normal mining operations were amplified by Stillhouse's intentional ventilation changes.

Stillhouse also criticizes Johnson for stating in the Secretary's interrogatory responses that "[t]his refusal to conduct a preshift examination in light of the lack of ventilation and the mining of coal on three shifts without such preshift examination of this area demonstrates a reckless disregard for this standard." (Ex. R-1, at 11.) The idea that the risks of Stillhouse's violation were heightened by the mine fan shutdown underlies Johnson's interrogatory statement, not the mistaken assertion that the gravity of the violation was high because Stillhouse failed to conduct a preshift examination while the fan was off. By not conducting any preshift examinations of the Wet Area prior to destroying the ventilation of its mine, Stillhouse's third-shift operation on December 3, 2006, resembled a pilot flying without instruments through the mountains while blinded by fog. In light of these considerations, Stillhouse's ability to comply with its regulatory mandate to conduct preshift examinations in the other areas of its mine does not reduce the severe gravity and negligence of its violation.

In failing to examine the Wet Area, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate the violation of 30 C.F.R. § 75.360. Stillhouse's violation created the high risk of permanently disabling injury to eight miners. *See* discussion *supra* Part IV.C.3.a. Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of serious bodily injuries in failing to eliminate its violation. Stillhouse recklessly failed to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1. The first two elements of a flagrant violation are established as to this violation. In deliberately disregarding an unjustifiable, reasonably likely risk of serious bodily injury, I also conclude that Stillhouse acted with reckless disregard in committing this violation.

Additionally, Stillhouse's failure to eliminate its violation of 30 C.F.R. § 75.360 was highly likely to result in permanently disabling injuries to eight miners. Accordingly, the third and fourth elements of a flagrant violation are established in this case. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. Because I conclude that all of the elements of a flagrant violation have been established, Order No. 6665039 is AFFIRMED as a flagrant violation.

4. Disposition of Other Issues

a. S&S

This violation involves the breach of a mandatory safety standard. In committing the violation, Stillhouse created a discrete safety hazard by heightening the risk of a mine explosion. It did so when it failed to conduct a preshift examination of the Wet Area, an area through which the belt haulage system runs and turns with head drives and power centers, prior to events during the third-shift on December 3, 2006. *See* discussion *supra* Part IV.C.3.a. The hazard of a mine explosion in this part of the mine was highly likely to result in permanently disabling injuries. *Id.* Satisfying all of four of the *Mathies* criteria, Order No. 6665039 is AFFIRMED as S&S.

b. Unwarrantable Failure

Here, Stillhouse's violation involved the high risk of permanently disabling injuries. *See* discussion *supra* Part IV.C.3.a. The failure to conduct a preshift examination occurred during the three shifts immediately prior to Stillhouse's purposeful engagement in highly risky mining conduct where it breached its MSHA-approved ventilation plan and mined with the fan shut off. This conduct heightened the risks associated with its failure to conduct preshift examinations, aggravating its failure to do so. Stillhouse was aware of this violation. All of these factors establish that Stillhouse's failure to conduct the examinations demonstrated an aggravated disregard, constituting more than ordinary negligence in violating 30 C.F.R. § 75.360. Order No. 6665039 is AFFIRMED as an unwarrantable failure to comply with a mandatory safety standard.

5. Penalty

The parties stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that it will not impact Stillhouse's ability to stay in business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. I have considered that Stillhouse has committed several minor prior violations under 30 C.F.R. § 75.360. (Ex. P-10, at 3.) Here, though, the gravity and negligence of Stillhouse's violation was very high. Nevertheless, this violation involved the high likelihood of permanently disabling injuries, not fatal injuries. I conclude that the Secretary's proposed penalty of $158,000 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of $158,000 against Stillhouse.

D. Order No. 6665038

1. Issues Presented

Order No. 6665038 alleges a violation of 30 C.F.R. § 75.220(a)(1), a mandatory safety standard.

The parties present the following issues in regard to Citation No. 6665038:

a. Whether a violation of 30 C.F.R. § 75.220(a)(1) occurred.

b. Whether the alleged violation was flagrant, as defined by 30 U.S.C. § 820(b)(2).

c. Whether Stillhouse acted with reckless disregard in committing the alleged violation.

d. Whether the alleged violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.220(a)(1);

e. Whether the alleged violation was highly likely to result in fatal injuries to two miners; and

f. Whether the alleged violation of 30 C.F.R. § 75.220(a)(1) was S&S.

2. The Parties' Arguments

a. The Secretary

The Secretary argues that Stillhouse intentionally disregarded its roof control plan by cutting the entries of the 002 section within 150 feet of the surface, called the "outcrop," wider than the 18-foot width prescribed by the plan. (Pet'r Br. 36.) The Secretary relies on evidence that mine roofs are weaker the closer they are to the surface, and, as a result, entries must narrow as mining advances to the outside. (*Id.* at 35.) As for the hazards in this particular case, the Secretary argues that Stillhouse disregarded obvious hazards, including hill seams and cracks. (*Id.* at 34, 36.) The Secretary points out that the roof in one of the entries had collapsed. (*Id.* at 36.) The Secretary also points out that Stillhouse's failure to follow its roof control plan occurred under circumstances where crossbars or steel beams were warranted to support the roof. (*Id.*) The Secretary emphasizes that Stillhouse improperly used thin metal straps to support an area of the roof affected by hill seams, rather than the required crossbars or steel beams. (*Id.*) The Secretary stresses that had Stillhouse used properly sized metal straps, called steel channels, it still would have been required to further reduce the width of the entries to sixteen feet. (*Id.*) According to the Secretary, because Stillhouse intentionally disregarded these hazards, it committed a flagrant violation. (*Id.* at 40.)

b. Stillhouse

Stillhouse's major argument is that a violation did not actually occur. (Resp't Br. 12.) Stillhouse argues that Field Office Supervisor Johnson and Inspector Clark gave vague, overly

broad definitions of the term "outcrop." (*Id.*) Relying on *Secretary of Labor v. Reed*, 16 FMSHRC 2108 (Oct. 1994) (ALJ), Stillhouse's position is that MSHA's Johnson and Clark improperly understood "outcrop" to mean a natural exposure of coal to the surface and a mechanically created exposure to the surface, when the term actually means just the natural exposure of coal to the surface. (*Id.* at 12–13.) Because Johnson and Clark did not testify about the location of the natural outcrop, Stillhouse argues that the Secretary has not proven her case.

Even if the Secretary establishes a violation, Stillhouse argues that the gravity and negligence must be reduced. (Resp't Br. 13.) Stillhouse states that the actions of Johnson and Clark provide the most telling evidence in support of its position. (*Id.*) Stillhouse notes that Johnson and Clark inspected the entries without installing any supplemental supports, taking a miner with them to the area. (*Id.* at 13–14.) According to Stillhouse, "[i]t defies credibility to contend that these inspectors would expose themselves and a *miner* to conditions they believed to be highly likely to cause a fatality." (*Id.* at 14.) Stillhouse also asserts that Stillhouse had substantially complied with its roof control plan by using roof bolts of the proper length and spacing and cable bolts as supplemental support. (*Id.* at 13; Resp't Reply 7.) Stillhouse relies on Johnson's acknowledgment that the roof bolts were supporting the areas where the roof had cracked. (Resp't Br. 13.) Stillhouse also specifically discounts the hazards posed by the roof fall in Entry No. 2 and the inadequately supported hill seams in Entry No. 3. (Resp't Reply 7.)

Finally, Stillhouse argues that the Secretary cannot establish it knew about its violation and consciously disregarded it. (Resp't Br. 15; Resp't Reply 5–8.) Stillhouse criticizes Johnson's assessments of Stillhouse's alleged negligence based on Johnson's allegedly contradictory statements concerning Stillhouse's violation of its roof control plan. (Resp't Br. 5.) Stillhouse further asserts that this violation does not even rise to the level of an unwarrantable failure based on the Commission's decision in *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (Oct. 1993). (Resp't Reply 5–6.)

3. Whether a Violation Occurred

The provision at 30 C.F.R. § 75.220(a)(1) requires "[e]ach mine operator [to] develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." The relevant part of Stillhouse's roof control plan states:

> When mining approaches within 150 feet of an outcrop:
> Initial development sketch will apply . . .
> Width of places within 150 feet of the outcrop will be maintained no more than 18 feet wide. Roof bolts will be at least 12 inches longer than the minimum specified in the Approved Roof Control Plan

(Ex. P-21, at 8.)

As set forth by the Commission, "[i]t is well established that plan provisions are enforceable as mandatory standards." *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 254 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 12995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987)). The law governing the interpretation of a regulatory standard applies to the interpretation of plan provisions. *Martin Cnty. Coal*, 28 FMSHRC at 255 (citing *Energy West*, 17 FMSHRC at 1317).

As with statutory interpretation, the "'language of the regulation [or in this case, plan provision] . . . is the starting point for its interpretation.'" *Martin Cnty. Coal*, 28 FMSHRC at 255 (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)). If the terms of the provision are clear, then they must be enforced as written unless the regulator intended a different meaning or that meaning would lead to absurd results. *Martin Cnty. Coal*, 28 FMSHRC at 255 (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)).

Here, the operative term "outcrop" is commonly understood in the mining community as "[t]he part of a rock formation that appears at the surface of the ground." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 383 (2d ed. 1997). The term "does not necessary imply the visible presentation of the mineral on the surface of the earth, but includes those depositions that are so near the surface as to be found easily by digging." *Id.* Johnson's and Clark's statements that the outcrop is the portion of the coal exposed to the surface via either natural or mechanical means are fully consistent with this definition. Indeed, the plan's requirements for outcrops appear directly below its requirements for openings to the surface, called "drift openings." (Ex P-21, at 8.) The overall context of the roof control plan affirms the conclusion that the outcrop lies at the surface where the coal is exposed, whether or not that surface was naturally or artificially created. Nothing in the roof control plan suggests that MSHA and Stillhouse intended a contrary meaning.

As for Stillhouse's position on the definition of "outcrop," a threshold issue is Stillhouse's reliance on the Administrative Law Judge's decision in *Reed*. As I note above in my discussion of Stillhouse's arguments concerning the preshift violation, the decisions of the Commission's Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.68(d). My consideration of this issue is not controlled by *Reed*.

During the hearing, Stillhouse suggested how its interpretation of "outcrop" should be applied. On cross-examination, Johnson was asked whether he knew the location of the outcrop prior to the creation of the box cut outside of the 002 section. (Tr1. 258:22–23.) The problem with Stillhouse's focus on the pre-box cut location of the outcrop is that it ignores that the box cut merely provides an area on the surface for the miners to emerge from underground through the coal seam. (Tr1. 260:10–19.) As discussed above, the purpose of narrowing the widths of the mine's entries as mining advances within 150 feet of the outcrop is to stabilize the roof in areas where it is expected to be much weaker. Only the span of roof between the underground working area and the cutout to the surface at the box cut is relevant to the application of this

component of the roof control plan. The location of the outcrop prior to creation of the box cut has no relationship with this distance. Stillhouse's restrictive view of the term "outcrop" thwarts the purposes of its roof control plan by creating the possibility of exceptions to the plan's requirement for narrower entries in underground areas near the surface, which typically need extra support. Based on these considerations, I conclude that the term "outcrop" in Stillhouse's roof control plan refers to areas of coal both naturally and mechanically exposed to the surface. Here, the outcrop was located at the box cut at the surface outside the 002 section.

When Johnson and Clark inspected the 002 section, they determined that the widths of the entries located within 110 feet of the surface exceeded the 18-foot distance prescribed by the roof control plan. The area where Johnson and Clark measured entry widths exceeding eighteen feet falls within the outcrop, as defined by the roof control plan. Because Stillhouse violated its roof control plan, I determine that Stillhouse committed the violation charged in Order No. 6665038.

4. Whether Order No. 6665038 Constitutes a Flagrant Violation

a. Risks of Stillhouse's Violation of § 75.220(a)(1)

As Stillhouse advanced toward the surface in the 002 section and the second-shift drew to a close, one of Stillhouse's miners tipped off MSHA by reporting poor roof conditions to an MSHA field office supervisor at his home late at night on Saturday, December 2, 2006. When Johnson and Clark arrived early the next morning, they indeed discovered dangerous roof conditions. Glue that should have been anchoring the roof bolts was running out of their holes, indicating that the roof was weak, as the roof bolts were not fully anchored. The roof was cracked and sagging, that is, beginning to fall, in several locations. (Tr1. 183:8–11.) Hill seams, areas where the roof is particularly susceptible to falling, were present in Entry No. 3.

It is worth noting that Clark issued a citation under section 104(a) of the Mine Act for Stillhouse's use of thin metal straps in securing the hill seams. (Ex. P-22, at 1.) Clark determined that this violation was highly likely to result in fatal injuries to two miners and concluded that the violation was S&S. (*Id.*) When hill seams are present, Stillhouse's roof control plan permits the use of steel channels instead of crossbars or steel beams. (Ex. P-21, at 11.) Had Stillhouse used steel channels to support the hill seams, its roof control plan obligated it to add cribs, posts, or jacks to limit the roadway to sixteen feet in width. (*Id.*) Stillhouse's roof control plan, however, did not permit the use of thin steel straps in lieu of crossbars, steel beams, or steel channels. (*Id.*) Reflecting the requirements of its roof control plan, Stillhouse paid the violation as written by Clark.

In addition to all of these conditions, a significant roof fall measuring four feet thick and running the width of the entry had occurred in Entry No. 2. After Johnson and Clark concluded their inspection of the area, posts were installed to provide additional support in the outcrop area.

The maximum deviations from the MSHA-approved roof control plan in each entry ranged from just under a foot to over three feet in Entry No. 3, which actually should have had supports reducing its width to sixteen feet given Stillhouse's decision to use metal straps to support hill seams in that area. Johnson and Clark identified numerous roof problems in the area, including the section 104(a) S&S violation discussed above that was determined to be highly likely to result in the death of two miners. Although many times roof falls do not occur when cutting to the outside, one did in this case. Indeed, Johnson explained that even if the entry where the roof fall occurred had been the proper width, in his judgment the fall would have occurred anyway. Narrower roof entries increase the strength of a roof. Cumulatively, these multiple hazards demonstrate how Stillhouse's violation fostered the high risk of a roof fall.

Stillhouse attempts to counter the Secretary's assessment of the risks involved in its conduct by emphasizing how Johnson and Clark inspected the entries at the cutouts without installing supplemental roof supports. Stillhouse, in effect, criticizes Johnson and Clark for doing their jobs, which is to inspect mines, even ones involving dangerous conditions. In recognition of the risks on the 002 section, Johnson and Clark continually monitored the roof while they conducted their investigation to ensure that neither they nor the miners accompanying them would be hurt by a roof fall. The conduct of Johnson and Clark during their inspection fails to suggest that the area was not as dangerous as they allege.

Stillhouse further argues that it had provided some supplemental support in the entries to the outcrop area. It is true that Stillhouse was installing elongated roof bolts and cable bolts to counteract the unstable roof conditions in accordance with its roof control plan. The roof bolts were of the proper length and spacing. It is also true that the roof bolts anchored the roof where it had cracked. Miners in the area are also required to remain under supported roof. (Ex. P-21, at 9.) However, glue was found to be running out of the holes containing some of the roof bolts, meaning that they were not fully anchored in the roof. The support in the 002 section was not as robust as Stillhouse claims.

The major problem with Stillhouse's attempts to discount the severity of its violation is that the numerous hazards in the entries of the 002 section demonstrate the roof was severely compromised. The roof fall in Entry No. 2 and the hill seams in Entry No. 3 strongly indicated the roof was prone to collapsing. As to these hazards, Stillhouse notes that the roof fall did not crush any miners, asserting that it occurred in an area away from where they were working. (Resp't Reply 7.) Stillhouse also notes that it had provided supports, albeit insufficient thin metal straps, for the hill seams. (*Id.*) Nevertheless, these hazards remained unmitigated while Stillhouse mined coal for nearly an entire shift during the fan shutoff. Stillhouse's observations do not undermine how the presence of these hazards pointed to dangerous roof conditions in the 002 section.

The other hazards discovered in the 002 section corroborated the roof's weakened state. The roof was soft and beginning to fall in the numerous places it had sagged. Cracks were present in the section. Moreover, amidst all of these hazards, Stillhouse's continuing mining

activity in the 002 section created vibrations affecting the roof (Tr1. 244:1–4), and deadly loose "draw rock" could have fallen from the areas between the roof bolts, even though they were properly spaced. (Tr2. 73:1–74:10, 75:15–16.) The dangerous roof conditions in this area had not been adequately addressed. (Tr2. 76:16.)

Consequently, that Stillhouse had complied with parts of its roof control plan is unavailing with regard to the violation at issue in this order. The roof control plan merely sets the floor of what is required to ensure miners' safety. The roof control plan regulation explicitly states that "[a]dditional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. §75.220(a)(1).

Narrower entries create more stable roof conditions. Stillhouse's failure to reduce the width of the entries in the 002 section to at least eighteen feet as it cut coal within 150 feet of the outcrop, as required by its roof control plan, aggravated the chances of a deadly roof fall. These risks were real, not mere "hyperbole" as Stillhouse contends. (Resp't Reply 5.) Stillhouse operated one double-headed roof bolter on the 002 section, which worked to secure the roof in the entries dug out by the continuous miner in that section. A double-headed roof bolter is operated by two miners. These miners were exposed to the severe roof conditions that had been further compromised by Stillhouse's violation. Stillhouse's violation exposed two miners to a high risk of fatal injury.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Johnson and Clark's inspection of Mine No. 1 was initiated by a concerned miner's report to MSHA of bad roof conditions in the 002 section. Hours later, Johnson and Clark discovered extensive evidence of poor roof conditions during their inspection of the section. *See* discussion *supra* Part IV.D.4.a. All five entries were discovered to be out of compliance with the roof control plan. The risk of fatal injuries to two miners pervaded throughout the 002 section.

Stillhouse's violation was abundantly obvious. The roof control plan plainly stated that eighteen-foot wide entries are required when mining within 150 feet of the outcrop, which in this case was at the box cut prepared for the miners to emerge to the surface from underground. *See* discussion *supra* Part IV.D.3. The fact that not one of the entries in the outcrop area of the 002 section conformed to the roof control plan's eighteen-foot width requirement was clear to the naked eye. The foreman's mount showing the distance between the underground area of the 002 section and the surface revealed that Stillhouse was within 110 feet of the outcrop, well inside the 150-foot distance designated by the roof control plan for narrower entries. Actual knowledge is "implied" when an individual has knowledge of certain information that would lead him or her to make further inquiries. Here, the requirements of the roof control plan and the location of Stillhouse's miners relative to the outcrop were abundantly clear to Stillhouse. Though Stillhouse denies that it had express actual knowledge of its violation, this evidence demonstrates

that Stillhouse had implied actual knowledge of its violation. Stillhouse knew it committed a violation of its roof control plan.

The hazards involved with this violation were obvious, as well. Johnson and Clark observed cracks, hill seams, glue running from the roof bolts, and a four-foot thick roof fall spanning the entire width of Entry No. 2. These plainly visible conditions underscored the gravity of the poor roof conditions in the 002 section and confirmed the alarms raised by the concerned miner's phone call to MSHA the previous night. In cutting these entries too wide, Stillhouse risked the high likelihood that two of its miners would suffer fatal injuries from a roof fall. A reasonably prudent mine operator would have installed supplemental roof support to alleviate the risks involved in cutting its entries too wide. Such supplemental roof support could have included the posts that Johnson and Clark ordered to be installed to abate this violation. Taking these simple precautions would not have placed a significant burden on Stillhouse.

The deliberate nature of Stillhouse's obvious violation was manifest. Prior to the start of third-shift, none of the entries in the 002 section had been cut to the surface. By the time Johnson and Clark ordered Stillhouse to cease its mining activities at the end of third-shift, Stillhouse had cut Entry Nos. 1 and 2 to the surface and, judging on the continuous miner's location in Entry No. 3, was well on its way to finishing the three remaining cutouts in the section. Moreover, not one of the entries in the 002 section complied with the eighteen-foot width requirement of its MSHA-approved roof control plan.

As for Stillhouse's assertion that Johnson's contradictory statements undermine MSHA's negligence findings associated with this violation, Johnson did state in the Secretary's interrogatory responses that "Stillhouse completely disregarded its RCP [roof control plan]" (Ex. R-1, at 8), and he testified at the hearing that Stillhouse had installed roof bolts in the 002 section that were of the proper length and properly spaced. However, on cross-examination, counsel for Stillhouse asked Johnson about this specific contradiction. (Tr1. 255:16–256:10.) Johnson asserted that Stillhouse completely disregarded the portion of its roof control plan concerning development in the outcrop by failing to narrow the width of its entries. (*Id.*) Johnson's explanation of his interrogatory answer is consistent with both the interrogatory answer's and his testimony's focus on Stillhouse's failure to cut entries of the proper width. The distinction Stillhouse attempts to draw between Johnson's interrogatory statement and his testimony does nothing to undermine his statements regarding Stillhouse's negligence.

Stillhouse relies on *Virginia Crews Coal* in arguing that this violation does not even rise to the level of an unwarrantable failure. In that case, the Commission explained that "a breach of a duty to know is not necessarily an unwarrantable failure." 15 FMSHRC at 2107 (citing the Administrative Law Judge's decision). The Commission reasoned that resting a determination of unwarrantable failure solely on the breach of the duty to know would make an unwarrantable failure indistinguishable from ordinary negligence. *Id.*

As discussed extensively, this violation does not involve Stillhouse's mere breach of its duty to know about the violation. Instead, Stillhouse systematically cut five entries in the 002 section that failed to comply with its roof control plan. Its failure to comply with the clear requirements of its roof control plan was visible to the naked eye. Most importantly, Stillhouse disregarded numerous, obvious hazards, such as locations where the roof was sagging and glue was running away from the rods, which indicated that its violation created the high risk of fatal injuries to miners working in the section.

Based on the foregoing, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate its known violation of 30 C.F.R. § 75.220(a)(1). Stillhouse's violation involved the high risk of fatal injuries to two miners. *See* discussion *supra* Part IV.D.4.a. In disregarding this known violation and obvious hazards foretelling a deadly roof fall, Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of "death or serious bodily injury." § 820(b)(2). As a result, Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. *See* discussion *supra* Part III.D.1. The first two elements of a flagrant violation are present in this violation. As Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of death or seriously bodily injury, I also determine that Stillhouse acted with reckless disregard in committing this violation.

As noted above, Stillhouse's reckless failure to eliminate its violation created the highly likely possibility that two miners would suffer fatal injuries. *See* discussion *supra* Part IV.D.4.a. Stillhouse's reckless failure to eliminate its violation of 30 C.F.R. § 75.220(a)(1) reasonably could have been expected to cause death or serious bodily injury, thus establishing the third and fourth elements fo a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. I therefore conclude that all of the elements of a flagrant violation are satisfied in this case, and Order No. 6665038 is AFFIRMED as a flagrant violation.

5. Disposition of Other Issues

a. S&S

The Secretary proved a violation of the mandatory safety standard at § 75.220(a)(1). Stillhouse's failure to rectify its violation created the high likelihood of roof falls, a discrete mining hazard. Though one roof fall did not crush any miners, had Stillhouse's mining operations continued, such an event was highly likely to have occurred, resulting in fatal injuries to two miners working as roofbolters in the 002 section. *See* discussion *supra* Part IV.D.4.a. As this violation satisfies all four *Mathies* criteria, Order No. 6665038 is AFFIRMED as S&S.

b. Unwarrantable Failure

As for the aggravating factors underlying a determination of unwarrantable failure, Stillhouse's violation involved the high risk of fatal injuries to two miners. The extent of

Stillhouse's violation was great, as the operator failed to comply with its roof control plan in every single one of the five entries in the outcrop area. Stillhouse committed this violation in spite of the obvious conditions, such as hill seams, that warned of the dangers associated with its violation. *See* discussion *supra* Part IV.D.4.a. All of these aggravating factors lead to the inevitable determination that Stillhouse's conduct rose to the level of an unwarrantable failure to comply with 30 C.F.R. § 75.220(a)(1). Accordingly, Order No. 6665038 is AFFIRMED as an unwarrantable failure to comply with this safety violation.

6. Penalty

As with the other violations in this case, the parties have stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that it will not impact Stillhouse's ability to stay in business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. In contrast to the other violations in this case, Stillhouse has three prior significant violations of the roof control standard arising from a roof collapse that killed two miners. (Ex. P-10, at 2; Ex. P-23; Ex. P-24.) The collapse occurred a little over a year before this violation. (Ex. P-23.) It is true that the circumstances surrounding the collapse were different than those presented in this violation, e.g., it did not occur in the 002 section. (*Id.*) Nevertheless, these miners' deaths provided to Stillhouse a grave reminder of the importance of complying with its roof control plan. *See San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (recognizing that prior violations of the accumulation standard at 30 C.F.R. § 75.400 for different conditions occurring in different areas of the mine as opposed to the violation at issue may nevertheless put the operator on notice of an accumulation problem in its mine). As I have noted in detail, the gravity and negligence of Stillhouse's violation was severe. *See* discussion *supra* Part IV.D.4. Based on these considerations, particularly on those concerning the severity of Stillhouse's history of violations and on this specific violation's gravity and negligence, I conclude that the Secretary's proposed penalty of $177,600 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of $177,600 against Stillhouse.

E. Stillhouse's Constitutional Argument Against the Penalties Proposed by the Secretary

Stillhouse argues that the Secretary's proposed civil penalty assessments for flagrant violations under section 110(b)(2) of the Mine Act violate the Excessive Fines Clause of the Eighth Amendment, based on the United States Supreme Court's decision in *United States v. Bajkajian*, 524 U.S. 321 (1998). (Resp. Prehr'g Report 2; Resp't Br. 19–20.) Stillhouse argues that any civil penalty associated with a flagrant violation lacks proportionality and is thus punitive, and it invites me to find the penalty grossly disproportional and unconstitutional. (*Id.*) *See Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8, 21 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) (Commission may resolve constitutional challenges raised against enforcement of the Act).

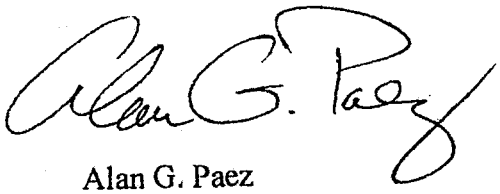
However, Stillhouse's constitutional arguments are misplaced. The Supreme Court has traditionally viewed the Excessive Fines Clause in the context of criminal prosecutions and punishments, such as in personam criminal forfeitures, and this point is reflected in *Bajkajian*, which narrowly applied the Court's test for excessive fines in the context of an in personam criminal forfeiture. *See, e.g.*, Matthew C. Solomon, Note, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 Geo. L.J. 849, 870–82 (Feb. 1999) (discussing *Bajkajian* in the context of the Supreme Court's jurisprudence on the Excessive Fines Clause). I do not accept Stillhouse's invitation to extend Eighth Amendment protections into the administrative civil penalty context. *Cf. S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 138 F.3d 686, 687 (7th Cir. 1998) (holding administrative fine does not constitute punishment for Eighth Amendment's double jeopardy purposes). Accordingly, I conclude that the Secretary is not constitutionally barred from seeking to impose a civil penalty on Stillhouse for a flagrant violation.

V. Conclusion

I conclude that the evidence in this case establishes that Stillhouse committed the four flagrant violations charged in Citation No. 6665036 and Order Nos. 6665037, 6665038, and 6665039. The citation and orders are hereby **AFFIRMED**, as written.

VI. Order

Stillhouse is **ORDERED** to pay a civil penalty of $761,000.00 within 40 days of this decision.



Alan G. Paez
Administrative Law Judge

Distribution:

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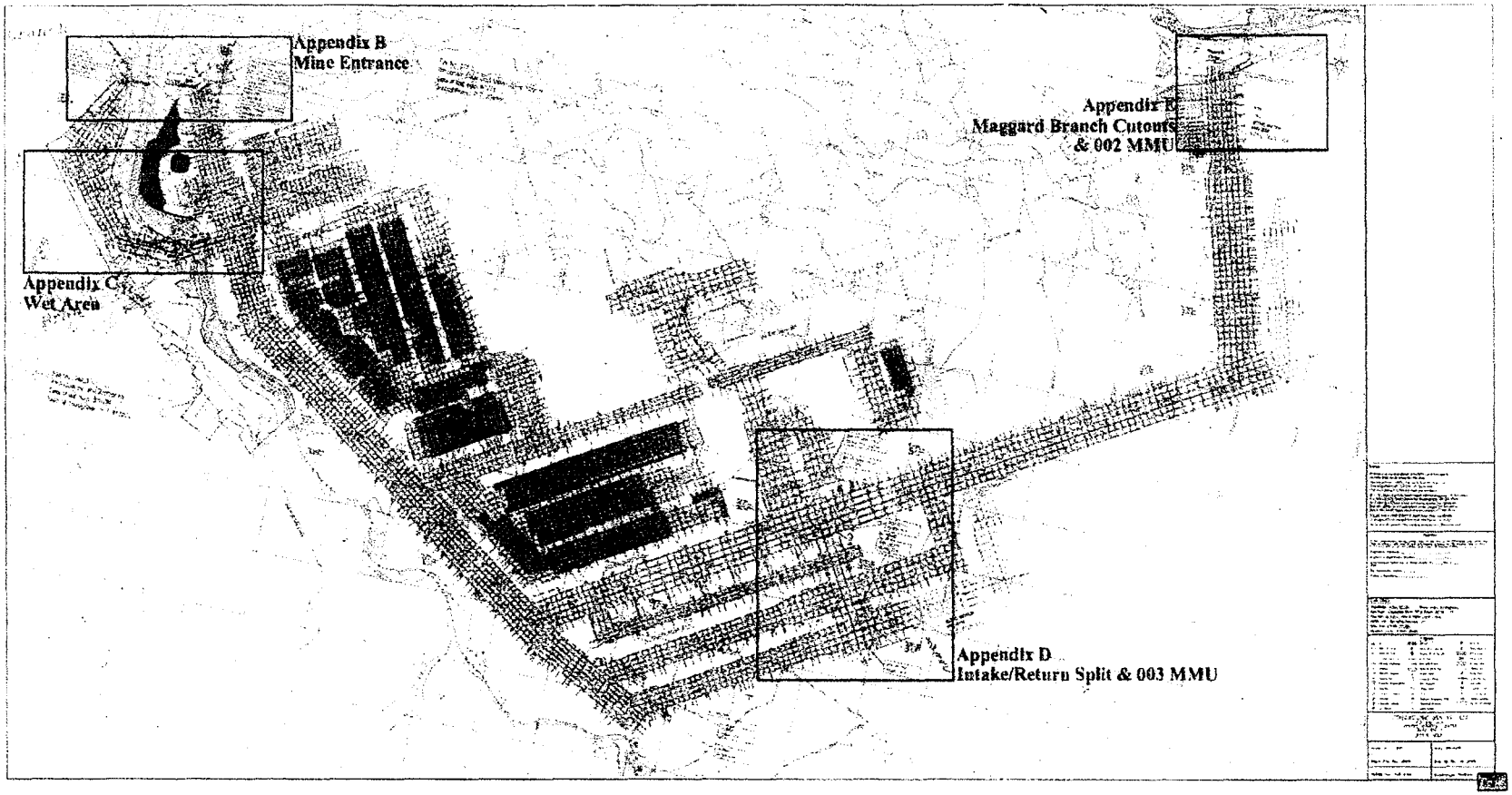
John M. Williams, Esq., and Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Center Circle, Suite 375, Lexington, KY 40513

/jts

Appendix A – Stillhouse Mine No. 1 – December 3, 2006 (Exhibit R-3)

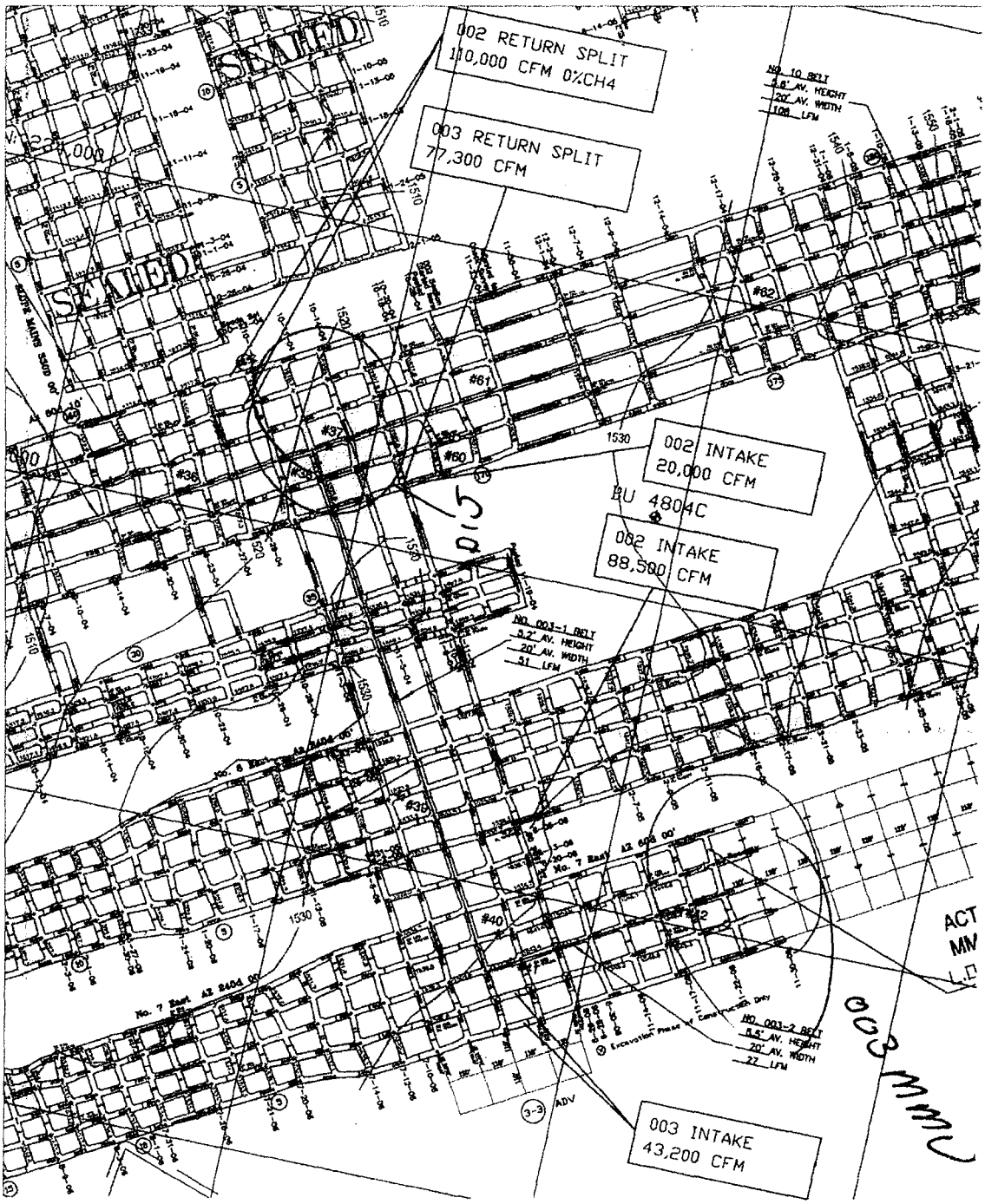


Appendix B_1 – Mine Entrance

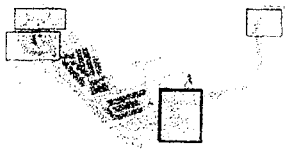
Appendix B_2 – Relative Location of Mine Entrance

Appendix C_1 – Wet Area

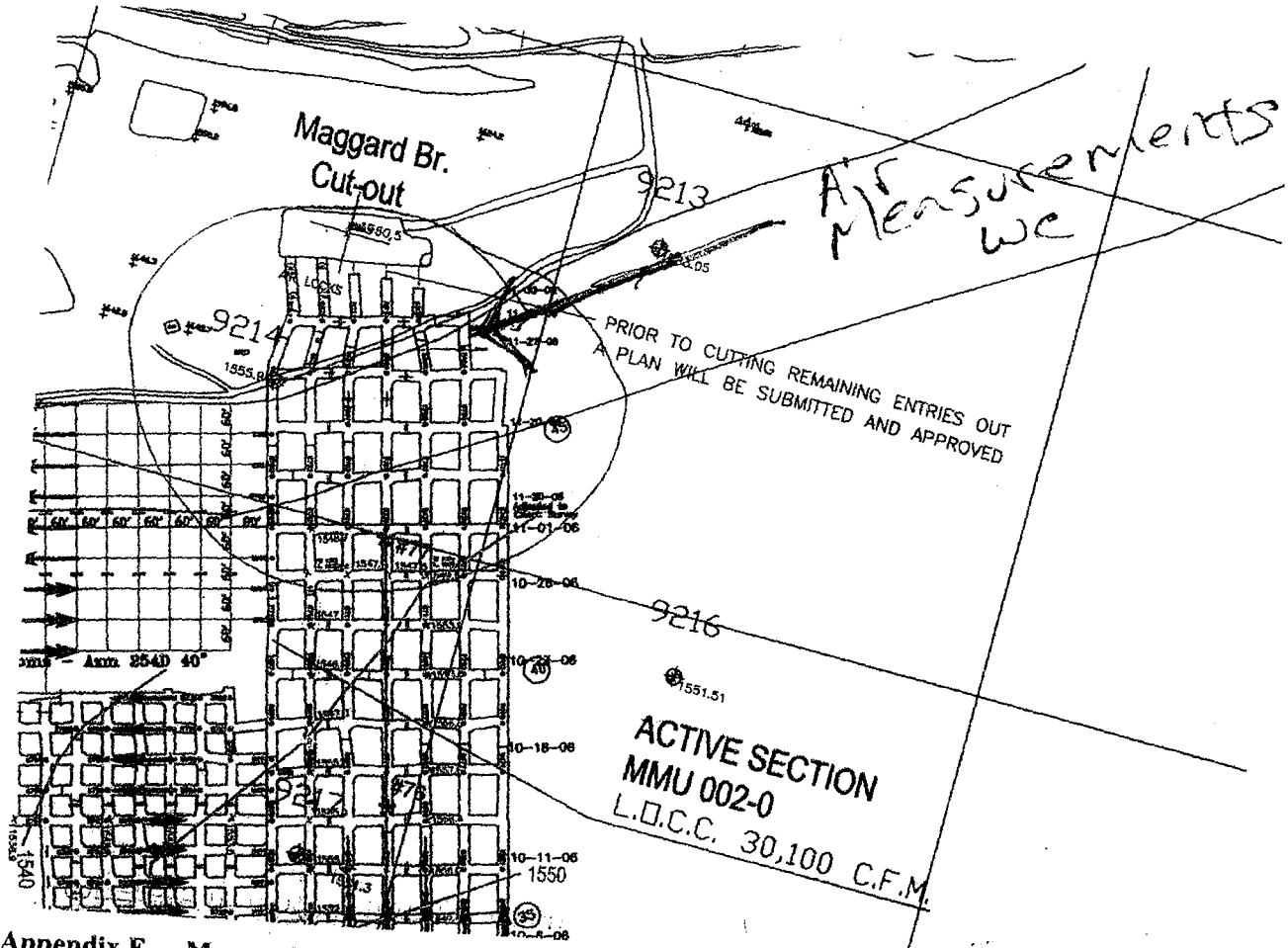
Appendix C_2 – Relative Location of Wet Area



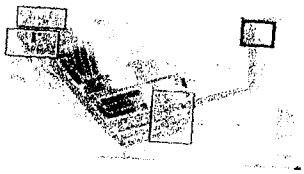
Appendix D_1 – Intake/Return Split & 003 MMU



Appendix D_2 – Relative Location of Intake/Return Split & 003 MMU



Appendix E_1 – Maggard Branch Cutouts & 002 MMU



Appendix E_2 – Relative Location of Maggard Branch Cutouts & 002 MMU

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-577 6809
Telecopier No.: 202 434 9949

March 28, 2011

OAK GROVE RESOURCES, LLC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2009-261-R
v.	:	Citation No. 7696616; 01/08/2009
	:	
	:	
SECRETARY OF LABOR,	:	Oak Grove Mine
MINE SAFETY AND HEALTH	:	Mine ID 01-00851
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-487-P
Petitioner	:	A.C. No. 01-00851-180940-01
v.	:	
	:	
OAK GROVE RESOURCES, LLC.,	:	Oak Grove Mine
Respondent	:	

DECISION

Appearances:

Jennifer D. Booth, Esq., on behalf of the Secretary of Labor
R. Henry Moore, Esq., Jackson Kelly, PLLC, on behalf of Oak Grove Resources, LLC

Introduction:

These cases are before the Court on a notice of contest filed by the Respondent, Oak Grove Resources, LLC ("Oak Grove") and a civil penalty petition filed by the Secretary of Labor ("Secretary"), acting on behalf of the Mine Safety and Health Administration ("MSHA"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as

amended. ("the Act") (30 U.S.C. §§ 815, 820). In the Notice of Contest, the Contestant challenged, among other aspects, the validity of a safeguard, on several grounds. In the civil penalty proceeding, the Secretary, via a special assessment, seeks a $55,000.00 penalty on the basis of an alleged violation of 30 C.F.R. § 75.1403-10(b), a safeguard provision. A hearing was held in Birmingham, Alabama on December 7, 2011.

Background:

Miner Lee Graham was killed at Respondent's Oak Grove Mine on May 22, 2008. There is no dispute about the circumstances of his death which may be briefly summarized as follows: On the date of Mr. Graham's death, Oak Grove was in the process of transporting a shearer body to the longwall face via the main haulage road. The shearer body, a machine that operates on the longwall face, weighs 24 tons and at the time of the accident it was being transported on a "shearer carrier," which is a haulage carrier designed for the task of hauling the shearer body. Mr. Graham died when he was pinned between a locomotive he was operating and the shearer body.

Oak Grove was attempting to transport the shearer body using two tandem locomotives: Motors No. 3 and No. 8, to *pull* the shearer carrier and Motors No. 4 and 9 to *push* the shearer carrier. Therefore in terms of their destination to the longwall, Motors No. 3 and 8, since they were pulling, were leading and Motors No. 4 and 9 were following the procession. Each pair of locomotives was connected to one another by a coupling. For the two coupled motors pulling the shearer body, No. 8 was in the lead, and connected to No. 3. The No. 3 itself was connected to the shearer body by a one inch diameter, flexible, wire rope. Thus, unlike the relatively rigid connection between the motors, through a coupling, the connection for the *pulling* locomotives, utilizing a *wire rope* to the shearer carrier was anything but rigid. Miner Graham was operating the No. 3 motor. In contrast to the wire rope arrangement connecting the pulling motors to the shearer carrier, the pushing motors were connected to the shearer carrier by a *solid drawbar.*

To recap, if one were standing alongside the transporting effort at the time, such individual would have observed, beginning at the front, pulling end, the No. 8 motor, which was connected to the No. 3 motor via a coupling and then the No. 3 motor connected to the shearer carrier by the wire rope. Next would be the shearer carrier itself and on the pushing end, a connection from it, by means of a solid drawbar, to the No. 4 motor. Finally, the No. 9 motor was connected to the No. 4 motor via a coupling in the same fashion as the link between the No. 3 and the No. 8. The significance of the wire rope connection will become apparent momentarily.

To understand how the fatality occurred, picture the procession moving towards its destination, as described, and reaching an upgrade. Slack then developed in the wire rope connection and the consequence was a derailment of the shearer carrier. Examining the situation, the victim unwittingly placed himself in a dangerous position, standing in the middle of the track, between his locomotive and the derailed shearer carrier. It was then that the coupled motors,

Nos. 3 and 8 either slid or rolled downhill with Mr.Graham becoming fatally pinned between those motors and the shearer carrier.

An MSHA investigation ensued. This investigation was conducted by Inspector David Allen. Upon the conclusion of his investigation, Inspector Allen issued Citation No. 7696616, pursuant to Section 314(b) of the Mine Act for an alleged violation of Safeguard No. 2604892. In his testimony at the hearing, Mr. Allen spoke to the hazards arising from pushing cars on haulage roads. The hazards, he expressed, are plain. When one pushes a car visibility is affected because the load is in front of the pushing force. This makes it more difficult to see the track and any traffic that may lie ahead. Beyond that concern, when pushing, as opposed to pulling, one does not have positive control. Third, pushing also creates a pinch point, as happened here between the shearer carrier and the No. 3 motor.

The law regarding Safeguards:

The law regarding safeguards is well-established and clear. A few cases, representative of that law, are here noted.

In *McElroy Coal*, 23 FMSHRC 201 (Feb. 2001), Judge David F. Barbour, discussed this issue where the mine challenged the validity of the underlying safeguard.[1] Judge Barbour noted that the Commission has recognized that section 314(b) of the Mine Act "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining," citing *Jim Walter Resources, Inc.*, 7 FMSHRC 493, 496 (April 1985), but that, because a safeguard is issued without notice and comment rulemaking, the interpretation of them is more restrained. Further, he observed that "the safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed," citing *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 ("*Southern Ohio Coal*"). As the Commission expressly stated in *Southern Ohio Coal*, "a safeguard notice *must identify with specificity the nature of the hazard at which it is directed* and the conduct required of the operator to remedy such hazard." *Id.* at 512. (emphasis added). In that case, the safeguard spoke to fallen rock and cement blocks and required 24 inches of clearance on both sides of the conveyor belt. Given those identified hazards, the Commission held that "conditions such as the water described in the citation" were outside of the hazards identified in the safeguard's notice.

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[1] The text of that safeguard in that case provided: "Ten miners . . . were observed on the Blakes Reideg elevator . . . also on the elevator was a . . . cart loaded with 6 boxes of water, a belt conveyor scraper, and a pipe connector. If the elevator would stop abruptly, the cart and/or supplies could expose these men to injury from being struck. To eliminate this hazard, the following safeguard notice is hereby issued [:] This is a notice to provide safeguards prohibiting supplies, parts or tools, except small hand tools or instruments, to be transported with persons on the elevator at this mine." The reader should note that the hazard was described in the safeguard notice.

Judge Barbour also noted that, for all of these requirements, it is the Secretary that bears the burden of proof in establishing the validity of the safeguard "by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address the actual transportation hazard."[2]

In *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781 (Nov. 1997), ("*Cyprus*") the Commission spoke to the subject of safeguards in a context similar to this case. There, signal lights to control traffic were in issue.[3] Although the entire text of the safeguard was not stated in the decision, the quoted portion of it is still informative. There it noted: ". . . track haulage equip[ment]operators to use the block lights installed along supply track haulage at the mine, to clear such lights (turn off after each use) in order to assure approaching haulage equipment a clear road exists and also only 1 piece of haulage equipment shall be operated in the same block light except [motors] . . . ." That safeguard was later modified, deleting the one piece of haulage equipment being operated in a block requirement but adding a requirement that vehicles be separated by at least 300 feet and that the signal light be used properly so that others would know when other equipment was within a block. The Commission took the opportunity in *Cyprus* to review the requirements for a valid safeguard, as set forth in *Southern Ohio Coal Co.*, 14 FMSHRC 1, (January 1992)("*Socco II*"). It noted that, in addition to the predicate requirement, that is, that there be a transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition, the safeguard must state the corrective measures that are to be taken.

In line with these requirements, the Commission added that such safeguards must be strictly construed, because they are issued without the usual practice of notice and comment rulemaking. *Socco II*, 14 FMSHRC 1, 8.

Oak Grove's challenge to the validity of Safeguard No. 2604892.

Oak Grove has raised a number of challenges to MSHA's enforcement action which will now be discussed.

Respondent contends that although the safeguard refers to a locomotive pushing two loaded supply cars down grades, nowhere does it identify the nature of the hazard to which it was directed. R's Br. at 2. Looking to Commission precedent, Oak Grove asserts that the safeguard

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[2]Judge Barbour also noted that the Secretary's burden also includes establishing that the "conditions for which the citation was issued c[o]me within the safeguard."

[3] In *Cyprus* the transportation hazard was leaving a block light "on" after an equipment operator had departed that block and the Commission upheld the validity of the safeguard. The light system provided a means of communication so that miners would be informed of the presence of another piece of equipment within a block. Disregarding the light procedure could result in an accident between cars operating in a block.

was not validly issued. It notes that not only do Commission decisions in cases such as *Socco II* make this a plain requirement for safeguards, but also that MSHA's own Program Policy Manual ("PPM") directs that the "safeguard notice should also identify the nature of the hazard to which it is directed." Emphasizing this point, the PPM continues with an example of a potential subject for a safeguard, adding that the "safeguard should also include a statement of the hazards that . . . [it] is intended to prevent." R's Br. at 8-9, quoting 2003 PPM at p. 129. In fact, the safeguard notice in issue in this litigation fails to expressly address any hazard. Thus, the Respondent urges that because the safeguard in this case lacked the required specificity identifying the nature of the hazard, it must fail. R's Br. at 7-10. Accordingly, it is Respondent's position that the Citation in issue in this proceeding should be vacated because the underlying safeguard "fails to identify with specificity the nature of the hazard at which it is directed."[4]

The government's sole witness was David Allen, who is with the MSHA District Office in Birmingham, Alabama. Presently he is the supervisor, Mine Safety and Health Specialist for the ventilation plans group. Tr. 16. Allen was assigned to investigate the accident associated with this litigation. Tr. 19. Ex 4 is Allen's accident investigation report. Tr. 20. According to Allen, as noted earlier, miners were in the process of moving the shearer carrier and, as they were traveling upgrade, slack developed in the wire rope between the No. 3 motor and the shearer carrier. With that slack, the carrier derailed. Allen agreed that once the shearer carrier derailed, the miners evaluated the problem. This took anywhere between two to five minutes and during that time the motors on either side of the shearer carrier did not move. At some point after that time elapsed Mr. Graham, the victim, stepped in between the shearer body and the No. 3 motor and it was then that the motor moved, resulting in Mr. Graham becoming fatally pinned between that motor and the shearer body. Tr. 56-57. Allen agreed that "one of the causal factors" was someone forgot to set a brake on the motors that moved. Tr. 58. Thus, apart from the safeguard's failure to identify any hazard, and even if the Secretary's claim as to the hazards supposedly addressed by the safeguard were accepted, this accident occurred not because of any claimed failure to comply with that safeguard. In short the accident did not occur from pushing the shearer.

Allen, who had prior mining experience moving mining equipment, stated that, when in his past work at mines, he had performed such tasks, the equipment was pulled through the mine. The pulling was accomplished by using a solid bar, that is a tongue or a drawbar between the locomotive and the car itself. Yet, he conceded, even when moving by pulling, derailments would occur. Tr. 28-29.

The safeguard, which was originally issued in March 1986, is set forth in GX 2. Tr. 40.

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[4]Alternatively, even if it is determined that the safeguard is valid, Respondent contends that the action must also fail because the conditions cited must be within the reasonable scope of its terms. Respondent raised several other arguments such as that the safeguard does not pertain to the act of moving heavy equipment. Given the outcome here, these contentions need not be resolved.

Allen offered *his particular interpretation* of the hazard the safeguard is intended to address. To that end, he described what the safeguard *requires*, that is, that cars on main haulage roads are not to be pushed. Tr. 42. Distinct from that requirement, which is undeniably in the safeguard, is the matter of the hazard. To deal with that, however, Allen moved from reading the text of the safeguard to "the hazard that [*he*] identified in association with the safeguard." That answer required, not reading on Allen's part, but *reading into* the hazard he *assumed* was intended by that safeguard. Tr. 42. Allen then proceeded to identify "several hazards associated with [the safeguard]." These included visibility hazards, the lack of "good positive control of the loads" by pushing instead of pulling, and creating a "pinch point." Tr. 42-44. To get right to the point, the Court notes that not one of these hazards, or any other expressly stated hazard for that matter, is within the four corners of the safeguard, and as such the safeguard is fatally flawed.[5] Nor is the hazard so plainly obvious that it need not be stated.

It was brought out that during his investigation of the accident, Allen also issued two safeguard notices. Tr. 63. In contrast to the safeguard at issue here, Allen's safeguards, one of which was based on 30 C.F.R. § 75.1403-10(b), described both the condition *and the hazard* he identified. Tr. 64. The other safeguard he issued did the same thing; it identified the hazard. Tr. 65. Further, Allen admitted that the safeguard in issue in this case *does not* describe the hazard. Tr. 65. Accordingly, when Allen was asked if the safeguard made any reference to "pinch points or visibility or the ability to control the load," he responded: "No. I mean, it's not in there." Tr. 66. Allen admitted that when *he* writes a safeguard he always puts the hazard in it. Tr. 67.

For its part, the Secretary notes that the Act specifically provides for safeguards, per Section 314(b) of the Mine Act and that the provision allows the Secretary to issue "other safeguards adequate, in the judgment of an authorized representative . . . to minimize hazards with respect to transportation of men and materials." Of course, no one disputes those observations. The Secretary acknowledges that the inspector must determine the presence of an actual transportation hazard, which hazard is not already addressed by another mandatory standard and that the safeguard is necessary to correct that hazard.

To the Respondent's contention that the safeguard fails to specifically identify the hazard, the Secretary contends that the safeguard does sufficiently notify the mine of the hazardous conditions. Sec. Br. at 5. However, the Secretary's admission that the hazard must be identified is not unqualified, as she argues that the safeguard does not require enumerating the specific hazards in it, such as the risk of one being crushed or struck. In its Reply Brief, the Secretary

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[5]While the failure to state a hazard is fatal, even beyond that the safeguard would fail. Allen stated that if the operator had been pulling the shearer no pinch point would have existed between the No. 3 motor and the shearer carrier. Of course, the shearer was being pulled and pushed at the same time. The pulling aspect was by means of the wire rope but even as to that Allen maintained a rigid connection, not a wire rope, would have to be used. Just as one will not find any listed "hazard" in the safeguard, one will search in vain to find any requirement for a rigid connection.

reiterates that point, asserting that the Commission has never invalidated a safeguard for failure to identify the specific hazards involved. Sec. Reply at 1. The test, it maintains, is that the safeguard adequately apprise the mine operator of the hazardous practice proscribed by it. Here, the Secretary believes, the safeguard could not be plainer: cars on main haulage roads are not to be pushed, period. The Secretary adds that is exactly what occurred with this fatality. The shearer carrier was being pushed, contrary to the safeguard's prohibition of that practice. Thus, from the Secretary's perspective, upholding the safeguard is a simple matter. The safeguard proscribes pushing cars and the Respondent's Assistant General Mine Foreman/DayShift Foreman, Chad Johnson, admitted that the shearer carrier was being pushed as the shearer was being transported to the face. Sec. Br. at 7, citing Tr. 99. Therefore, it contends the Citation, No. 7696616, was established. As explained earlier, the Court has noted that Commission law requires more for a safeguard to be sustained.

CONCLUSION

In applying the law regarding safeguards to a specific enforcement action, here a section 104(a) citation, the determination of the applicability and validity of the safeguard must begin, and be bounded by, the four corners of the notice to provide safeguard. In this instance, the safeguard in question, which was issued on March 3, 1986 provided in full:

> The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No 10 sections. Respectively, this notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the the working section to the producing entries and rooms.

Manifestly, the notice to provide safeguard fails to satisfy the requirements established by the Commission because nowhere does it identify the hazard it purports to address. True, the *requirement* is stated clearly that, with some exceptions, cars may not be pushed, but *the hazard* from that activity is not stated. As such, applying the clear rules established by the Commission for evaluating the validity of a safeguard, the safeguard issued here must fail.[6]

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[6]This safeguard has some history associated with it. After it was issued, a waiver of its requirements followed. Then, that waiver was voided and the safeguard reinstated. Those issues were addressed in the Court's earlier Order on the Respondent's Motion for Summary Judgment. 2010 WL 3616463 (August 2010). The "waiver" of the safeguard provides some insight into the

The history of the safeguard in this case fails to comport with these requirements.[7]

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hazard the safeguard attempted to address because the contingencies for the waiver speak of ensuring that the track is clear of all traffic, that a sign or light be placed to prevent equipment from entering the haulage route during the move, and that sufficient motors be employed to control the load. However, there are two problems with referencing the waiver to understand the hazard addressed by the safeguard. First, the *safeguard* must identify the hazard in the first instance. Subsequent documents, such as a waiver, cannot act as a substitute for what the safeguard must provide in the first instance. Only a new safeguard notice or an amendment to the original safeguard notice can fill the void created by the absence of a hazard being identified. Second, even if it were assumed for the sake of argument that one could look to a subsequent document that is not a safeguard itself or an amendment to one, in this case the waiver only implicitly identifies the hazard being addressed.

[7] The Secretary has also noted that two other administrative law judges have recently addressed this issue. For example, Judge Miller in *American Coal Company* held that it is not required for a safeguard to specify each specific scenario that may develop. Instead the requirement is for the safeguard to identify the hazard. Order Denying Respondent's Motion for Summary Decision, LAKE 2007-139 etc. (September 20, 2010) Administrative Law Judge Manning reached the same conclusion in a separate case involving *American Coal Company*, LAKE 2007-171 etc. (December 17, 2010). Some comment about the impact of these two administrative law judge decisions is in order. The first, and most obvious observation, is that decisions issued by fellow administrative law judges have no precedential effect. The second observation, the corollary of the first, is that the Court must pay attention to the Commission's decisions. That said, a closer examination of the administrative law judges's decisions cited by the Secretary is still useful. In Judge Miller's decision in *American Coal Company*, she stated that a safeguard "hazard" refers to "conditions/objects in the mine, as opposed to potential risks/outcomes associated with those conditions or objects." Order Denying Respondent's Motion for Summary Decision, LAKE 2007-139 etc. (September 20, 2010). For Judge Miller the safeguard must identify with "necessary specificity (1) a condition/object that could affect the safe transportation of men and materials and, (2) the conduct required to remedy such." This Court interprets the phrase "a condition/object" that could affect the safe transportation as synonymous with the hazard. But beyond the semantic choices employed, a closer examination of the safeguards themselves reveals that they are quite different from the safeguard issued in this case. In one, a miner was being hoisted in a cage with the gate in open position. The safeguard required that the gate be closed. In another, a mine floor had loose and dislodged flooring and the safeguard required such problems to be corrected either by re-securing or removing the problems, while another was issued for insufficient travelway width due to water and slurry, a problem to be corrected by removal of the water and slurry. In the Court's view, the hazards were identified in many instances. A safeguard addressing a miner traveling in a car with the gate open needs no further statement, as it is plain that the hazard, an open door on a moving elevator, creates a hazard. Similarly, in Judge Manning's decision, *American Coal Company*,

ORDER[8]

For the foregoing reasons, Oak Grove's contest to Citation No. 7696616 is sustained and accordingly that Citation is hereby VACATED. Further, the Petition for the Assessment of Civil Penalty in Docket No. SE 2009-487-P is hereby DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

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R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, PA 15222

LAKE 2007-171 etc. (December 17, 2010), in many instances the hazards were inherently or expressly described within the safeguards.

[8] The parties raised a number of other issues but, because of the Court's ruling that the safeguard was irreparably flawed by failing to identify the hazard for which certain activity was to be proscribed, these matters became ancillary. These included Oak Grove's claim that after the MSHA waiver was voided, the agency allowed Oak Grove to develop its own procedure for pushing heavy equipment; that the safeguard here only applied to mine supply cars, not moving heavy equipment; that it was safer to push the shearer carrier; that at least one MSHA inspector had observed the mine move heavy equipment and made no objection to the process and that a former MSHA District Manager testified that he ordered all deficient safeguard notices to be vacated and if a hazard was again determined to exist, to re-issue the safeguard with the hazard clearly stated in it. For various reasons, none of these claims were considered impressive by the Court but it is unnecessary to elaborate upon them, given the determination that the safeguard itself failed to identify the hazard involved.

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 29, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2009-880-M
Petitioner	:	A.C. No. 01-03255-193266-01
	:	
v.	:	Docket No. SE 2009-881-M
	:	A.C. No. 01-03255-193266-02
	:	
PICENOS BROTHERS,	:	King Quarry
Respondent	:	

DECISION

Appearances: Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Alberto Picenos, *pro se*, Oneonta, Alabama, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings are before me based on three alleged violations of the Secretary's mandatory safety standards in Part 56 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U. S.C. Part 56, governing surface metal and nonmetal mines. These proceedings also concern two alleged violations of the Secretary's new miner and refresher training regulations in Part 46 of the Mine Act. These alleged violations occurred at King Quarry, operated by Picenos Brothers, a sole proprietorship. At King Quarry, Picenos Brothers employs six miners who use a dozer, a bobcat, sledge hammers and picks to extract dimensional stone material. The Secretary proposed a total civil penalty of $23,707.00 for the five alleged violations at issue.

During a May 10, 2010, conference call with the parties, Picenos Brothers stipulated to the fact of the violations, but contested the proposed penalties. I expressed concern that the proposed $23,707.00 civil penalty did not appear to be proportionate to the size of the mine operator as required by the statutory penalty criterion in 30 U.S.C. § 820(i). In response to my concern, the Secretary offered to reduce the total proposed civil penalty to $20,000.00, which did not adequately address the issue of proportionality.

During a May 27, 2010, conference call, Picenos Brothers was asked to provide documentation and information regarding the size of the company and the circumstances behind the cited violations. Shortly thereafter, Picenos Brothers provided documentation and information reflecting that it is a relatively small mine operator.

On November 9, 2010, the Secretary was given the opportunity to provide the testimony of the issuing Mine Safety and Health Administration ("MSHA") inspector to support the proposed civil penalties. Picenos Brothers waived its right to attend the hearing since it had stipulated to the fact of the violations and only contested the proposed penalty amount. Given the Commission's unprecedented workload, the hearing was held in Washington, D.C. At the hearing, I was particularly concerned about MSHA's enforcement of Part 46 training obligations of a small operator, such as Picenos Brothers.

The issuance of the subject 104(g)(1) withdrawal orders blurs the distinction between the failure to provide training and the failure to certify that such training had been given. On June 30, 2009, the inspector issued 104(g)(1) withdrawal Order Nos. 6511150 and 6511151 citing violations of the refresher training and new miner training provisions in Part 46. (Gov. Exs. 8, 9). The citations were issued after the inspector determined that Picenos Brothers had not completed MSHA certification Form 5000-23 for refresher and new miner training as required by 30 C.F.R. § 46.9. Specifically, Picenos Brothers had not certified that: (1) refresher training had been given to six miners; and, (2) new miner training had been given to one miner.

At the hearing, the issuing inspector conceded that on-the-job training is a significant, if not the most important element, of new miner training. (Tr. 250-51). The Secretary attributed the cited violation to a high degree of negligence and proposed a civil penalty of $7,176.00[1] for 104(g)(1) Order No. 6511151 despite the fact that the new miner had been working at the mine site for several months and apparently had received on-the-job training. The training concerned the new miners' job duties that principally consisted of operation of a bobcat and manually stacking pallets. (Tr. 247-49). Though the inspector observed the new miner operating a bobcat, the inspector did not determine the nature and extent of the bobcat training that had previously been provided.

The 104(g) orders required the immediate withdrawal of miners because, as noted in the orders, the miners were alleged to be a hazard to themselves and others. (Gov. Exs. 8, 9). However, the inspector did not determine what, if any, refresher and new miner training had been given to abate the 104(g) orders and to warrant allowing the subject miners to return to work. The withdrawal orders, and the abatement thereof, were based solely on Picenos Brothers' completion of Form 5000-23 for each of the subject miners. (Tr. 213-14, 254-55).

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[1] Order No. 6511151 attributed the cited violation to a high degree of negligence, but it was not designated as unwarrantable because it alleged a violation of the statutory provision in section 104(g) of the Mine Act. 30 U.S.C. § 814(g). Only alleged violations of mandatory safety standards can be attributed to an unwarrantable failure. 30 U.S.C. § 814(d)(1). However, the proposed $7,176.00 civil penalty for Order No. 6511151 was the same as the proposed civil penalty for other alleged violations of mandatory standards in these proceedings that the Secretary alleges are unwarrantable.

Obviously, small operators do not have the formal training staff or facilities available to a large mine operator. Nevertheless, new miner and refresher training constitute a significant means of preventing miners' exposure to hazardous conditions and practices. However, MSHA's enforcement in this matter, requiring refresher and new miner certifications, without determining what, if any, training had been provided, elevates form over substance and trivializes, rather than achieves, the purpose of the training regulations. The failure to ascertain the degree of training provided before and after the issuance of 104(g) orders relegates such orders to certification reporting violations rather than serious training violations. I urge the Secretary to revisit her method of enforcement of the Part 46 training regulations, particularly with respect to their application to very small mine operators.

To determine the appropriateness of the size of her proposed penalty, following the hearing, the Secretary deposed Alberto Picenos to obtain further information about the size and operation of his business. The Secretary now has filed a motion to approve settlement wherein the parties have agreed to a reduction in the civil penalty from $23,707.00 to $11,910.00. The parties' settlement agreement includes an agreed upon payment schedule, beginning within approximately 60 days of this order, to be paid in a total of 31 monthly installments.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Picenos Brothers **IS ORDERED** to pay $1,500.00 on or before June 1, 2011, and to pay the remaining balance in 30 monthly installments of $347.00 on the first of each month thereafter, in satisfaction of the five citations at issue.[2] In the event that timely payment is not received, the entire balance will become due immediately. Upon receipt of timely payments, the captioned civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket Nos. and A.C. Nos. noted in the above caption on the checks.

Distribution: (Certified Mail)

Sophia Haynes, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, GA 30303

Alberto Picenos, Owner, Picenos Brothers, 93 Parks Circle, Oneonta, AL 35121

Amy Allman, 5205 County Highway 24, Springville, AL 35146

/jel

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

March 31, 2011

BIG RIVER MINING, LLC Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2008-1627-R
	:	Order No. 6606120; 07/09/2008
v.	:	
	:	Docket No. WEVA 2009-1408-R
	:	Citation No. 8014667; 04/13/2009
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. WEVA 2009-1409-R
	:	Citation No. 8014669; 04/15/2009
	:	
	:	Docket No. WEVA 2009-1410-R
	:	Citation No. 8014670; 04/16/2009
	:	
	:	Docket No. WEVA 2009-1417-R
	:	Citation No. 8016683; 04/29/2009
	:	
	:	Docket No. WEVA 2009-1418-R
	:	Citation No. 8016684; 04/29/2009
	:	
	:	Docket No. WEVA 2009-1867-R
	:	Citation No. 8019935; 07/22/2009
	:	
	:	Docket No. WEVA 2009-1868-R
	:	Citation No. 6606537; 07/22/2009
	:	
	:	Docket No. WEVA 2009-1869-R
	:	Citation No. 8019938; 07/22/2009
	:	
	:	Docket No. WEVA 2009-1870-R
	:	Citation No. 8019939; 07/22/2009
	:	
	:	Broad Run
	:	Mine ID 46-09136

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1
Petitioner	:	A.C. No. 46-09136-156167
	:	
	:	Docket No. WEVA 2009-358
	:	A.C. No. 46-09136-159271
	:	
	:	Docket No. WEVA 2009-376
	:	A.C. No. 46-09136-167886-01
	:	
v.	:	Docket No. WEVA 2009-377
	:	A.C. No. 46-09136-167886-02
	:	
BIG RIVER MINING, LLC.,	:	Docket No. WEVA 2009-652
Respondent	:	A.C. No. 46-09136-170809-01
	:	
	:	Docket No. WEVA 2009-892
	:	A.C. No. 46-09136-176268
	:	
	:	Docket No. WEVA 2009-893
	:	A.C. No. 46-09136-176268
	:	
	:	Docket No. WEVA 2009-1105
	:	A.C. No. 46-09136-178779-02
	:	
	:	Docket No. WEVA 2009-1301
	:	A.C. No. 46-09136-181460
	:	
	:	Docket No. WEVA 2009-1302
	:	A.C. No. 46-09136-181460
	:	
	:	Docket No. WEVA 2009-1604
	:	A.C. No. 46-09136-187355
	:	
	:	Docket No. WEVA 2009-1669
	:	A.C. No. 46-09136-184534
	:	
	:	Docket No. WEVA 2009-1742
	:	A.C. No. 46-09136-190394
	:	
	:	Docket No. WEVA 2009-1989
	:	A.C. No. 46-09136-196188

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: Docket No. WEVA 2009-1990
: A.C. No. 46-09136-196188
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: Docket No. WEVA 2010-191
: A.C. No. 46-09136-199569-01
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: Docket No. WEVA 2010-192
: A.C. No. 46-09136-199569-02
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: Docket No. WEVA 2010-355
: A.C. No. 46-09136-202456
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: Docket No. WEVA 2010-473
: A.C. No. 46-09136-205265
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: Docket No. WEVA 2010-558
: A.C. No. 46-09136-207865-01
:
: Docket No. WEVA 2010-559
: A.C. No. 46-09136-207865
:
: Docket No. WEVA 2010-677
: A.C. No. 46-09136-210733
:
: Mine: Broad Run

DECISION APPROVING SETTLEMENT

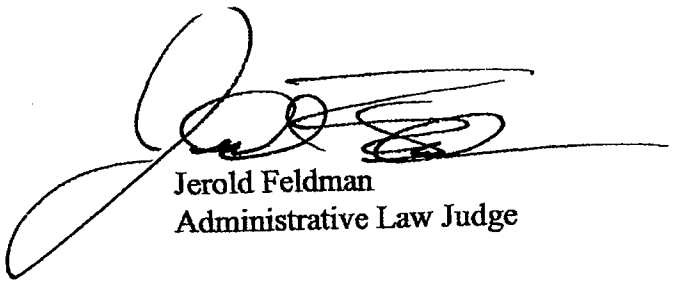
Before: Judge Feldman

These captioned proceedings are before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a comprehensive settlement agreement and to dismiss the 32 above captioned dockets. A reduction in total civil penalty from $1,341,410.00 to $979,230.00 is proposed.

The specific settlement terms are as noted in the comprehensive settlement agreement appended to the electronic version of this decision approving settlement, and posted online at the Commission's website: *http://www.fmshrc.gov*. The above captioned contest dockets have been resolved by the terms of the comprehensive settlement agreement. The proposed and agreed upon civil penalties for each docket are as follows:

Docket No.	Originally Assessed Penalty	Proposed Settlement
WEVA 2009-1	$57,333.00	$45,263.00
WEVA 2009-358	$119,411.00	$85,831.00
WEVA 2009-376	$40,250.00	$34,723.00
WEVA 2009-377	$1,156.00	$1,156.00
WEVA 2009-652	$16,961.00	$16,961.00
WEVA 2009-892	$4,000.00	$4,000.00
WEVA 2009-893	$18,682.00	$18,682.00
WEVA 2009-1105	$38,759.00	$38,759.00
WEVA 2009-1301	$27,333.00	$27,333.00
WEVA 2009-1302	$65,699.00	$65,699.00
WEVA 2009-1604	$10,402.00	$10,402.00
WEVA 2009-1669	$12,718.00	$12,718.00
WEVA 2009-1742	$2,824.00	$2,824.00
WEVA 2009-1989	$50,694.00	$25,478.00
WEVA 2009-1990	$92,570.00	$74,115.00
WEVA 2010-191	$101,522.00	$78,538.00
WEVA 2010-192	$140,651.00	$95,820.00
WEVA 2010-355	$17,926.00	$17,926.00
WEVA 2010-473	$94,291.00	$67,978.00
WEVA 2010-558	$263,643.00	$135,675.00
WEVA 2010-559	$146,573.00	$101,337.00
WEVA 2010-677	$18,012.00	$18,012.00
TOTAL	$1,341,410.00	$979,230.00

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and pursuant to the parties' agreement, Big River Mining, LLC **IS ORDERED** to pay the $979,230.00 civil penalty within 30 days of this order in satisfaction of the 32 dockets at issue.[1] Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:
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Curtis Capehart, Esq., Dinsmore & Shohl, LLP, P.O. Box 11887, 900 Lee Street, #600,
Charleston, WV 25399

/jel

[1] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket Nos. and A.C. Nos. noted in the above caption on the check(s).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

April 6, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2009-116 A.C. No. : 15-17165-164681
v.	:	
STILLHOUSE MINING Respondent	:	Mine: No. # 1

DECISION

Appearances: Matt Shepherd, Esquire, for the Secretary of Labor, United States Department of Labor
Richard D. Cohelia, Black Mountain Resources, Benham, Kentucky

Before: Judge Moran

Introduction

On January 16, 2008 section foreman Bobby Sexton took over the operation of a continuous miner so that an employee who was under his supervision could take his lunch break. In the process of operating the continuous miner, which process is carried out using a remote control box, Sexton placed himself in a "red zone," which is not allowed under the mine's roof control plan. As the continuous miner was being moved to the heading, it caught an uneven portion of the mine floor. This caused the continuous miner to pivot, with the result that Sexton became wedged between its tail boom and the rib. His injuries were not minuscule; he was knocked unconscious, had broken ribs, and missed several days of work from the incident.

There is agreement that the there was a violation, specifically that the conduct constituted a violation of the roof control plan. What remains in dispute is limited to whether the accident was the result of an unwarrantable failure on the part of the Respondent and whether the penalty sought by the Secretary, $60,000.00, is excessive. Tr. 14.

Given that the primary issue is whether there was an unwarrantable failure, it makes sense to begin with a review of the meaning of that term.

Unwarrantable failure

The oft-repeated starting point for describing "unwarrantable failure" is found at *Emery Mining Corp.*, 9 FMSHRC 1997, (December 1987) wherein the Commission explained that the term refers to aggravated conduct constituting more than ordinary negligence. It noted that it is "characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.'" *Virginia Crews Coal,*[1] 15 FMSHRC 2103 (Oct. 1993), quoting *Emery* at 2003-04. In *Gatliff Coal Company,*[2] 14 FMSHRC 1982 (December 1993), the Commission further discussed the distinction between negligence and unwarrantable failure. It noted that the subject is not simply a matter of semantics as an unwarrantable failure may trigger "the increasingly severe enforcement sanctions of section 104(d) [whereas] [n]egligence . . . is one of the criteria that the Secretary and the Commission must consider in proposing and assessing . . . a civil penalty." It went on to note that "'[h]ighly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence."

The Commission's decision in *Midwest Material Company,* 1997 WL 24292 (January 1997), looks at the other side of the coin; an instance wherein the administrative law judge's determination of no unwarrantable failure was reversed. There, the Commission found that the foreman was more than negligent in the dismantling of a crane boom, determining that his conduct was "intentional and deliberate" and therefore "aggravated conduct." The Commission noted that the foreman's negligent conduct resulted in a highly dangerous situation and it observed that it has considered a high degree of danger posed by a violation as supporting an unwarrantable failure.
It added that it is important to "recognize that the violation took place in the presence of a

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[1] Although cited, *Virginia Crews Coal,* is very distinguishable from the case at hand. In that case the Commission held that the Secretary had blurred the distinction between negligence and unwarrantable failure. The Secretary had argued that the operator knew of the violation through the preshift examination report but the Commission noted that Virginia Crews had only "a brief period of notice of the existence of a violation as a result of the preshift examiner's report." In contrast, here, as explained in more detail in the body of this decision, it was the mine's section foreman who committed the violation, and did so knowing that it was contrary to the roof control plan.

[2] *Gatliff Coal* also involved a foreman's actions and while the Commission noted that the foreman drove off the mine property with the two-way radio, the record showed that conduct was no more than inadvertence. In contrast, as explained in this decision, foreman Sexton's actions were not a consequence of "inadvertance."

foreman,[3] who, under Commission precedent, is held to [a] high standard of care." *Id.* at *4. The Commission noted that a section foreman is "held to a 'demanding standard of care in safety matters,'" and that there is a "heightened standard of care required of the section foreman and mine superintendent." *Id.*, citing *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987), *Wilmont Mining Co.* 9 FMSHRC 684,688 (April 1987)("*Wilmont*") and *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995).

In the Court's view, *Capitol Cement Corp.*, 21 FMSHRC 883 (August 1999) is particularly instructive. There, a shift supervisor's conduct in failing to deenergize the rail of a crane and not wearing a safety belt were deemed to constitute aggravated conduct. The Commission observed that both violations were obvious and dangerous. Further, the supervisor knew the consequence of his failure to deenergize and that not wearing a safety belt was dangerous. The Commission noted that "a high standard of care was required of [the]shift supervisor." It then added that "Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." 21 FMSHRC 893, citing *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). Finally, the Commission observed in *Capitol Cement* that the supervisor "had been entrusted with augmented safety responsibility and was obligated to act as a role model for [his] subordinate, who was watching him." *Id.*

Although already made clear by its decision, the Commission expressly stated that it "is well established that a supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes." *Id., citing* R&P, 13 FMSHRC at 194-97. Further, no *Nacco* defense[4] is available for violations that are the result of unwarrantable failure pursuant to section 104(d) of the Mine Act. *Id.* at 893.

Findings of fact[5]

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[3] *Midwest Material Company*'s principle applies *a fortiori* here, as the foreman was not merely in the presence of the violation, *he was committing it.* Significantly, the Commission expressed in that case that the "lapse of judgment or presence of mind on the part of the mine foreman with respect to the proper procedures for dismantling the crane boom, . . . qualifies as the type of 'indifference' or 'serious lack of reasonable care' that constitutes unwarrantable failure . . . ." *Id.* at *5.

[4] The "Nacco" defense arose where the Commission declined to impute a supervisor's *negligence* to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to risk of injury. 3 FMSHRC at 849-850.

[5] The parties entered into the following stipulations: Stillhouse Mining LLC was the operator of Mine No. 1; that mine is a mine as that term is defined by Section 3(h) of the Mine

As noted in this decision's introduction, Respondent's representative conceded: "We do not dispute that Mr. Sexton, who was both the foreman and the operator at the time, was standing in a precarious position . . . what we dispute is the unwarranted failure and aggravated conduct [assertion by the government]. Tr. 12 Therefore, this decision addresses unwarrantability and the appropriate civil penalty.

Inspector Kevin Doan, an employee with MSHA since 1999, and presently out of their Harlan, Kentucky field office, is a roof control specialist. Tr. 15. He has also been trained as an accident investigator. Doan had been called to the mine on January 16, 2008 to investigate an accident there, which occurred about 11 p.m. Tr. 24. Doan drove to the hospital first to check on the injured miner, and after that he proceeded to the mine, arriving between 12 p.m. and 1 a.m. The accident occurred on a working section where some 8 to 10 miners were working. As part of his investigation, Doan spoke with those miners who had knowledge about the accident. Tr. 26.

Based on his investigation through interviews and witness statements, Doan stated that there had been a malfunction with the continuous miner and its tail was turned outby for repairs. The machine was repaired but, as the continuous miner's operator was on a break,[6] the section foreman, Bobby Dean Sexton, took control of the continuous miner so that coal mining could be resumed. The machine is operated by a remote control box. As the section foreman began tramming the continuous miner back to the face, the machine contacted a ledge in the mine floor, causing it to pivot. This machine pivoting resulted in the foreman becoming pinned against the rib. Seconds later, the shuttle car operator came upon the scene, took over the remote control and backed the continuous miner away from the trapped foreman. Tr. 27-28. Doan augmented his testimony with a freehand drawing depicting the scene and he marked on the drawing where he believed the section foreman should have been standing. Tr. 29, 42 and Ex. 1A.

The section foreman, Mr. Sexton, was inby the tail boom of the continuous miner when he began 'tramming,' that is, moving, the continuous miner. Tr. 34. Doan confirmed that the section foreman, being located inby the tail boom while he was tramming the miner, was in violation of the roof control plan. Tr. 35, 39. This is not in dispute.

As Doan noted, a section foreman is responsible for the running the mechanized mining

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Act; the mine was engaged in commerce within the meaning of the Mine Act; more than 600,000 tons of coal were produced at the mine in 2008 and Stillhouse Mining is a large operator; a copy of the citation in issue in this proceeding was served on the Respondent by an authorized agent of the Secretary and Respondent timely contested the citation; Respondent is subject to the jurisdiction of the Mine Review Commission and the presiding judge in this proceeding; the judge has the authority in this matter and to issue a decision; and the proposed penalty will not affect Respondent's ability to remain in business. Tr. 9-10.

[6]Tr. 82.

unit. That includes "the management of that unit, as far as production and safety, and basically all aspects of that he's in charge of everything there." Tr. 39. Thus, Sexton was the supervisor of the eight to ten miners that work in that section.[7] Tr. 39, 87. Also, as section foreman, he is to have knowledge of the roof control plan and all other applicable plans. Tr. 40. Doan stated that, under the roof control plan, one is to be out of the way of "pinch points." There are numerous places one could be to be out of the way of such pinch points and the remote control box has an effectiveness range within which one can still control the continuous miner. Accordingly one does not have to be extremely close to the continuous miner in order to use the remote control device. Tr. 42.

Exhibits 2 and 5 complement Ex 1A in terms of understanding the place where the section foreman was pinned by the tail boom against the rib and Doan circled on Ex 5 the approximate location where the tail boom pinned Sexton against the rib. Exhibit 8 shows the ledge, or uneven floor, that caused the machine to pivot and as a consequence pin Sexton. Tr. 49.

Doan believed that Sexton would have had the opportunity to have seen the broken mine floor because he would have had to make a gas check of the area before he trammed the continuous miner. This is a requirement of the law. Tr. 50-51. Of course, while Sexton was well aware of the 'ledge,' or uneven floor problems, the violation existed apart from whether he had such knowledge.

As a consequence of his investigation, Doan issued a citation on January 24, 2008 for a violation of the roof control plan. Tr. 52-53. At that time the mine's roof control plan provided that when one is operating a continuous mining machine one must be in a safe location, and away from pinch points created by that machine and/or by haulage equipment. Tr. 53-54. Ex 11, item 1C, at page 7.

Doan also agreed that it was "common knowledge" that one operating a continuous miner is to position himself outby the end of that machine. This is well understood because there have been numerous accidents from people failing to position themselves safely. In providing this testimony, Doan was specifically including situations where a miner has been pinned by a continuous miner. Tr. 55. Thus, as a section foreman, Doan expressed that Sexton should have been aware of that, as well as all provisions of the roof control plan. Tr. 56. Sexton's error was placing himself in the turn radius. Tr. 58. Doan agreed that Sexton was in the "sheared" area[8] of the crosscut at the time of the accident.

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[7]That number includes the section foreman. Tr. 43.

[8] Thus, instead of a right angle for the entry, the corner is trimmed so that it is more like a 45 degree angle. Another way to visualize this is to imagine a trimmed corner of a crosscut so that the miner could enter the crosscut. Tr. 74. Doan marked the shear on Exhibit 1A. Such sheared areas are created so that the continuous miner can make the turn into the mine face.

Doan expressed that a "d" citation requires more than ordinary negligence, and that it may be associated with management's knowledge. Tr. 65. In his view Sexton's conduct was unwarrantable because he "violated the provisions of the Plan, [and] that as the section foreman and the leader of that crew he should have been familiar with that Plan. And so being the section foreman he should have known of the provisions of that Plan and he shouldn't have positioned himself in an area that would violate that Plan." Tr. 68. As he further explained, it was not simply one placing oneself where Sexton did that made it an unwarrantable failure. Rather it was "because he was the foreman and should have intimate knowledge of those plans." Tr. 69. Here, Doan considered Sexton's placing himself in the red zone that was deliberate. Tr. 70. He added that his determination did not rely solely upon Sexton placing himself in the shear area, nor would he consider the unwarrantable failure aspect to be eliminated if the tail of the continuous miner had been straight and no pinch point were created. Instead, the key determination from Doan's perspective was that Sexton had placed himself in the red zone. Tr. 70-71. Thus, Sexton placing himself in the sheared area did not insulate him from violating the Plan because he was still in the red zone. Tr. 76. As Doan summed up his unwarrantable determination, "[i]f a foreman knowingly violates a provision of any Plan . . . it would be unwarrantable." Tr. 72. In contrast, he expressed that the same analysis would not necessarily apply if the person who violated the Plan was not a foreman, because such person may not be familiar with the provisions of the Plan. Tr. 73.

Doan also considered it an aggravating factor if employees observe a foreman, as the leader of the crew, deliberately violating the Plan. Tr. 76. This is because the foreman is to set an example and see to it that the Plan is complied with and to make sure that those miners working under his authority comply with that Plan. Tr. 76. Doan's recollection was that the shuttle car operator saw the accident occur, a fortunate development, as that shuttle operator was able to rapidly come to Sexton's aid by using the remote to unpin Sexton from his trapped position against the rib. Tr. 77. Sexton, testifying later, asserted that the shuttle car operator did not see the accident actually occur but that he arrived shortly thereafter. However, Sexton stated that he was already pinned against the rib when the shuttle car operator came upon the scene. Tr. 86. The shuttle car operator arrived at that time because Sexton had started moving the continuous miner to the face and thus the shuttle car operator had arrived to get a load of coal from the miner. Tr. 86. The Court finds that no miner, other than Sexton himself, observed the accident.[9]

Bobby Dean Sexton, the foreman who was injured, also testified. Sexton has been a foreman for some 10 or 11 years. Tr. 80. He was operating the continuous miner because the usual miner operator had gone to lunch. Tr. 82. Sexton decided to put the continuous miner back to the task of mining coal, that is to say, he decided to tram the miner back into the heading and

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[9] However, that is of no consequence to the finding of unwarrantability. With an accident requiring the foreman's treatment at a hospital, word would have quickly passed about the circumstances and where Sexton was located when the accident occurred. Thus, directly observed or not, Sexton set a bad example for his crew.

he volunteered with his answer that he knew "the bottom was busted up there . . ." Tr. 82- 83. He also agreed that in doing so, he was using the continuous miner's remote control and that he placed himself in the shear. Tr. 84. Thus, Sexton himself admitted that he knew of the problem with the floor and he eventually conceded that he was in the shear when the accident occurred.

Significantly, when Sexton was asked to concede that the shear is in the red zone, he expressed that he did not agree that was the case, contending, by not answering the question, with his own challenge: "[w]here else are you going to get it?" Tr. 84-85. Accordingly, he expressed instead that, though in the shear, *he* thought he was in a "safe place." Tr. 85, 89. With little choice but to admit the obvious, as he was then pinned against the rib, he then admitted that he was not in fact in a safe place. Tr. 85-86.

Sexton also advised the Court that his intention was to run the continuous miner and start mining coal. Tr. 88. Just prior to the accident, Sexton stated that he was focusing on the pan on the miner because he was trying to get it "up over the top of that rock [on the mine's floor] where it was busting up." Tr. 88.

Sexton would not concede that, were he to do it again, he would not have placed himself in that position, as, in his view, "that's the only place to get to get out of the way." Tr. 89. He did not feel he could be elsewhere because he had the shuttle car on its way and he knew of no other place to be away from that car's arrival. As he put it,"[y]ou're locked up there with nowhere to go." Tr. 90. Thus, if faced with the same situation, though knowing he would be pinned, he would have stayed where he was at the time of his injury: "I believe I would, yeah." Tr. 90. Despite holding that point of view, he agreed he was standing in a pinch point. Tr. 90. Sexton also agreed that it was a violation of the roof control plan to stand in a pinch point while tramming the continuous miner. Tr. 91. Still, he insisted that he could think of no safer place to have been than where he was. Tr. 92. By taking that stance, he demonstrated a failure to have learned from the event. This attitude, held prior to the accident as well, also speaks to the unwarrantability of his conduct. After several attempts to obtain an answer, Sexton eventually admitted that he did know that he was in the red zone at the time of the accident.[10] Tr. 93-94.

Thus, Sexton believed there was no where else he could have positioned himself. He had to watch the bottom, as he was trying to have the continuous miner's pan avoid the uneven floor

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[10]Sexton stated that had the accident not occurred and had he been able to get the continuous miner back to the face, he would then have been outby the tail of the continuous miner and therefore out of the red zone at that time. Tr. 100. That is to say, had the continuous miner been trammed back to the face, once it had moved past the shear area on its way to the destination, that is, the face, he would not then have been in the red zone any longer. Tr. 102. Thus, the red zone is not a fixed position. It changes because it is relative to the location of the continuous miner at any given point in time. However, when the accident occurred, Sexton admitted that when he was struck by the tail boom of the continuous miner he *was* standing in the shear and that he was inby and that he was therefore in the red zone at that time. Tr. 101.

and he was concerned about the shuttle car which was on its way to receive an anticipated load of coal. Tr. 102.

The shuttle car operator on the day of Sexton's accident, Garland Gilliam, then testified. Much like Sexton, despite the accident, Gilliam did not agree that Sexton was in an unsafe location at the time of the accident. Tr. 106-107. He also felt there was no other place Sexton could have been. Tr. 107, 110. Accordingly, Sexton's established dangerous location was also viewed by one of his crew members as non-problematic. Gilliam was poised around the corner from the continuous miner, about 10 to 15 feet from it and he was waiting for the continuous miner to advance, at which point he intended to pull up behind it. Tr. 109. Thus, he stated that the normal mining process was that as the continuous miner is pulling into the face, the shuttle car operator is to be following in right behind. Tr. 111. Gilliam thought that a distinguishing factor was that the continuous miner was making the "second cut" and that he had no idea where the red zone was under such circumstances. Tr. 112. However, it is important to bear in mind that at the time of the accident, Sexton *was not in the second cut.* Rather, he was *tramming the continuous miner to make the second cut.*[11] Gilliam agreed with counsel for the Respondent that Sexton was in a confined position because of the line curtain and the shuttle car and that therefore, in his view, there was no other safe place to be. Tr. 114.

However, critically, while Gilliam had asserted that between the twin concerns of the line curtain and his operation of the shuttle car, there was no safe place for Sexton to be and avoid those concerns, *he agreed* that if the shuttle car operator had simply slowed down and not been intent upon coming up behind the continuous miner within seconds of its intended arrival at the face, Mr. Sexton could have stood outby the tail of the continuous miner. Tr. 119-120. Thus Sexton *could have stood outby the tail* and then the shuttle car operator could have pulled in behind, albeit at a slower speed. As Gilliam expressed it, "It's an option, yes." Tr. 119. Further, Gilliam expressed that such an option *would* slow down coal production. That is, employing such a technique would not allow mining to resume as quickly as possible. Tr. 119-120.

In response to a question from the Court, Gilliam reaffirmed that, in fact, had they proceeded differently, *there was* a place where Sexton could have stood which would have been safer, although such a location would have, as just noted, slowed down the production of coal. Tr. 121.

After the government rested, for its part the Respondent called Gregory Halcomb as a witness. Halcomb's experience includes having run a continuous miner for more than 20 years.

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[11]To be particularly accurate, the second cut had been *started* but then the continuous miner broke down, requiring repairs. After the repairs were made, Sexton took over and began tramming the continuous miner back to the face to continue making the second cut. Thus the continuous miner was on its way back to the face when it encountered the bad floor, causing it to pivot and strike Sexton as he stood in the red zone at the location of the shear, as indicated on Exhibit 1 A.

Tr. 125. He has worked with Sexton for more than 10 years. Tr. 125. On the day of the accident, Halcomb was filling in as an "extra miner" for the individual who normally would have operated the continuous miner on that day. Tr. 126. He had started making the second cut and in doing so had placed himself in "the flat, shearing," (i.e. he was standing in the shear) which location he considered to be the only place and the safest place he could be. Tr. 126, 128. As with Gilliam's testimony, Halcomb agreed that Sexton *could have in fact* stood outby the shear if no shuttle cars would be coming up. Tr. 132. Thus one could stand back out into the entry. Tr. 132-133.

Respondent's Post-Hearing Brief

Respondent contends that the Secretary did not establish unwarrantable failure. By its view, the evidence does not establish aggravated conduct, nor that it meets "any of the Commission's definitions of what constitutes unwarrantable failure." R's Br. at 7. Accordingly, it contends that there was no showing of "not justifiable and inexcusable" conduct, nor was it shown that the conduct was "more than inadvertence, thoughtlessness or inattention." *Id.*

Instead, from Respondent's perspective, foreman Sexton "did not realize his location in relation to the tail boom," and "did not deliberately violate the roof control plan." Contrary to those very assertions, Respondent then immediately asserts that, while Sexton did not realize his location and did not deliberately violate the plan, he "did not consider himself to be in violation of the plan since he did not think there was any safer place he could have stood to have operated the miner from its position." *Id.* at 7-8. Respondent continues that Sexton "reasonably believed that his actions were safer than any alternative" and, that being his state of mind, it asserts there was no unwarrantable failure. *Id.* at 8, (emphasis in brief). Apart from the facts, as found by the Court herein, Respondent's argument contradicts itself. Respondent cannot simultaneously assert that Sexton's actions were without realization of his location in relation to the tail boom and not deliberate, while also claiming that Sexton viewed his actions as not in violation of the roof control plan as he deemed his position to be the safest location for him. The latter claims bespeak conscious activity on Sexton's part and therefore flatly contradict any claim that his actions were not deliberate. Beyond the conflicting arguments of counsel, Sexton's own testimony shows that he knew exactly what he was doing.

Respondent's Counsel also repeats the theme in its brief, twice, that Sexton was standing in the "only place a miner operator could be positioned to operate the miner by remote." It then adds "***It is an undisputed fact that if Sexton had stood in the entry, he would not have been able to see to have operated the miner***." Id. at 8 (all emphases in brief). The problem with this contention is that it tells only half the story. Sexton had another, safe, position he could have located himself, but the overriding concern was to resume mining coal. This was unwise. Had the section foreman slowed things down, as he certainly could have, and moved to the position which he admitted was safe, resumption of coal mining would have been only very briefly delayed.
The consequence of focusing solely on the resumption of coal mining was that a significant,

rather than a momentary, delay in mining came about from the accident which ensued.

Respondent also contends that "the roof control plan [did] not specifically address the factual situation presented in this case [,namely]. . . where a miner operator should position himself to operate a continuous miner in a second cut."[12] *Id.* at 9. Last, in its weakest contention, Respondent seems to suggest that while Sexton is a shift foreman, he became a mere miner as he "was acting as a continuous miner operator when the accident occured." *Id.* Thus, while admitting that a foreman is to set a good example, Respondent seems to suggest that the responsibility vanishes where a foreman takes over a miner's task, such as here, where the crew member is on a lunch break. No authority is cited for this novel argument that one's status as a foreman ebbs and flows depending on the foreman's particular activity of the moment.

Apart from its contentions regarding unwarrantability, Respondent believes that the proposed $60,000.00 civil penalty is excessive. It seems to acknowledge that, though a higher penalty can have the effect of persuading the operator to encourage its management to comply, there is no evidence here that the Respondent does not already do that. *Id.* at 9. That may be the case, or it may not be, as the record does not speak to that, but the contention misses the point that a significant penalty can help focus the mind on those efforts and whether, in view of the section foreman's decisions here, management's encouragement of compliance with the safety regulations needs to be revisited, as stimulated through an attention-getting civil penalty.

In its post-hearing Reply Brief, the Secretary notes, as the Court did earlier in this decision, that in *Wilmont*, the Commission observed that supervisors have an obligation to set a good example for non-supervisory miners working under their direction, which is the situation which existed in this instance. The Secretary also points out that Sexton was a foreman, regardless of the particular task he may engage in at any given moment. Sec. Reply at 2. The Court, as stated, agrees. In fact, the Secretary maintains that there is an especial duty when a foreman takes over a subordinate's normal task to set the proper example. Here, as the Secretary correctly notes, this example was even more important because Sexton was not only a foreman, he had also been a long experienced continuous miner operator during his mining career. The record, as previously discussed, shows that Sexton's poor practice impacted Gilliam's perspective adversely.

To the contention that Sexton did not deliberately violate the roof control plan, and that he had no choice but to stand in the red zone, the Secretary reminds that Sexton acknowledged that he knew he was in the red zone. Sec. Rely at 3-4, citing Tr. 93-94. Clearly the record

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[12]Respondent also points to the "Red Zones are No Zones" chart because it also does not advise where one should be located for a second cut. R's Br. at 9 and R's Ex. 1. Again, this is a misdirected argument. Sexton was on his way to the face, and not in the process of actually continuing with the second cut. Besides, even Sexton admitted he was in the red zone when the accident happened.

supports the Secretary on this point and the Court explicitly finds it as a fact.

Last, the Secretary asserts that the violation was of an aggravated nature and thus unwarrantable. It contends that the record reflects that the Respondent, at least through its section foreman's actions, placed production over safety. The Court agrees with that characterization as well, and this too is a finding of fact, based on the record as a whole. It is clear, from Sexton's own testimony that his focus was on resuming coal production, not safety. Accordingly, the Court agrees with the Secretary that a "production over safety mentality [ ] caused the accident." *Id.* at 5. As the Secretary aptly described it, "[i]f Sexton would have stopped production and instructed the shuttle car operator to stay put, Sexton could have trammed the miner into the heading while standing outby the tail." *Id.* As the shuttle car operator admitted, if they had simply slowed things down, Sexton could have placed himself in a safe position and that choice was an available option, albeit with a momentary lull in the production of coal. Tr. 118-120.

Accordingly, for all the reasons discussed *supra*, the Court finds the violation was an unwarrantable failure.

Civil Penalty Assessment

The Court agrees with the Secretary's analysis of the appropriate civil penalty to be imposed in this instance, and it incorporates by reference, those pages reflecting the Secretary's review of the penalty criteria. Sec. Br. at 8-9. Thus the Court, upon taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i), subscribes and adopts that analysis[13] in its determination that the appropriate civil penalty is $60,000.00 (Sixty thousand dollars), as initially proposed.

ORDER

[13]Accordingly by virtue of the incorporation by reference, the Secretary's analysis of the history of previous violations, size of the operator, ability to continue in business, gravity, including the finding that the violation was significant and substantial, which finding was not challenged in any event, and the good faith abatement are all adopted by the Court. The negligence, rising to unwarrantable failure, has already been discussed in the body of this decision.

Within 40 days of the date of this decision, Stillhouse Mining **IS ORDERED** to pay a civil penalty of $60,000.00 for the violation of section 75.220(a)(1), as set forth in Citation No. 7502252. Upon payment of the penalty, this proceeding **IS DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

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April 18, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2008-503-M A.C. No. 20-00422-151959-02
v.	:	
TILDEN MINING COMPANY, L.C., Respondent.	:	Mine: Tilden Mine

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, on behalf of the Secretary of Labor;
R. Henry Moore, Esq., Arthur M. Wolfson, Esq., and Jason P. Webb, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Paez

This case is before me upon the Secretary's filing of a petition for assessment of civil penalty, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815. The Respondent, Tilden Mining Company, L.C. ("Tilden Mining"), timely filed an answer, and the case was assigned to me for hearing and decision. Both parties have moved for summary decision pursuant to Commission Rule 67, 29 C.F.R. § 2700.67. Tilden Mining filed a motion for summary decision on August 31, 2010, seeking to vacate Citation No. 6400301, dated April 16, 2008, and Citation No. 6400312, dated April 20, 2008, and issued under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). (Tilden's Mot. for Summ. Decision.) The parties conferred, agreeing that all violations except Citation Nos. 6400301 and 6400312 could be settled, and set a briefing schedule. The Secretary timely filed her response to Tilden Mining's motion as well as her cross-motion for summary decision on October 6, 2010. (Sec'y Cross-Mot. for Summ. Decision.) Tilden Mining's response to the Secretary's cross-motion for summary decision was timely filed on November 1, 2010. (Tilden's Resp. to Sec'y Cross-Mot. for Summ. Decision.) Thereafter, on November 9, 2010, the Secretary filed her reply to Tilden Mining. (Sec'y Reply to Tilden's Resp.)

On October 28, 2010, I issued a Decision Approving Partial Settlement in Docket Nos. LAKE 2008-502-M and LAKE 2008-503-M in which all the citations were resolved, except the two now before me in Docket No. LAKE 2008-503-M. Both citations allege a violation of 30 C.F.R. § 56.12028 for failing to test and record the resistence of extension cords used as part of the grounding system at this surface mine. MSHA determined both citations did not

significantly and substantially contribute to the cause and effect of a mine safety or health hazard. The parties stipulate there is no genuine issue as to any material fact involving these citations.

I. Brief Summary of the Parties' Arguments

Tilden Mining argues in its submissions that 30 C.F.R. § 56.12028 does not apply to extension cords. (Tilden's Mot. for Summ. Decision ¶ 8.) It submits that I should apply Administrative Law Judge T. Todd Hodgdon's holding in *Secretary of Labor v. Hibbing Taconite Co.*, 21 FMSHRC 346 (March 1999) (ALJ), where he vacated 67 citations and held that § 56.12028 does not apply to extension cords, power cords, or cables. (*Id.* at ¶ 11.)[1] Tilden also argues that MSHA's Program Policy Manual provisions on § 56.12028, and 1994 Program Policy Letter No. P94-IV-1 on which they are based, are not interpretative guidelines but substantive rule changes to 30 C.F.R § 56.12028, requiring notice and comment rulemaking. (*Id.* at ¶¶ 11-16, Ex. 3.)

The Secretary argues in her submissions that § 56.12028 applies to extension cords, as "extension cords are part of the grounding system because they constitute equipment grounding conductors." (Sec'y Cross-Mot. for Summ. Decision ¶ 6.) The Secretary also argues that the Program Policy Manual and Program Policy Letter do not contain substantive rule changes but are interpretative rules that do not require notice and comment rulemaking. (*Id.* at 12-15, Ex. 4.) Finally, the Secretary argues that ALJ Hodgdon's decision in *Hibbing Taconite* is not binding precedent and that it is inconsistent with Sixth Circuit case law. (*Id.* at 10-12.)

II. Issue Statement

The dispositive issue is whether extension cords should be considered part of a grounding system subject to continuity and resistence testing under 30 C.F.R. § 56.12028, and if so, whether this constitutes a substantive change in the standard requiring notice and comment rulemaking.

III. Principles of Law

The safety and health standard promulgated under the Mine Act and applicable to this case is § 56.12028, which provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a

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[1] Although Tilden Mining advocates following ALJ Hodgdon's decision to vacate these two alleged violations of § 56.12028, another ALJ had affirmed a violation of the same standard after publication of PPL No. P94-IV-1. *Sec'y of Labor v. Bob Bak Construction*, 19 FMSHRC 582, 590-91 (Mar. 1997) (ALJ Fauver) (finding a violation of § 56.12028 for failing to perform continuity and resistence testing of grounding systems on "portable extension cords").

request by the Secretary or h[er] duly authorized representative.

30 C.F.R. § 56.12028 (2010).

Program Policy Letter No. P94-IV-1, first issued in 1994 and cited by both parties, recites the language of § 56.12028 and provides, in relevant part, as follows:

> [56/57.12028 Testing Grounding Systems]
>
> The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. These tests will alert the mine operator if a problem exists in the grounding system which may not allow the circuit protective devices to quickly operate when faults occur. With the exception of fixed installations, numerous fatalities and injuries have occurred due to high resistance or lack of continuity in equipment grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.
>
> Grounding systems typically include the following:
>
> 1. equipment grounding conductors – the conductors used to connect the metal frames or enclosures of electrical equipment to the grounding electrode conductor;
>
> 2. grounding electrode conductors – the conductors connecting the grounding electrode to the equipment grounding conductor; and
>
> 3. grounding electrodes – usually driven rods connected to each other by suitable means, buried metal, or other effective methods located at the source, to provide a low resistance earth connection.
>
> Operators shall conduct the following tests:
>
> 1. equipment grounding conductors – continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments;
>
> 2. grounding electrode conductors – continuity and resistance must be tested immediately after installation, repair, or modification, and annually if conductors are subjected to vibration, flexing or corrosive environments; and

3. grounding electrodes – resistance must be tested immediately after installation, repair, or modification, and annually thereafter.

. . . .

Grounding conductors in trailing cables, power cables, and cords that supply power to tools and portable or mobile equipment must be tested as prescribed in the regulation. This requirement does not apply to double insulated tools or circuits protected by ground-fault-circuit interrupters that trip at 5 milli-amperes or less.

. . . .

A record of the most recent resistance tests conducted must be kept and made available to the Secretary or his authorized representative upon request. When a record of testing is required by the standard, MSHA intends that the test results be recorded in resistance value in ohms.

MSHA Program Policy Letter ("PPL") No. P94-IV-1, at 2-3 (U.S. Dep't of Labor, 1/31/1994). Two years after issuing PPL No. P94-IV-1, MSHA reiterated it verbatim in its 1996 Program Policy Manual which it republished, verbatim, in 2003. *See* IV MSHA, U.S. Dep't of Labor, *Program Policy Manual* ("PPM"), Parts 56/57, at 44-45 (Release IV-21, Feb. 2003).

Finally, Commission Procedural Rule 69(d), provides that, "[a] decision of an Administrative Law Judge is not binding precedent upon the Commission." 29 C.F.R. § 2700.69(d).

IV. Discussion and Conclusions of Law

Tilden Mining relies on ALJ Hodgdon's decision in *Hibbing Taconite*[2] as support for its argument that 30 C.F.R. § 56.12028 does not apply to extension cords. It states, "First and foremost, the ALJ determined that the standard did not apply to extension cords, power cords, and cables . . . the ALJ found[,] instead[,] that if the Secretary wanted to apply this standard to extension cords, power cords, and cables, she would have to proceed with notice and comment rulemaking." (Tilden's Mot. for Summ. Decision ¶ 4.)

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[2] Under Commission rules, ALJ Hodgdon's decision in *Hibbing Taconite* is not binding in this matter. 29 C.F.R. § 2700.69(d). I do agree with ALJ Hodgdon regarding the law he found applicable in *Hibbing Taconite*, including citation to the case law, the Administrative Procedure Act, the Mine Act, and the standard. They are also applicable here. However, for the reasons stated herein his conclusions in that matter – that § 56.12028 does not include extension cords and that notice and comment rulemaking is required for the changes brought by the PPL – do not apply in this case.

Tilden Mining argues that, "The ALJ further found that the Secretary had inappropriately tried to characterize a 1994 Program Policy Letter, which declared that [§] 56.12028 applied to extension cords, power cords, and cables, as an interpretative rule. The ALJ determined that the 1994 Program Policy Letter was not an interpretative rule because it had the effect of amending a prior legislative rule." (Tilden's Mot. for Summ. Decision ¶ 4.)

A. Deference to the Secretary's interpretations of her regulations

Tilden Mining contends that when the Secretary has made a policy decision for some years, in this case, not including extension cords in the definition of grounding systems from 1978 through 1993, and then changes her mind to include them within the definition by issuing a Program Policy Letter in 1994, this violates the notice and comment procedures of the Administrative Procedure Act. Tilden Mining further argues that the Secretary made explicit in her 1988 PPM that "the annual test does not apply to grounding conductors in trailing cables, power cables, and cords which provide power to portable or mobile equipment." (Tilden's Resp. to Sec'y Cross-Mot. for Summ. Decision ¶ 10.)

However, the United States Supreme Court has ruled that the Secretary can change her interpretation, if the new interpretation as reviewed by a court, fits within the Secretary's original understanding of the statute. The Supreme Court has stated, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978). The Supreme Court cautioned that the "task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). The Commission historically gives deference to the Secretary's interpretation of her regulations and has stated, "[it is] mindful that the Commission and the courts are obliged to give weight to the Secretary's interpretation of [her] regulations." *Sec'y of Labor v. Dolese Bros.*,16 FMSHRC 689, 692 (Apr. 1994); *see also Sec'y of Labor v. Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193-94 (Mar. 1998) (citing to *Dolese Bros.* and noting "the Commission long has recognized [the PPM] as evidence of MSHA's policies and practices."). Indeed, the Commission's decision in *Daanen & Janssen* is instructive, as the Commission discussed the term "system" as it relates to braking systems to find the standard ambiguous, thus deferring to the Secretary's long-held interpretation in the PPM as a reasonable interpretation of the standard's plain language. *Daanen & Janssen*, 20 FMSHRC at 191-94.

Notwithstanding the Secretary's prior interpretation to exclude extension cords from such testing, the Secretary provided notice to the regulated community through her 1994 PPL when she began to include grounding conductors in extension cords within the definition of grounding electrode conductors, and when she started requiring continuity and resistance testing immediately after repair, modification, and annually thereafter if the conductors were subjected

to vibration, flexing, or corrosive environments. *See* PPL No. P94-IV-1 (1/31/1994). Section 56.12028, as written, is broad enough to include grounding conductors in extension cords within the definition of "grounding systems." Under a reasonable reading, the inclusion of grounding conductors in extension cords within the definition of grounding systems would not be considered a substantive change to the standard unless it was inconsistent with the standard or went beyond the standard to create a new requirement. *Cf. Daanen & Janssen*, 20 FMSHRC at 193 ("Because the definition of the term 'system' entails an interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional."). Neither of those situations is present here, as it is reasonable to conclude that the grounding conductors in extension cords can be used as a component in grounding systems. Because the 1994 PPL requirements are consistent with § 56.12028, I determine that the Secretary's interpretation of this standard is reasonable and should be given weight here.

B. Extension cords fall under § 56.12028

Grounding conductors in extension cords are part of the grounding system because they are the grounding electrode conductors that connect the equipment in a mine to power outlets. Due to this function, they are an essential part of a grounding system. According to Inspector Leppanen, "Extension cords are the means by which metal-encased equipment, including portable, hand-held equipment such as a welder, is tied into the grounding system and thus are integral parts of the grounding system." (Sec'y Cross-Mot. for Summ. Decision, Ex. 3.) According to the PPM, extension cords supply power to tools and to portable and mobile equipment. Due to their function and the importance of preventing electric shock to miners, continuity testing must be performed on all aspects of the grounding system, including grounding conductors in extension cords. Extension cords can and have been tested utilizing a continuity test. (*Id.*) According to Leppanen, "Conducting a continuity test assures . . . that the equipment being used is connected directly to the ground prong, and thus the grounding circuit is complete." (*Id.*)

In determining whether grounding conductors in extension cords fall under the standard, first, I find that extension cords and the grounding conductors they contain are part of the grounding system and can be tested. Second, I give deference to the Secretary in her interpretation of her standard because the standard is broad enough to include a change that is neither substantive nor contradictory. Due to the deference given to the Secretary and the fact that this inclusion is not contradictory to the standard, I determine that 30 C.F.R. § 56.12028 applies to grounding conductors in extension cords.

C. Notice and comment rulemaking proceedings

The United States Court of Appeals for the District of Columbia Circuit has stated in *Alaska Professional Hunters v. FAA* that, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." 177 F.3d 1030, 1034

(D.C. Cir. 1999). In *Syncor International Corp. v. Shalala*, the D.C. Circuit held that a modification of an interpretative rule that changes the agency's substantive regulation will "likely require a notice and comment procedure." 127 F.3d 90, 94-95 (D.C. Cir. 1997). In this case, Tilden Mining argues that when the Secretary issued the 1994 PPL, and later the 1996 PPM, it was a substantive rule change requiring notice and comment rulemaking.

I must first determine whether the PPM's provisions are substantive rules and then assess if notice and comment rulemaking was required for both the PPL and the PPM. The Commission has held that, "the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission," and in citing to *King Knob Coal Company* noted that "the Manual's 'instructions are not officially promulgated and do not prescribe rules of law binding upon this Commission.'. . . [T]he express language of a statute or regulation 'unquestionably controls' over material like a . . . manual." *Sec'y of Labor v. D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) (citations omitted)). Here, the PPM and the PPL are not rules of law but are the Secretary's interpretations of § 56.12028. Neither the PPL nor the PPM are binding on the Commission or the Secretary. Rather, the PPM and the PPL give mine operators detailed notice of how MSHA inspectors will enforce the Secretary's regulations. However, neither the PPM nor the PPL have the force of law that a standard or a statutory provision would have.

To determine if notice and comment rulemaking is required in this instance, I must examine the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. According to the APA, "[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." 5 U.S.C. § 553(b). The APA has several exceptions to the mandatory proposed rulemaking procedures for administrative agencies. The notice and comment rulemaking procedures do not apply "to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice; or [] when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(A), (B).

The Secretary argues that the PPM and the PPL are interpretative rules that do not require notice and comment rulemaking.[3] According to the D.C. Circuit, an interpretative rule "typically reflects an agency's construction of a statute that has been entrusted to the agency to administer." *Syncor Inter'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). The Supreme Court defined an interpretative rule as one "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' Interpretative rules do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that

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[3] The Secretary does not argue that the PPM and PPL are general statements of policy, rules of agency organization, procedure, or practice. Nor does she argue this is an instance where MSHA, for good cause, found that notice and comment procedures were impracticable. Therefore, I will not analyze the PPM or PPL under these exceptions.

weight in the adjudicatory process." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (citations omitted).

Here, the requirements presented in the PPM provisions cited above do not result in a substantive rule change to the provisions of 30 C.F.R. § 56.12028. If the 1996 and 2003 PPM provisions and the 1994 PPL had adopted a new position inconsistent with the Secretary's existing regulations or significantly revised the existing regulations, then notice and comment rulemaking would be required. As set forth, however, the PPL and PPM provisions are not inconsistent with § 56.12028, nor did they significantly revise § 56.12028 when grounding conductors in extension cords were included within the definition of "grounding systems." If anything, the PPL and PPM provisions provide a clearer explanation of the requirements of § 56.12028 to mine operators than the ambiguous term "grounding systems" alone provides. Supplementing a previous provision with a consistent interpretation does not create an APA notice-and-comment procedural violation. In fact, § 56.12028 is broad enough to include grounding conductors in extension cords within the definition of grounding systems.

I reject Tilden Mining's argument that notice and comment rulemaking is required for the Secretary's new interpretation to include extension cords in the definition of grounding systems contained in the PPL and subsequent iterations of the PPM. Therefore, I conclude the PPM and PPL are interpretative rules of the regulatory standard at 30 C.F.R. § 56.12028 and fall under the "interpretative rules" exception to the notice and comment requirements of the APA at 5 U.S.C. § 553(b)(3)(A).

D. Prior notice of the interpretative rules at the Tilden Mine

The interpretative rule change was implemented in the 1996 version of the PPM and reiterated in the 2003 version, which to date remains MSHA's current interpretative rule. Thus, Tilden Mining has been on notice since the issuance of the 1994 PPL (and the later iterations of the PPM) that the Secretary interprets extension cords to be electrode grounding conductors, which are a part of the grounding system and subject to the testing and recordkeeping requirements of § 56.12028. Although the notice argument made by the operator in the *Hibbing Taconite* decision may have been persuasive at that time, given that the interpretative rule change had only been recently implemented, I cannot apply the facts of *Hibbing Taconite* to the facts of this case. *See Hibbing Taconite Co.*, 21 FMSHRC 346 (March 1999) (ALJ). Here, Tilden Mining has had fourteen years notice of the Secretary's change in interpretation (and at least five years notice since republication of the 2003 PPM after the 1999 *Hibbing Taconite* ALJ decision) until the issuance of Citation Nos. 6400301 and 6400312.[4]

In fact, Robert Leppanen, the MSHA inspector assigned to the Tilden Mine, stated in his declaration that he has enforced § 56.12028 to include "trailing cables, power cables, and

[4] The PPL was issued in 1994 and the new PPM language was published in 1996 and republished in 2003; the citations in this case were issued in 2008.

extension cords" at the Tilden Mine since 2004. (Sec'y Cross-Mot. for Summ. Decision, Ex. 3.) Given this unrefuted statement as well as the fact that the 1996 PPM requirements were republished in the 2003 PPM, I find Tilden Mining had ample notice of the Secretary's interpretation of how she would enforce the requirements of § 56.12028. Tilden violated that standard by not conducting continuity and resistence testing on the cited extension cords and recording it.

E. Drummond's application to this case

Tilden Mining cites to *Secretary of Labor v. Drummond Company*, 14 FMSHRC 661 (May 1992), as support for its proposition that the 1994 PPL at issue in this case resulted in a substantive change to the standard. In *Drummond*, the Commission heard an appeal from a mine operator that argued the Secretary's proposed penalty assessments were improper because they were not based on the Secretary's civil penalty regulations, as set forth under 30 C.F.R. Part 100. Instead, the penalties were computed using the Secretary's excessive history program that she set forth in a 1990 Program Policy Letter. The mine operator argued that the new excessive history program was unlawfully implemented in violation of the APA notice-and-comment requirements.

Drummond is distinguishable from this case because the Secretary in *Drummond* created a completely new category for designating points to mine operators that had a history of prior violations. This new category created steeper penalties for these mine operators for any future violations. This was a substantive change from the previous civil penalty regulations set forth in 30 C.F.R. Part 100, as the mine operators would now incur more monetary liability than before without the ability to comment on the new proceedings. *Drummond*, 14 FMSHRC at 681-90. The Commission determined the PPL in *Drummond* established a new category of special history assessment for significant and substantial violations, and that notice and comment proceedings were required before such substantive changes which greatly effect private interests could be imposed. The Commission held that the PPL was issued in contravention of the APA and would be accorded no legal weight or effect. *Id.* at 690.

The main difference between this case and the *Drummond* decision is that in *Drummond*, the Secretary attempted to implement a substantive rule change. Here, including extension cords within the definition of "grounding systems" and finding them to be grounding electrode conductors is not a substantive rule change. In fact, it is an interpretative rule change that does not require notice and comment procedures. As stated previously, the Secretary is not prohibited from changing her interpretation, as long as her new requirements do not greatly derogate from her previous interpretation. Here, the Secretary's inclusion of extension cords as part of a grounding system is a reasonable and consistent interpretation of § 56.12028. Therefore, after comparing the case at hand to the facts in *Drummond*, I find that *Drummond* is inapplicable to the facts in this case.

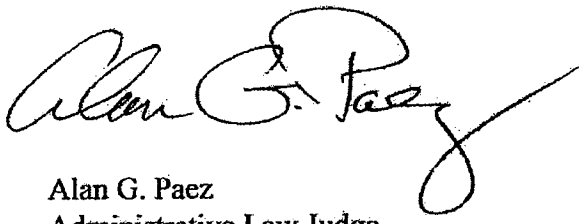
For all of the reasons discussed above, I conclude that extension cords and the grounding conductors within them are part of the grounding system and that the Secretary properly issued

Citation Nos. 6400301 and 6400312. Additionally, I conclude that Tilden Mining has failed to establish that the PPM's provisions violate the APA's requirements of notice-and-comment proceedings. Pursuant to Commission Rule 67(b), 29 C.F.R. § 2700.67(b), I conclude that the Secretary is entitled to summary decision as a matter of law.

V. Order

In view of the conclusions above, it is hereby **ORDERED** that Tilden Mining's Motion for Summary Decision is **DENIED**. It is further **ORDERED** that the Secretary's Cross-Motion for Summary Decision is **GRANTED**. Citation Nos. 6400301 and 6400312 are hereby **AFFIRMED**.

WHEREFORE, the Respondent is **ORDERED** to pay the penalty assessment of $1,050.00 within 40 days of this decision.[5] Upon receipt of full payment, this case is **DISMISSED**.



Alan G. Paez
Administrative Law Judge

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/lo

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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April 20, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket Nos. SE 2009-401-M SE 2009-402-M A.C. No. 09-01036-179032
v.	:	
MIZE GRANITE QUARRIES,INC., AND ROBERT W. MIZE III, AND CLAYBORN LEWIS Respondent.	:	Docket No. SE 2009-553-M A.C. No. 09-01036-184807 Docket No. SE 2009-554-M A.C. No. 09-01036-184807 Docket No. SE 2009-849-M A.C. No. 09-01036-219258 Docket No. SE 2009-850-M A.C. No. 09-01036-219259 Mine: Mize Granite Quarries

Appearances: Charna C. Hollingsworth-Malone, Esq.; Sophia E, Haynes, Esq.; and, Angela R. Donaldson, Esq., Office of the Solicitor, U.S. Department Of Labor, Atlanta, GA
for the Petitioner
Robert W. Mize, III, President, *pro se*
for the Respondents

Before: Priscilla M. Rae, Administrative Law Judge

These consolidated civil penalty proceedings are before me pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, et seq., (the "Act") charging Mize Granite Quarries, Inc. ("Mize"), and Robert W. Mize and Clayborn Lewis as agents of Mize, with violations of mandatory standards. The general issue before me is whether there were violations of the cited standards. Other issues include whether certain violations were "significant and substantial," whether certain violations were caused by the "unwarrantable failure" of Mize and whether certain violations were "knowing" violations committed by Mize and Lewis as agents of a corporate mine operator within the meaning of Section 110(c) of the Act. If violations are found to have been committed and if those violations are found to have been "knowingly" committed by Mize and Lewis as agents of a corporate

operator, then appropriate civil penalties must also be assessed utilizing the relevant criteria under Section 110(i) of the Act.

This matter was heard by me in Augusta, Georgia where the parties presented evidenced and submitted exhibits. Both parties also submitted post hearing briefs and financial information pertaining to the Section 110(c) violations, which I have considered in making this decision.

I. Stipulations

The parties entered into written stipulations prior to the hearing which were admitted as S-19 and read into the record. They are that Mize engages in activities which affect interstate commerce and that they are subject to the Mine Health and Safety Act of 1977, as amended. The administrative law judge has jurisdiction to hear and decide this case pursuant to Section 105 of the Act,[1] and to assess appropriate penalties pursuant to Section 110(i) of the Act.[2] The citations and orders contested herein were issued by Mine Safety and Health Administration ("MSHA") certified inspectors John Mayer and Michael Cohen acting within their official capacity when so issued. The copies of these orders and citations made exhibits hereto are true and accurate copies. Robert Mize and Clayborn Lewis are agents as defined by the Act[3] and the operator

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[1] Sec. 105 (d) states: If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

[2] Sec. 110(i) provides: 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. In proposing civil penalties under this Act, 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.

[3] Sec. 3(e) "agent" means any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine.

demonstrated good faith in abating all violations. Mize is a small metal/non-metal mine reporting 10,043 annual hours of production in 2009. Additional stipulations were entered into at the hearing providing that all photographs offered by the Secretary are accurate depictions of the conditions in question at the time of the inspections and the inspector's notes offered at the hearing are true and accurate copies of the originals. Additional stipulations of fact were reached with regard to certain citations which will be set forth within the discussion of the individual citations.

II. Statement of Facts and Conclusions of Law

Robert Mize owns and operates Mize Granite Quarries, Inc., located in Elberton, GA. The operation is a stone quarry which blasts, cuts and removes large blocks of dimensional stone which is then sized and sold for the primary purpose of erecting monuments. The primary tools used in the extraction process are explosives, wire saws and jackhammers or pneumatic drills to size and drill holes into the blocks, cranes for extracting the block from the quarry, and front-end loaders to load the blocks onto the flat bed trucks. The blocks weigh approximately 20,000 lbs. at the time they are removed from the quarry. The company has been in business for ten years and employs one foreman, Clayborn Lewis, and at the time of the hearing seven miners.

The orders and citations decided herein arose during two inspections conducted by authorized MSHA inspectors. The Secretary also conducted a special investigation which resulted in assessments against Robert Mize and Clayborn Lewis under Section 110(c)[4] of the Act which are addressed herein, based upon four of the alleged violations.

A. The January 13, 2009 Inspection

2. John Mayer is an authorized MSHA inspector with three years of experience in his position. Prior to his employment with MSHA, he was a maintenance administrator for the Department of Defense responsible for ensuring equipment maintenance and safety. On January 13, 2009, Mayer arrived at Mize at approximately 9:00 am to conduct a "walk and talk" which he described as a courtesy visit to discuss conditions that they would be inspecting at a later date to inform the operator of specific compliance requirements. Tr. 20. When he arrived at the mine, Mayer met with Robert Mize and was later joined by Clayborn Lewis. As he stood with these two gentlemen on the top ledge of the mine looking down upon the bottom ledge, Mayer observed a pathway leading to the bottom ledge used by the miners to access the working ledge that in his opinion was unsafe. The path was approximately two feet wide, cluttered with loose material, wet, slick and elevated approximately eight feet above the quarry floor. The pathway and the bottom ledge were at a right angle to one another forming

[4] Sec. 110(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

a corner with a wall rising up at the juncture requiring the two ledge men to access the bottom ledge from the path by "skimming" across a 15" wide area for a distance of four feet at an elevation of eight feet above the quarry floor. Tr. 27. The quarry floor was filled with water of unknown depth and likely to be filled with rocks, in the inspector's opinion. Tr. 22-26 and S-1 pg. 4. The ledge men told the inspector on the scene that they had accessed the working ledge in this manner for several days. Tr. 27. Mr. Lewis told Inspector Mayer that the condition had been that way only since that morning when he had a ladder removed that had been used to span the gap between the two ledges. He was in the process of building, but had not completed, a bridge to replace the ladder. Tr. 28-31. In Inspector Mayer's opinion, however, the ladder would not have provided safe access either as it did not provide a flat surface upon which to walk and did not have handrails to prevent a fall. Citation No. 6507102 was issued for unsafe access based upon this condition. S-1.

In order to abate the citation, Mr. Lewis completed construction of the wooden bridge. He asked one of the miners to secure the bridge between the path and the bottom ledge. The miner, in an effort to accomplish this, was operating a jackhammer under Foreman Lewis' supervision while standing within two feet of the edge facing the water. After approximately 30 seconds, Inspector Mayer advised Lewis that the miner needed to don fall protection. Mr. Lewis then told the miner to put on the equipment but he did not secure it. Inspector Mayer then told Mr. Lewis to instruct the miner to secure the gear which the miner did but he still failed to tie off. At that point Mayer issued a Section 107(a) imminent danger order [5] to remove the miner from the area, and issued Citation No. 6507104. Tr. 32-35, S-2 pg 1, S-3, pg 1 and photographs S-3 pgs 3-5.

C. The March 11 -12, 2009 Inspection

The remaining citations and orders were issued by MSHA Inspector Michael Cohen during an inspection he performed on March 11 and 12, 2009. Inspector Cohen is familiar with mining based upon his ten year employment history as a maintenance supervisor for a surface and underground limestone operation. Cohen has been an authorized MSHA inspector for two years and has inspected 28 granite quarries. Tr. 58-61. He arrived at Mize at approximately 9:30 am on the 11th when he saw two ledge men operating a rotary drill standing within three feet of the ledge with a 40' drop to the bottom ledge. Neither of them had on fall protection. Tr. 62-64, photograph S-5, pg 3. Inspector Cohen issued an oral imminent danger order (later reduced to

[5] SEC. 107. (a) If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

writing) and a Section 104(d)(1) order.[6] S-4 and S-5. At the time this condition existed, Mize and Lewis were on the top ledge of the quarry looking down watching the miners at work. Tr. 66-67.

As the inspection on the 11th progressed, Inspector Cohen issued a second Section 104(d) order for a condition he observed on the same bottom ledge area in which Inspector Mayer issued his imminent danger order on January 13th. S-10. Inspector Cohen determined that because the pathway the miners used to access the working ledge was elevated approximately six feet [7]above the quarry floor, a handrail was needed along the 45' of the path to prevent a trip and fall into the water below. Tr. 82-84. The pathway cited by Inspector Cohen and Mayer leads to the bottom ledge which in turn leads to the working ledge. The miners were gaining access to the working ledge by climbing a set of stairs lacking a handrail. In order to exit the stairs onto the ledge, the miners had to twist their bodies around the stairs while holding on to one side and step onto the ledge, which also lacked a handrail. The ledge area at the top of the stairs was filled with large loose rocks, a broken ladder, and uneven ground. Tr. 89-91 and photographs S-11 pgs 4-5. According to Mr. Lewis, two miners used these stairs in this condition for approximately eight days. Tr. 92. Inspector Cohen issued a third Section 104(d) order for this alleged violation. Exhibit S-11.

Inspector Cohen, in the course of his two-day inspection at Mize, issued an additional six Section 104(a) citations for alleged violations discussed below. S-6, 7, 8, 9, 12 and 13.

Mize presented evidence and argument that the citations and orders issued are unfair and a product of an agenda on the part of MSHA to put a small operator who employs minority workers out of business. Tr. 181. He cited his safety award in 2007 and the lack of a history of injuries in support of his position that he operates a safe mine that is being unnecessarily targeted. Tr. 187 and Mize post hearing Brief of Respondents pg 47-54.

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[6] Sec. 104(d)(1)states: If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[7] There is a discrepancy between Inspector Mayer's and Inspector Cohen's testimony as to whether the ledge was elevated six or eight feet. I do not find it to be material; a fall from either height would be equally serious.

D. Citations and Orders

1. *Citation No. 6507102 (S-1)*

This Sec. 104(d)(1)citation issued on January 13, 2009, by MSHA Inspector Mayer for a violation of 30 C.F.R. §56.1101 reads as follows:

> Safe access was not provided on the southeast corner from one ledge to another at the first level from the pit floor which was filled with water. Two Ledge (sic) men were required to cross over a small footing between the two ledges which was approximately 15 inches wide for a distance of approximately 4 feet that was wet and covered with loose material and was at a height of approximately 8 ft. Foreman Clayborn Lewis stated that he knew about the condition because he had the crane operator remove the ladder that was being used to cross from one ledge to another prior to the ledge men returning to work in that area. Foreman Lewis stated that he felt that the ledge men would be okay crossing the small footing until he could get a bridge built to connect the ledges. Foreman Lewis engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the condition existed from more than one day and that (sic) employees were required to access that area at least twice daily for work. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector designated the violation as having a high degree of likelihood to result in a fatality, significant and substantial (S&S), affecting two persons and being the result of high negligence and an unwarrantable failure. He determined that the condition had existed for two days. Tr. 27. The proposed penalty is $9,634.00.

The Violation

30 C.F.R. §56.11001 of the Secretary's regulation cited in this violation requires safe access be both provided and maintained by the operator. Although the regulation does not provide a definition of the word "safe," the Commission has said of the term as it applies to her regulations, it can be defined as "whether a reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (Dec. 1982).

The Commission has held, in construing a regulation worded identically to section 56.11001, regarding the means of access:

> [T]he standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" with the meaning of the

standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

The Hanna Mining Co., 3 FMSHRC 2045, 2046 (September 1981).

The operator presented several arguments with respect to this citation. Either the means of access between the two ledges was not unsafe, the miners did not cross between the two ledges as Inspector Mayer described, they could have used fall protection if they chose to, or that a bridge had been available that was specifically constructed for use to connect the two ledges and was to be installed imminently. It had not been put into place when the inspector arrived because mining operations were not yet underway –the worker Mayer saw was merely engaged in surveying operations at the time. Plans were in place to move the bridge when quarrying began. Tr. 47 and Brief of Respondents, pg 5.

In an attempt to establish that the miners did not cross the bottom ledge as described by Mayer, Mize elicited through cross-examination that the inspector did not actually see how the two miners accessed the working ledge. The men were already on the upper working ledge when Mayer arrived. Tr. 41-42. However, when interviewed by Special Investigator Mary Mitchell on April 14, 2009, Mize confirmed Inspector Mayer's observations. He stated that as Inspector Mayer arrived on the property, the miners were on the ledge performing their usual duties. As he and Mr. Lewis were watching the two miners working, the miners were "laying the block out. Putting wedge in to brake with a hammer, preparing the block to be moved out of the quarry." S-14 at 4. He described the manner in which the miners crossed from the path to the bottom ledge by saying "they cross the ledge, there at the bottom. It (*sic*) ledge was about 2 foot (*sic*) wide. We were in the process of building a bride (*sic*) for them to cross." When asked "they must step from one ledge to the other then up the ladder to the working area?" he responded "yes that is right." He identified the route taken in photograph S-14 pg 10 which is identical to S-1 pg 4 identified by Inspector Mayer as the unsafe means of passage. He reasoned that they "did have to step a little be (sic) not far." S-14 at 4. He explained that they had been working on a bridge but it had not been completed. "The guys had maybe cross (*sic*) the ledge 10 or 12 times...We didn't think it was excessive...We were trying to get production so we could stay in business." S-14 at 5. Mr. Mize estimated the depth of the water in the quarry to be two or three feet deep. "If they fell it would be enough to break the fall but not enough to drown them," he said. S-14 at 7. Mize signed the written statement prepared by Inspector Mitchell averring it to be a true and accurate statement of the facts.

Clayborn Lewis gave differing accounts of the situation as well. Inspector Mayer testified that on the day of the inspection, Lewis told him that there had been one ladder that he placed across the corner between the two ledges. The men had used the ladder to cross in the morning and then Lewis had the ladder removed. He pointed out the ladder to Inspector Mayer at the time. Tr. 28-31 and photograph S-1 pg. 5. Lewis testified at the hearing that the miners working for Mize were highly experienced with approximately 120 years of experience among them inferring that for them, the means of access was not unsafe. He also stated that the men had safety

harnesses and could have put them on within a reasonable amount of time. Tr. 164-165. Lewis was also interviewed by Special Investigator Mitchell on April 14, 2009. His statement was reduced to writing and was signed by him attesting that it was true and accurate. S-15. When asked whether he believed the men had safe access to their work area, he answered in the affirmative. He further explained that on the day of the inspection, the men had already started to work but when they crossed the ledges to access the working ledge, there were two ladders – one on each side of the corner. They climbed down one ladder, walked across the quarry floor and climbed up the other one. The two ladders were then removed at his direction. He said he was then going to have the crane operator put in a longer ladder but before he could accomplish this, the inspector arrived. (Presumably this is the same ladder he showed Inspector Mayer and that he said the miners had used that morning.) He added that the miners used the two- ladders means of access for two days. S-15 pgs 4-5. Mr. Lewis stated that the miners never crossed the ledge in the manner described by Mayer. S-15 at 5. He estimated the depth of the water to be about 1 ½ feet in the quarry floor. S-15 at 6.

The two miners in question were also interviewed by the special investigator. Their statements were also reduced to writing; however, in order to protect their identity, all personal information was redacted. S-15 and S-16. It is evident from the orders and citations written and the questions asked of the miners that the two interviewed were Anthony Pass and Gary Almond.

Gary Almond told Mitchell that he and Pass had been crossing the corner between the two ledges for approximately four days to one week without a ladder or bridge. He would cross in the morning, go out and come back at lunch time, and would again cross at the end of the day. He stated that there were never any ladders on either side of the ledge provided as an alternate way of crossing the corner. He did request that the foreman build something to go across the corner or provide another way to get there. That is when Lewis began construction of the bridge that was later installed. He stated that he was sure Mize and Lewis were well aware of how they were getting across the corner as there was no other way to get there. Mize also would stand on the top ledge of the mine and look down to where they were working. Almond estimated the depth of the water to be about 1 ½ feet deep due to being pumped regularly. He described the water as being shallow enough to walk through. S-16.

Anthony Pass confirmed, when asked by Investigator Mitchell, that they crossed the ledges at the corner without the use of a ladder or bridge. He also estimated the condition had been present for about one week. Like Almond, he was sure Mize and Lewis were aware of the situation as there was no other way to access the working ledge. He did recall that when the weather was dry and there was no water in the bottom of the quarry, they could climb down one ladder and up another. But most of the time there was water in the pit due to the amount of rain they had so they had to climb around the corner in the manner described by Mayer. He estimated the path to be just wide enough to get by carrying a small cooler and the depth of the water to be three or four feet. He also asked the foreman to put something in place at the corner to cross. S-17.

Both miners stated that they did not use fall protection gear when traveling to and from the working ledge. It was issued to them but they kept it on the working ledge rather than tote it back and forth. S-16 and 17. Mr. Lewis stated to Investigator Mitchell that the miners did not wear fall protection to cross the corner between the ledges because it was not necessary; they had the ladders to use. S-15 at 5.

Based upon the evidence presented, I find that Mize violated the safe access standard. The photographs alone submitted by the Secretary, S-1 pgs 4 and 6, and S-3 pgs 3, 6 and 7, very clearly show the violative condition on the day of the inspection. They depict what was accurately described by Inspector Mayer as a path being approximately two feet wide with an uneven surface littered with rocks and other debris. Also evident from the photographs is that the quarry floor, which is approximately eight feet below the ledge, had water and rocks in it on the day of the inspection. This comports with the miners' statements that they had been accessing the bottom ledges as described by Mayer because the rain prevented them from using the two ladders as alleged by Lewis. Also evident in the photographs is the path between the ledges that is so narrow that the men had to turn sideways to inch across. There is no question that crossing the corner section between the ledges in this manner as described by Mayer as "skimming across" was unsafe. It presented a situation where a "reasonably prudent person familiar with the factual circumstances surrounding the alleged hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." *Alabama By-Products Corp.*, at 2130.

I find Lewis' assertions that the miners were provided with a safe means of access to be unsupported by the evidence. First, I find his statements to Mayer and Mitchell that the miners had either one ladder across the corner or two ladders down to the quarry floor and back up to the other ledge on the day of the inspection to be less than credible. Both miners stated to Mitchell that they had been accessing the working ledge by crossing the corner without a bridge or ladder of any sort for days. Moreover, Robert Mize confirmed this information in his statement to Mitchell adding that it was just 10 or 12 times which they didn't think was "excessive." They were trying to get production out to stay in business and the water, after all, was only a few feet deep which would be enough to break their fall but not drown them. Also, Lewis told Mayer that he had the ladder removed with a crane before the blasting. Mayer testified he was on the site at the time of the blast and did not hear the crane being used. Tr. 29. Second, although an operator does not have to assure that every conceivable route to a working place is safe, none of the alternative means Lewis alleged were available, such as fall protection or the ladders, to provide safe access.

With respect to the use of fall protection, the miners had to walk along a 45 foot long path, cross a corner section and walk along a second ledge to reach the ladder that brought them to the working ledge. Fall protection is not effective unless it can be tied off to an immoveable object to anchor the miner. Under the given circumstances, a safety harness would not be practical or even possible to use. It is apparent that Inspector Mayer did not consider the use of fall protection to be the appropriate means by which to make access to the ledge safe either as he did not write the citation as a violation of section 56.15005 requiring the use of safety belts and

lines . He abated the citation when the bridge was installed. Lewis also clearly recognized a more substantial means of access was needed to ensure the miners' safety as he began construction of the bridge when the two miners requested a safer way to cross the bottom ledge. (Lewis' suggestion that they had fall protection that could have used if they had wanted to, also underscores the lack of enforcement in the use of fall protection as discussed below.)

Inspector Mayer was shown the ladder that Lewis told him was in place on the morning of the inspection when the workers crossed to the work site. Although the miners both denied using this ladder, even if it were to be believed, I accept the testimony of Mayer that it would not have been safe either. Walking across the ladder would require stepping on the edge of each of the stairs avoiding the gaps in between them. It would also require a tremendous amount of balance in doing so as the edge of the rungs appear to be about two inches wide and set on a slant. There is no handrail on either side of the ladder to assist in maintaining ones footing. S-1 at 5.

The use of ladders to climb down into the quarry floor and back out onto the other ledge may have offered the most reasonable means of travel under certain conditions. However, there is no evidence that this means of access had been provided to the miners for at least four days and possibly as long as one week due to weather conditions. If the ladders had been in place on the day of the inspection as Lewis told Investigator Mitchell, there would have been additional hazards posed by their use as there was water in the quarry floor which would have obscured the rocks and debris below creating the potential for trips and falls. Pass confirmed that there was water in the pit most of the time and they had not used the two ladders in about one week as a result. Additionally, the ladder shown to Mayer by Lewis lacked handrails which would have lead to another safety violation. Thus I find that this alternate means of travel would not have provided the miners safe access during the period Mayer determined the condition to have existed, which was actually on the conservative side at two days. Furthermore, the regulation requires that the safe means of access be maintained which is an ongoing responsibility to ensure safe means of access are used as "opposed to a purely passive approach in which the operator initially provides safe access and then has no further obligation." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001).

Significant and Substantial

Inspector Mayer found this violation to be significant and substantial ("S&S"). A significant and substantial violation is described in section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four

criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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*, 6 FMSHRC at 3-4.

With regard to this violation, I have already found that a safety standard has been violated. The inspector testified that "skimming across" the corner between the two slippery and littered ledges created a hazard of slipping, tripping and falling from a height of eight feet to the quarry floor which was filled with water and rocks. Thus, the violation – lack of safe access to the working ledge –created a distinct safety hazard satisfying the second prong of the *Mathies* criteria. Mayer felt it reasonably likely that such an accident would occur and that the resulting injuries would be a fatality. Tr. 30. Common sense, as well as the inspector's testimony, indicates that a fall from the elevated ledge to the quarry floor would result in a reasonably serious injury, if not death. Consequently, I conclude that this violation was S&S.

Unwarrantable Failure

The citation alleges that the violation resulted from the company's unwarrantable failure to comply with the standard. The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery* at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991) and *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been

placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. E.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

Mayer testified that he assessed this violation as unwarrantable failure because management knew the miners were crossing the ledge without safe means and allowed it to exist for more than one shift. Tr. 30. Based upon the statements of Mize and the two miners involved, the condition actually existed for at least two days and as many as four days. Mize and Lewis were fully aware of the situation as the uncontroverted evidence established that both men stood on the top ledge of the quarry to look down upon the workers each day. The bottom ledge is fully visible from the top ledge, as Mize, Lewis and Mayer were standing on the top ledge when Mayer saw the condition and issued this citation. Robert Mize also confirmed his knowledge of the situation in his statement to Investigator Mitchell when he said the miners had to cross the ledges absent other means about 10 to 12 times. If the miners generally crossed twice a day that would mean the condition existed for five or six days. Lewis was responsible for the condition existing in the first instance. In this very small operation, by his own account, he is the one responsible for directing the workers, conducting the work place examinations, conducting pre-shift checks, providing training and safety briefings and overseeing production. If Lewis is to be believed, he also the one who removed the two ladders from the bottom ledge, removing with them any degree of safety they afforded.

Lewis tendered the testimony that he had been building a bridge to provide a safe means of access across the bottom ledge in defense of this violation. He testified that he was the only one with the skills to build the bridge and his regular duties in the mine interfered with its completion. I do not consider this an adequate attempt to take precautionary measures or to lessen the degree of negligence involved. Had he or Robert Mize ordered a cessation in production until the bridge was completed and installed, it would be a very different matter. However, as Robert Mize told Investigator Mitchell, they had to keep production up and it was not an excessive risk to let the miners cross the ledges this way for several days. The callous and reckless disregard for the safety of the miners is sufficient for me to determine that this violation was correctly and justifiably assessed as unwarrantable failure to comply with the standard.

2. *Order No. 6507103 and Citation No. 6507104 (S-2 and S-3)*

This section 107(a) order and section 104(a)[8] citation contain identical language and are issued in violation of 30 C.F.R. §56.15005. They allege:

> An employee was not wearing fall protection while working within 1 foot of the edge at the first ledge from the bottom in the southeast corner of the quarry. The ledge was wet and covered with loose material and is approximately 8 ft. in height from the quarry floor which is filled with water. This condition exposed the employee to injuries from falling and drowning.

The citation and order were issued on January 13, 2009 during Inspector Mayer's "walk and talk" as set forth above. The citation alleges a gravity of "highly likely" to result in a fatality from a violation that is S&S affecting one person. Mayer found moderate negligence and abated the citation when the miner was removed from the ledge and retrained on the proper use of fall protection. The proposed penalty is $2,976.00.

The Violation

30 C.F.R. § 56.15005, provides that "safety belts and lines shall be worn when persons work where there is a danger of falling." The reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Secretary of Labor v. Great Western Electric Company*, 5 FMSHRC 840, 842 (May 1983). Under 30 C.F.R. § 77.1710(g), a standard similar to 30 C.F.R. § 56.15005, the Commission also explained that the standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Secretary of Labor v. Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

The operator's position with respect to this citation and order is that Lewis was in the process of abating the first citation issued by Mayer when this occurred. Mayer had only given Lewis 30 seconds in which to instruct the miner to don his personal protective equipment ("PPE"). Had Lewis been given a reasonable amount of time to respond to the situation, he would have instructed the employee to put on the gear. If the inspector had been in a "more reasonable frame of mind" he could have allowed Lewis to correct the situation without issuing a citation. Tr. 43-44. Furthermore, Lewis testified that as the foreman, he is responsible for the

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[8] Sec. 104(a) states: If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

safety program at the quarry and it is required that safety harnesses be utilized. He gives safety talks weekly to remind the workers to use them. At times they do not wear them but Lewis "stay(s) after them as much as possible." There had never been an accident in the past seven or eight years. Additionally, the men, he said, had the safety harnesses with them when they came to put the bridge in place but hadn't put them on. Tr. 161-163, 165-166. Lewis did admit in his statement to Mitchell regarding the later fall protection order issued by Cohen that he doesn't "stand over his men and watch them." S-15. Mize told Mitchell that he also forgets to use the fall protection equipment at times. S-14.

When Pass and Almond were interviewed by Investigator Mitchell with respect to this citation, they both stated that they had safety harnesses issued to them and that Lewis does remind them to use them. They confirmed that they do so when needed. S-16 and 17.

I find the Secretary has proven by a preponderance of the evidence that this standard was violat the order and citation are affirmed. There is no question that working within one foot of a ledge eight above the quarry floor which is filled with water and rocks would put any reasonably prudent person o notice that there is a danger of falling warranting the use of a safety harness and line. There is also no question that the violation occurred. The evidence of record is that Mayer and Lewis were watching th miner for 30 seconds while he was working on the ledge without wearing fall protection. There is no requirement that Mayer give the foreman a certain amount of time in which to correct the miner's viola conduct before issuing the order or citation. A fall with dire consequences could occur in far less than seconds. Had Mayer waited any longer, he too would have been negligent in the protection of the mine And while it may be true that Mayer had the discretion to correct the violation without issuing a citatio is also no dispute that he had the right to issue them. Furthermore, in view of the fact that this conditio because Lewis was abating an unsafe condition Mize had just been cited for that day, Lewis should hav on high alert to ensure the miner was following safety protocol. His failure to immediately recognize a correct the situation without prompting indicates that it probably was not unusual for the miners to wor the ledges without harnesses and that Lewis is not as diligent in enforcing the safety program as he clai any event, the standard requires strict adherence to the standard and regardless of whether there was a s rule in effect at the mine or whether the miner was at fault for ignoring it, the standard was clearly viol and Mize is strictly liable. *Mar-Land Industrial Contractor, Inc.*, 14 FMSHRC 754 (May 1992); *Sou Ohio Coal Company*, 4 FMSHRC 1459; citing *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (Jan. 1981

Significant and Substantial[9]

The Secretary has also established by a preponderance of the evidence that the *Mathies* criteria have been satisfied. Inspector Mayer credibly testified that he assessed this citation as S&S because the ledge was cluttered with loose material, it was prone to being wet and slippery and was sufficiently elevated to pose a discrete danger of falling to the quarry floor below. Because the miner was using a jackhammer which causes severe vibrations, the likelihood of his losing his balance and slipping or tripping and falling over the edge was even more likely. Tr.

[9] The requirements for S&S as set for the above in the discussion of Citation 650710 apply hereinafter.

34-35. Should a fall occur it would likely result in a fatality, or at least broken bones and contusions due to the height of the ledge and presence of rocks and water in the quarry floor. I find the gravity of this violation to be very serious.

Negligence

This violation was assessed as moderate. Moderate negligence means that the operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances. "Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards." *See* 30 C.F.R. §100.3(d)(Table VIII)(2007).

In Mayer's opinion, Lewis was negligent in failing to instruct the miner to utilize PPE. However, Inspector Mayer assessed his negligence as moderate as he found Lewis' efforts to correct the condition as he (Mayer) pointed it out, mitigating. Tr. 36.

There is no question the foreman's negligence is imputable to the operator in this case. See *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981). The Commission has stated that to find the operator negligent where a rank and file miner engages in negligent violative conduct, there must be a finding that the operator has taken reasonable steps to prevent that violative conduct. See *Whayne Supply Co.*, 19 FMSHRC 447 (March 1997); *Nacco Mining Co., Supra*; and *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (Aug. 1982) (SOCCO). The "operator's supervision, training and disciplining of its employees must be examined" to make this determination. *Nacco* at 850-851. In *Southwestern Illinois Coal Corp.*, 4 FMSHRC 610 (May 1985)(Southwestern II), the operator's 100% fall protection use and tie-off safety policy was made known to the miners through written rules, a training seminar and annual refresher training. In addition they had a disciplinary system in which a first offense for failure to wear fall protection resulted in a personnel action warning with progressive forms of discipline for each additional violation. However, the operator left the decision to wear the belts largely to the miners which was determined to be an insufficient policy lacking in enforcement. *Southwestern II* at 613.

I find the facts in this case to be somewhat like those in *Southwestern II* in that Lewis testified that he did have a PPE policy and provided weekly training to the miners reminding them to wear their harnesses. This was confirmed by both miners in their statements to Investigator Mitchell. However, it does not appear that the company has a written policy, warning signs, or annual refresher training. It is also clear that the policy was not actively enforced at the quarry through disciplinary measures, inspections or otherwise. Furthermore, Lewis testified that he was in the process of moving the bridge so he was otherwise engaged in something else at the time. Tr. 44. The fact that the foreman was busy and was not paying attention does not lessen his responsibilities to the miners to protect them. He is the agent of the operator entrusted with ensuring the miners follow all safety protocols. The miner was working with Lewis under his direction and supervision installing the bridge. Lewis should have given this project his undivided attention. Particularly, since he was abating a previously issued citation

and the inspector was watching the work being performed.

The conditions found during this inspection are striking examples of the company's lack of enforcement or concern for safety. Lewis and Mize both exhibited a rather unconcerned attitude towards the miners' not wearing their PPE when questioned by Investigator Mitchell. Their response was simply that they didn't know why they were not wearing it. Mize said he sometimes forgets too. Lewis stated "I don't stand over my men and watch them." S-15. Both miners, in their statements indicated that they leave their gear on the working ledge at the top ledge of the mine rather than carry it back and forth with them. Almond said that it is given to them to wear and they are supposed to use it and do so when needed. S-16. The miners are apparently left to decide when to use it. This all serves to portray a very passive, if not completely unconcerned, attitude on the part of the company towards the use of PPE.

In sum, I find the operator was moderately negligent in not taking reasonable steps to adequately supervise, train and discipline the miners to ensure the miners used their PPE to prevent this violation. I support Inspector Mayer's opinion that Lewis' effort to correct the miner when prompted is a mitigating factor.

3. *Order No. 6505708 and Order No.6505709 (S-4 and S-5)*

This imminent danger Section 107(a) order and Section 104(d)(1) order were written for a violation of 30 C.F.R. §56.15005. The citation, which incorporates the language of the order, reads as follows:

> Anthony Pass and Gary Almond (Ledge Men) were not wearing fall protection while operating a pneumatic drill approx. 3' from the quarry working ledge. Both men were exposed to a fatal fall approx. 40' to the granite quarry floor. Fall protection was available at the working ledge. Clayborn Lewis (Foreman) and Robert Mize III (Owner) both engaged in aggravated conduct constituting more than ordinary negligence in that they were both observing the (2) ledge men operate the pneumatic drill approx. 3' form the quarry ledge while not wearing fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Inspector Cohen issued these orders dated March 22, 2009, during his March 11-12, 2009 regular inspection. He designated the citation as highly likely to result in a fatal injury affecting two persons resulting from the operator's reckless disregard for their safety. It is alleged as S&S as well. The proposed penalty is $35,543.

The Violation

The same standard and discussion previously addressed in Citation No. 6507104 applies and will not be repeated here.

Mize offered no testimony specifically addressing this violation except as is set forth above with regard to their company safety policy. They did not deny the facts as alleged in the citation. In Robert Mize's statement given to Investigator Mitchell, he identified the photograph of the ledge in question, S-5 pg 3 and S-14 pg 14. He said the men were just getting ready to start back to work after the shot had been made to blast the rock. When asked why the men did not have on their PPE, he responded "they had forgotten to put it on, even I do that sometimes." When questioned who would have been responsible for making sure the miners were using their PPE, he said, "I guess it was Lewis but I can't blame him for this. I was there also. I was paying more attention to them pulling blocks, I guess. Ultimately I guess it is me anyway isn't it." S-14 pg 6. Lewis told Mitchell that the men were squaring up the block and preparing them to be taken out. He said Mize and he were standing on the quarry wall discussing the removal of the blocks and didn't really see the men standing on the edge. That is when he made the statement that he doesn't stand over his men and watch them because he doesn't want to make them nervous. He also did not know why they were not wearing their gear. S-15 pgs 7-8.

Ledge man Almond told Investigator Mitchell that he was not wearing fall protection because the two of them had worked their way down to the bottom of the quarry and were working at an elevation of two feet where the PPE was not needed. S-16. Inspector Cohen, however, saw the miners when he arrived on the property working on a ledge that was 40' high. He took a photograph of where the violation took place which clearly is not a ledge two feet off the ground. It may be that Almond was confused as to what point in time Mitchell was questioning him about and that he was unaware that he had been observed by Cohen at an earlier moment, when he made this statement. I accord Cohen's testimony regarding this violation greater weight.

Based upon the strict liability enforcement provisions of the Act as discussed above, I find Mize did commit the violation as alleged and the orders are affirmed.

Significant and Substantial

Inspector Cohen testified that he assessed this violation as S&S because the ledge was 40' above the bottom ledge of the quarry. The men were operating a rotary drill (jackhammer), which vibrates violently, while standing within three feet of the edge. In his opinion, fall protection is needed when working within six feet of the edge because that is the average height of a man. Presumably this would make a trip and fall from that distance likely to result in a fall over the edge. If a fall from the height occurred, it was reasonably likely that the resulting injuries would be fatal. Tr. 63-67. I agree and find this violation is S&S.

Unwarrantable Failure[10]

Inspector Cohen testified that he observed the condition described in the citation himself

[10] The requirement for unwarrantable failure as set forth above in discussion of Citation No. 6507102, applies hereinafter.

while standing at the top of the quarry some 30' above the miners. With him were Lewis and Mize who had both been on the top ledge for some time looking down at the workers when Cohen arrived on the scene. Tr. 66. He characterized the violation as unwarrantable based upon the fact that this was an obvious condition, clearly known to management and because neither Lewis nor Mize took any action to correct the hazard until Cohen ordered them to do so. Tr. 67-68. For this reason, the inspector marked the level of negligence as reckless disregard.

Upon reviewing the factors set forth in *Cyprus Emerald Resources Corp., Supra*, I find this violation to be an unwarrantable failure to exercise due care in safeguarding the two miners working on the ledge. I come to this conclusion based upon the same analysis as set forth in the discussion of Citation No. 6507102 herein. Both Mize and Lewis watched the miners perform their work on a ledge 40' above the quarry floor without taking safety precautions. Neither man really noticed that the workers were doing this for the past two days because they were too busy discussing production. S-14. Essentially, they just didn't care so long as the blocks were being sized and removed from the quarry. Compounding the shocking disregard for the safety of the miners is that fact that this situation took place just two months after Inspector Mayer issued his orders and citations for the same lack of safety enforcement at this mine. Obviously, not only did Mayer's orders and citations not put Mize and Lewis on notice that greater efforts at compliance were necessary, but it had absolutely no effect on them what-so-ever so long as production was occurring. I can only describe their conduct, both individually and in concert, as egregious.

4. *Citation No. 6505710 (S-6)*

Inspector Cohen issued this Section 104(a) citation on March 11, 2009 alleging:

> The tool rest gap on the Delta 10" bench grinder measured appx.(*sic*) ¾" from the tool rest to the grinding wheel. The bench grinder is used daily to sharpen the plug drill bits. This condition exposed miners to cuts and abrasions to the fingers and hand from the sharpened material falling between the tool rest and the grinding wheel. Adjustable tool rest (*sic*) shall be set so that the distance between the grinding surface of the wheel and the tool rest is not greater than 1/8 inch. 30 cfr (*sic*) standard 56.14115(b) has been issued (1) time in a past inspection.

Cohen designated the gravity as reasonably likely to result in lost workdays or restricted duty, S&S and affection one person. He characterized the negligence as moderate. The proposed penalty is $362.

The Violation

30 C.F.R. §56.14115(b) provides an adjustable tool rest be set so that the distance between the grinding surface of the wheel and the tool rest in not greater than 1/8 inch. Mize does not challenge the alleged violation but does the gravity of the violation. I, therefore find that the violation has been established by a preponderance of the evidence presented.

Significant and Substantial

Inspector Cohen testified that because the gap between the wheel and the rest exceeded the required 1/8 inch, it is reasonably likely that whatever is being grinded could fall between the wheel and the rest which would pull a hand against the grinding wheel. This would likely result in cuts and abrasions to the hand and fingers. Tr. 69-70. The grinder is used daily at Mize to sharpen the drill bits. Tr. 68. Mize established through cross-examination of Inspector Cohen that the drill bits that are sharpened on the grinder exceed 1/8 inch, in fact they measure from 3/4 inch to 1 inch in diameter. Tr. 105-106. The following exchange took place between Mr. Mize and Inspector Cohen with regard to the likelihood of an injury occurring as a result of this violatio

> Mize: Do you know what size most of the drill bits are:
> Cohen: They range anywhere from three-quarter and larger, I think.
> Mize: So the smallest one you know of is three-quarters an (*sic*) inch?
> Cohen: Yes, sir.
> Mize: So three-quarters of an inch cannot go into one-eighth of an inch, can it?
> Cohen: No.
> Mize: So it wouldn't be possible for the-for that to happen as you mentioned about the – you mentioned that the-the possibility of someone being injured would be-the way they're being injured was – is whatever you were drilling would fall in between that –between the grinder and the little rest?
> Cohen: That's correct.
> Mize: So three-quarters of an inch would be impossible to fall into an eighth, would it not?
> Cohen: I'm not gonna say impossible. It would be likely- unlikely, yes.
> Mize: Well, I don't think I could stick it through there. Could you?
> Cohen: Probably not.

Based upon the admission of Inspector Cohen that it would be unlikely, if not impossible, for the size of drill bits used by Mize to result in the type of injury cited, I find the Secretary has not met her burden of proving that this violation was S&S. The gravity of this violation is "unlikely" and non-significant and substantial. I will adjust the penalty accordingly.

Negligence

Inspector Cohen assigned moderate negligence to this citation because he found Lewis credible when he said he was unaware that the gap between the wheel and the rest exceeded the required measurement. Tr. 71. I find that based upon Lewis' being unaware of the condition and upon the fact that there is very little likelihood that it would cause an injury, that the negligence should be reduced to low.

5. *Citation No. 6505711 (S-7)*

Inspector Cohen issued this Section 104(b) citation on March 11, 2009 for failing to properly store oxygen cylinders. The citation reads as follows:

> A compressed oxygen cylinder was found stored at the east end of the quarry with the valve not protected by a cover. This condition exposed miners to serious injuries resulting from a broken valve releasing stored energy inside the compressed cylinder. Valves on compressed gas cylinders shall be protected by covers when being transported or stored and by a safe location when the cylinders are in use.

Cohen designated this violation as unlikely to result in an injury to one person and not S&S. However, the nature of an injury would be fatal and the result of high negligence. The proposed penalty is $807.00

The Violation

Cohen testified that the valve cap on one cylinder located near a crane was missing. The cylinder missing one cap was being stored in an upright position and was secured to a handrail and is pictured in S-7 pg 4. Tr. 73-74. Mize did not offer any evidence to challenge this citation. The violation has been established.

Negligence

High negligence means that the operator knew or should have known of the condition and took no action to correct, prevent or limit the exposure to the hazard. 30 C.F.R. §100.3(d). Lewis told Cohen when he found this condition that the tank had been uncapped for two days. For an injury to occur from this hazard the cylinder would have to either fall over and break the valve off or something would have to fall on top of the valve and break it off. That would turn the tank into a projectile. Tr. 73-74. He also stated that the cylinder had not been used on the day of the inspection but had been in use in the previous couple of days. Tr. 72. The manner in which they were secured to the handrail was proper and the fact that it was in an upright position made it unlikely that an injury would occur. Tr. 73. Cohen felt the negligence was high primarily due to the fact that the condition had been allowed to exist for two days according to Lewis. He found no mitigating circumstances.

No evidence was presented by the Secretary to establish whether the condition would have been discovered on a pre-shift examination before the cylinder was used again. There was also no evidence presented as to how the cylinder would fall or be struck by an object in such a way as to break off the valve when it was properly secured to a handrail at the top of the quarry. Cohen did state that there was oxygen in the tank but did not say how much was in it or how much pressure would be required to turn the tank into a projectile if the valve were broken off. I find that absent this information, it cannot be established that the negligence was high. I find that the fact that the tanks were properly stored in an upright position making the occurrence of an

injury unlikely to be a mitigating circumstance and find the negligence to be moderate.

6. *Citation No. 6505712 (S-8)*

This citation was issued by Inspector Cohen on March 11, 2009 and states:

The hoist hook on the Manitowoc 3900T Crawler Crane had a safety chain that was welded to the hook. Also, the lifting dog chains have wore (Sic) down into the saddle of the hook apprx. (sic) ¾ inch. The average granite blocks being lifted from the quarry weigh appx. (sic) 20000 lbs. This condition exposed miners to serious injuries in the event the hoist hook broke and dropped the lifted load. Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons. 30 cfr (sic) standard 56.14100(b) has been issued (2) times in past inspections.

The gravity of the violation was assessed as unlikely to cause an accident but would result in fatal injuries, not S&S, affecting one person and the negligence as moderate. The proposed penalty is $243.00

The Violation

The standard is set forth in the narrative portion of the citation. Cohen testified that the hook had been welded at the tip area where a homemade safety latch had been added. In order to properly weld a hook, the metal has to be heat treated, welded and then cooled down through a specific method otherwise the metal can become brittle and break. Tr. 75 and 77. The saddle area on the hook had been worn down by the dog chains. The grooves in the saddle were approximately 3/4 of an inch deep which was reducing the strength of the hook which was used several times per week to lift blocks weighing 20,000 pounds out of the quarry. Never had Inspector Cohen seen grooves this deep worn into a hook. Tr. 75-76.

Cohen found an injury would be unlikely because Lewis told him the crane hook had been in that same condition for two years. If it did fail, however, it could drop its load and strike a miner. Tr. 78.

Mize elicited through cross-examination that the inspector did not know if in fact the weld on the safety latch had been done in the proper manner or not. Tr. 108. Mize also attempted to establish that the grooves in the saddle had been worn by cable rather than dog chains as Cohen had never seen dog chains make indentations like those in the hook before. Tr. 109-111. I find the difference irrelevant.

I find that there is insufficient evidence presented by the Secretary to establish that the safety latch was improperly welded onto the hook by the inspectors' own admission. I further find that the Secretary provided no basis for the opinion that the strength of the hook was compromised by the grooves in the saddle area particularly in light of the fact that the equipment had been used in

that condition several times per week for two years lifting 10 ton blocks. The photograph presented depicts a hook that is extremely large and sturdy. The grooves do not appear to be particularly deep in comparison to the overall circumference of the hook. Ex. S-8 pg 4. There was also no evidence presented how the condition would affect one person. I cannot presume that the operator of the crane would be in a position to be injured if his load fell from the hook below him. There was no evidence presented that once a block is attached by cable or dog chains to the hoist, that there is anyone working below or anywhere near the hook who would be affected if the block fell. The Secretary has not met her burden of establishing this violation and it is hereby Vacated.

7. Citation No. 6505713 (S-9)

This citation alleges a violation of Section 56.6132(a)(4) of 30 C.F.R., the narrative section of which reads:

> The inside of the blasting caps magazine door contained (4) metallic carriage headed 5/16" bolts that secured the interior wood to the door. The magazine is located at the west end of the quarry and contained (25) 12' blasting caps. This condition exposed miners to serious injuries in the event the contents inside the magazine explodes (sic). Magazines shall be made of nonsparking material on the inside.

This violation was characterized as unlikely to cause injury, not S&S, of moderate negligence affecting one person who would be fatally injured if an accident did occur. The proposed penalty is $243.

The Violation

The standard requires that magazines be made of nonsparking material on the inside. The magazine, located within 100' of the parking area of the quarry contained metallic bolts on the inside of the door. The head of the bolts were exposed but located sufficiently far from the blasting caps stored therein to make an explosion unlikely. Tr. 79-81.

The parties stipulated that the magazine contained detonating charges capable of initiating an explosion. S-19. Because this safety standard imposes liability without fault, I find that it has been established and I find that the likelihood was appropriately assessed as unlikely.

The Negligence

Moderate negligence was assessed because Lewis told Cohen he was unaware that the bolts were exposed on the door of the magazine. He is the only one with keys to the magazine so no one else would have known of the violation. Tr. 81. It also follows, however, that Lewis must have been the one to create the hazardous condition. There was no evidence presented as to how long this condition existed, or how often Lewis would have opened the magazine or how recently to determine what opportunity he had to remediate this condition. There is another magazine on

the property which did not have the same condition. Tr. 82. Under these circumstances, I find considerable mitigating circumstances to support the level of negligence as moderate.

8. . *Order No. 6505714 (S-10)*

This is the Section 104(d) order Inspector Cohen issued for the missing handrails along the 45' pathway located on the bottom ledge of the quarry where the bridge was eventually installed. The narrative portion reads:

> Approximately 45' of handrails was(sic) not provided next to the elevated walkway at the south end of the quarry next to the wood bridge. The walkway is right beside the quarry ledge and is appx. (sic) 2' to 3' wide. Miners use the walkway daily to access the current working ledge. This condition exposed miners to fatal injuries from a fall of appx. (sic) 6' to the water in the bottom of the quarry. The water is appx. (sic) 3' deep. Clayborn Lewis (Foreman) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the handrails were not provided and allowed the miners and himself (sic) to access the elevated walkway next to the south end quarry ledge. This violation is an unwarrantable failure to comply with a mandatory standard.

The order cites the gravity as reasonably likely to produce a fatal injury, S&S, affecting one person and the result of a high degree negligence and an unwarrantable failure. The proposed penalty is $4,440.00.

The Violation

The mandatory standard provides in relevant part that elevated walkways shall be provided with handrails, and maintained in good condition. 30 C.F.R. §56.11002. The Secretary introduced photographs S-10 pg 4 – 8 which clearly depict the uneven, cluttered and narrow elevated pathway lacking any type of handrail.

Mize contests the violation on two grounds. First, the condition had existed in January and was not cited by Mayer when he made his inspection and issued the safe access citation in the same area of the mine. Secondly, that the miners were supposed to take a different route that was 12' from the edge. Tr. 167-168. Neither of these arguments is persuasive on the issue of whether the mandatory standard was violated. The Secretary cannot be estopped from enforcing her safety regulations and therefore Mize's first argument fails. *See U.S. Steel Company, Inc.*, 115 FMSHRC 1541 (Aug. 1993). As to the testimony by Lewis that the miners were supposed to use a different route to access the working ledge, it is contradicted by his own statement to Mitchell in which he confirmed the photographs accurately depict the walkway used by the miners to travel to the working ledge. He further agreed that the pathway was approximately six feet above the quarry floor and that it was worn down and had numerous trip, slip and fall hazards on it. S-15. The statements given to Mitchell by Almond and Pass also contradict

Lewis' testimony and support the observations of Inspector Cohen. S-16 and 17.

I therefore find based upon a preponderance of the evidence that the mandatory safety standard has been violated.

Significant and Substantial

As previously stated, the bottom ledge was approximately six feet above the quarry floor which could have anywhere from one to three feet of water in it depending upon the amount of rainfall. The pathway was narrow and littered with all types of debris and loose rocks with several elevation changes posing serious trip and fall hazards that could result in a fall onto the floor below. There was a possibility of striking rocks or other objects on the quarry floor or drowning if a fall occurred. Tr. 87-88. There is no doubt that the condition created a distinct safety hazard with a reasonable likelihood that it would result in an injury if unabated and a reasonable likelihood that the injury would be of a reasonably serious nature. This violation was properly assessed as S&S.

Unwarrantable Failure

Cohen determined that this violation was also an unwarrantable failure to comply with the mandatory standard because it had been allowed to exist for seven days uncorrected and it was patently obvious to management. Tr. 87-88. He assigned high negligence to the violation for these reasons.

I disagree with the inspector's assessment that this was an unwarrantable failure to comply with the safety standard. While the length of time the violation existed and that management was aware of the condition can be determinative factors in finding a violation is unwarrantable, I do not find that alone is sufficient in this case to say the conduct of the operator constituted more than ordinary, albeit high, negligence. As the Commission stated in *Emery Mining, Supra,* if a finding that the operator knew, or should have known of the condition is the basis for determining an unwarrantable failure, every ordinary negligence case would be unwarrantable. There needs to be additional aggravating factors to elevate ordinary negligence to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care. Such factors may be the length of time the condition existed, the extent of the violation, the degree of danger posed or whether the operator was on notice that greater efforts were necessary for compliance. *Lopke Quarries Inc., Supra.*

I found the violation in Citation No. 6505709 to be unwarrantable because there, the two miners were operating a drill 40' above the quarry floor without fall protection. The vibrations from the pneumatic drill coupled with the extreme height presented an extremely high degree of danger. Further aggravating the situation was the fact that both Mize and Lewis were watching this occur but were too busy discussing production to notice or care. The condition presented in Citation No. 6507104 which I found to be an unwarrantable failure was aggravated by the fact

that the miners had to cross between two ledges eight feet off the ground by walking sideways on a 15" wide path for a distance of four feet. Management's attitude was that the miners were sufficiently experienced to be able to accomplish this balancing act for the number of days that the condition existed.

With respect to this violation, however, the situation is sufficiently different. The inspector found that it was reasonably likely, not highly likely that a miner would trip on the path, fall over the edge and down to the floor below. The path was two feet wide which is sufficiently wide for someone to walk in a normal forward-facing manner. The miners were not performing any work while traveling this route twice a day and there was nothing to divert their attention along the way. The danger posed by this condition, therefore, was not of such grave concern that a failure to address it constituted aggravated conduct. Although Mize's argument that the condition had not been cited by Mayer in January is not a defense to the violation, it does militate against a finding that Mize was on notice that greater efforts were necessary to comply with the standard. Mayer conducted a thorough inspection of this bottom ledge area and issued two citations and one imminent danger order. The condition of the pathway was the same then as it was in March. Mize had at least some reasonable basis for their belief that the bottom ledge was made safe when they abated Mayer's citations and order. The conduct of the operator here is not reckless, intentional or so indifferent to find that it rises above ordinary neglect. I note also, that Inspector Mayer assessed only moderate negligence on Citation No 6507104 when a miner was operating a pneumatic drill within one foot of the edge on this bottom ledge without fall protection. The gravity of that violation was highly likely and yet, he did not believe the conduct of the operator in that more serious violation was unwarrantable, and I agree.

A finding of high negligence is supported by the evidence; the assessment of unwarrantable failure is not. The penalty shall be adjusted accordingly.

9. Order No.6505715 (S-11)

This Section 104(d) order was issued for a violation of the safe access standard 30 C.F.R. §56.1101. The citation issued by Cohen states a set of stairs at the south end of the quarry did not have a handrail. In order to step off the ladder the miners had to "twist their bodies around the side of the stairs to access the ledge above" where there were various trip and fall hazards. Tr. 89-91. This upper working ledge is elevated eight feet above the quarry floor thereby necessitating fall protection to ensure safe access to the work area.

Inspector Cohen designated this condition as S&S, an unwarrantable failure to comply with the standard, reasonably likely to produce a fatal injury and the result of a high degree of negligence. The proposed penalty is $4,440.00.

Mize offered no evidence to contest this violation. The Secretary offered photographs of the condition. S-11 pgs 4 and 5. Interestingly, one photograph shows a

second ladder in the background that does have handrails on both sides which indicates to me that the operator was well aware of the need for them. S-11 pg 7. Based upon the unchallenged testimony of the inspector and the photographs of the ladder and the condition of the upper ledge, I find the violation has been substantiated.

Significant and Substantial

Had this condition not been abated, it was reasonably likely that during the course of continued normal mining operations a miner would trip and fall from a height of eight feet thereby sustaining serious, if not fatal, injuries in Cohen's opinion. Tr. 90-92. Cohen testified that management was aware of the condition and that Lewis had told him that he used the ladder himself. Tr. 93. Cohen's notes indicate that Lewis informed him the ladder was put into use in that location eight days prior to the inspection. S-11 pg 3.

Both Lewis and Mize informed Mitchell that the ledge was normally not cluttered with loose rocks. Mize stated that they had blasted three or four days prior to the inspection and had not gotten around to cleaning up the debris. S-14 and 15. The ladder was tied off at the top and anchored at the bottom. The miners kept three-point contact on the ladder at all times and the side on which they dismounted was clear of debris, Mize said. S-14.

Almond and Pass told Investigator Mitchell that the ledge was typically cluttered. Almond added that they never have time to clean it up because management always wanted them to focus on production. S-16. Pass said that he would "just try to clean a little walk way" to get through. S-17. These statements convince me that the condition was not recently created and that one side of the ledge was not kept clear of debris as Mize stated if the miners had to clear their own path to make their way through to the work area.

It is not difficult to imagine that a miner could lose his balance or misstep while climbing the ladder. Without a handrail to grab onto, there would be a substantial likelihood of falling. The risk of a miner losing his footing when twisting around the top of a ladder, stepping onto the debris strewn ledge and falling, is also readily apparent. A fall from a height of eight feet to a hard granite floor would cause serious (or fatal) injuries. The *Mathies* criteria are satisfied.

Unwarrantable Failure

Cohen testified that he designated this violation as unwarrantable for the same reasons he assessed it as S&S. Tr. 93. What convinces me that this was an unwarrantable failure to comply with a mandatory standard, however, is found in his notes. In them, he states that the handrails on this ladder had been missing for approximately one month. The ladder had been in its current location for eight days at

the time of the inspection and was used daily by the miners according to Lewis. S-11 pg. 3. This tells me two things. First, that the operator was aware of the need for the handrails on the ladder. Secondly, that they had more than ample time to reinstall the handrails to make this ladder safe before putting it into service and did not do so. The comment by ledge man Almond, that he didn't have time to clear the ledge because management wanted them concentrate on production underscores Mize's complete indifference and reckless disregard for the safety of its miners.

10. *Citation No. 6505716 (S-12)*

This alleged violation was cited by Inspector Cohen on March 12, 2009. The citation alleges:

The 1" air hose connections, for the plug drills and jack hammer, were not equipped with a safety chain or other suitable locking device. The air tools are used daily at the current working ledge. This condition exposed miners to cuts and abrasions to the body in the event of a (sic) air hose connection failure.

It is assessed as reasonably likely to cause an injury resulting in lost workdays or restricted duty, S&S and the result of moderate negligence by the operator. The proposed penalty is $362.

The Violation

The standard, 30 C.F.R. §56.13021 provides "safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of ¼-inch inside diameter or larger, and between high-pressure hose lines of ¾-inch inside diameter or larger, where a connection failure would create a hazard."

Inspector Cohen found 1 inch diameter air hoses that connect to plug drills and jackhammers that were missing locking connections. The working pressure of these air hoses is 120 psi. In the event of a connection failure, the air pressure would cause the hose to whip around producing cuts and abrasions to the miner operating the equipment as the connector is close to the body when in use. S-12 pg 3 and Tr. 96-97. Both miners were operating the jackhammer when Inspector Cohen arrived. They use these tools on a daily basis. Tr. 96. The typical air hose is secured by pushing the hose coupling into the equipment coupling and twisting it. A pin is then used to connect both couplings and prevent a connection failure. The pin, however, was missing making it reasonably likely to result in a connection failure as described. The inspector was familiar with the types of injuries caused by such a failure from having seen and been involved in such an incident. Tr. 97.

Mize offered no evidence to contest this violation. I find, based upon the inspector's testimony and notes that it has been established.

Significant and Substantial

The tools in question are used daily in the quarry thereby increasing the likelihood of a connection failure through repeated use. It would have been helpful if Inspector Cohen had provided information regarding how many pounds of force is exerted by a connection failure of a 1" diameter hose at 120 psi or under what conditions a connector failure would occur. However, I rely on the inspector's personal experience with this type of accident, and his training as an MSHA inspector, as a credible basis for his opinion. I concur that under continued normal mining operations, it is reasonably likely that this hazard would have resulted in cuts and abrasions which would be reasonably serious in nature.

Negligence

Lewis told Cohen that he was unaware that there was not a locking device on these hoses in mitigation of the violation. The ledge men set up and use these tools, not Lewis. Tr. 98. There is no evidence of record as to how long the condition existed. Because Lewis is primarily responsible for the safety of the miners and for making the pre-shift examinations of all equipment and areas of the mine, he should have known of this condition. Based upon the overall lack of concern for safety in the mine exhibited by Mize, it is likely that this condition was not a recent development. Taking all of these factors into consideration, I conclude that this violation was the result of moderate negligence.

11. *Citation No. 6505717 (S-13)*

On March 12, 2009, Cohen issued this Section 56.12028 citation alleging that a continuity and resistance test was not performed on the Sullair air compressor model #25-100L immediately after installation six weeks prior to this inspection. The gravity was marked as unlikely to result in a fatal accident affecting one person with a moderate degree of negligence. The proposed penalty is $190.00.

The Violation

The mandatory standard requires that continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification, and annually thereafter. 30 C.F.R. §56.12028.

Cohen testified that he was told by Lewis that this compressor had been installed six weeks before the inspection. Therefore there should have been a report of a continuity and resistance test done within that same time period. Tr. 100-101. Lewis testified that the compressor had been installed six years ago and that Cohen misunderstood him. Tr. 168. Cohen confirmed that when he asked Lewis for the new report, Lewis provided him with the prior year's annual test report. Tr. 102. Based upon these facts, it is impossible to find that the compressor was only six weeks old when the test report in Lewis' possession for this very piece of equipment

was dated one year earlier. The citation is Vacated.

III. Penalties

A. Penalties under Section 110(i) of the Act

The Mine Act delegates the duty of proposing civil penalties for violations to the Secretary. 30 U.S.C. §§815(a) and 820(a). When an operator challenges the Secretary's proposed penalties, the Secretary petitions the Commission to assess them. 29 C.F.R. §2700.28. Once petitioned to assess the penalties, the Commission delegates the authority to the administrative law judges to assess the civil penalties de novo. Section 110(i), 30 U.S.C. §820(I). The administrative law judge is required by the Act to consider the following six statutory criteria in her assessment of the appropriate penalties:
(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. §820(I).

The penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties stipulated to facts which affect the assessment of penalties. They are that the operator is a small mine reporting 10,042 annual hours of production in 2009, and that Mize demonstrated good faith in abating the cited citations. The negligence and gravity of the violations herein have been previously discussed. I find several of the penalty amounts proposed by the Secretary to be out of proportion to the size of the mine and the facts presented.

Mize has raised the issue of an inability to remain in business if ordered to pay the proposed penalties. Corporate tax returns for years 2007 through 2009 were provided and considered. The Secretary argues that the tax records alone are not sufficient evidence of an inability to continue in business under *Spurlock Mining Co., Inc.*, 16 FMSHRC 697 (April 19914). Further she points out that Mize has increased the number of employees between 2007 and 2009 and has reported substantial receipts in each of these years. And, finally, that Mize has been assessed $105,996.90 in penalties between 2001 and 2010 which have become final orders, $99,710.90 of which are delinquent. Sec'y's Post Hearing Brief at 62-63.

I have considered the criteria in 110(i) in view of the evidence of record in making my findings herein. The following penalties well not affect the operator's ability to continue in business and are appropriate under the Act:

1. Citation No.	6507102	$4,440.00
2. Citation No.	6507104	$2,976.00
3. Order No.	6505709	$10,000.00
4. Citation No.	6505710	$100.00
5. Citation No.	6505711	$250.00
6. Citation No.	6505712	Vacated
7. Citation No.	6505713	$243.00
8. Order No.	6505714	$3,000.00
9. Order No.	6505715	$4,440.00
10. Citation No.	6505716	$362.00
11. Citation No.	6505717	Vacated
Total:		$25,811.00

B. Penalties under Section 110(c) of the Act

Section 110(c) of the Act which provides in relevant part that whenever a corporate operator violates a mandatory health or safety standard or knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Commission has interpreted the meaning of the word "knowingly" as knowing or having reason to know. "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 68 F. 2d 632 (6th Cir. 1982), *cert denied*, 461 U.S. 928 (1983). To clarify under what circumstances an individual may be personally liable for penalties, the Commission stated "a corporate agent in a position to protect employee safety and health has acted 'knowingly,' in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventative steps." *Secretary of Labor v. Roy Glenn agent of Climax Molybdenum Co.*, 6 FMRSHR 1583, 1586 (July 1984). The level of proof required of the Secretary to sustain personal liability is more than

the assertion that, at the time of assignment of a specific task, the task could have been performed in either a safe or unsafe manner and the agent failed to prevent the miner from employing the unsafe one. The agent has the obligation to prevent those hazards which he or she has reason to know will occur. *Roy Glenn* at 1588.

The proposed special assessments are based upon the following citations in the stated amounts: 1) Citation No. 6507102, $3600.00; 2) Order No. 6505709, $6000.00; 3) Order No. 6505714, $4000.00; and, 4) Order No. 6505715, $4000.00. They have been assessed against both Robert Mize and Clayborn Lewis who have stipulated to being "agents" of Mize Granite Quarries, Inc. under the provisions of 110(c).

In *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997), the Commission held that "judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals." The "relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations . . . [w]ith respect to the 'size' criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth." *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997) (*Ambrosia I*). The Commission further held that, if an individual is married, the judge should consider the individual's share of the household net worth, income, and expenses. *Ambrosia Coal & Construction Co.*, 19 FMSHRC 381, 385 (April 1998) (*Ambrosia II*).

Robert Mize raised a defense of an inability to pay the penalties as a small business owner fighting to stay in business. Neither party provided evidence at the hearing pertaining to the 110(i) penalty criteria for Mize or Lewis. I therefore issued an Order dated March 4, 2011 reopening the record for 10 days for submission of relevant evidence by the Secretary, Mr. Mize and Mr. Lewis. The Secretary and Mr. Mize responded. Mr. Lewis did not. Under the circumstances, I find that making additional inquiries and delaying the case further would not be fruitful. Instead I make the finding that the penalties I assess will not adversely affect the ability to meet individual financial obligations of Mr. Lewis. *See William A Hooten, Jr.* 21 FMSHRC 1083, 1091 (Oct. 1999) (ALJ).

The Secretary provided the personal income tax returns for the Robert Mize for years 2007, 2008 and 2009. S-22-24. The Secretary stipulated that Mize has not had any injuries or lost workdays on the site and was the recipient of two safety awards. She also stipulated that each of cited conditions was rapidly abated in good faith. She argues that Mize has sufficient income to support the proposed penalties based upon the income tax returns provided.

Also undisputed is the fact that Robert Mize is the owner/operator of Mize Granite Quarries, Inc. and Mize Granite Sales, Inc. I consider the overall deterrent purpose of the Act and that fact that Mize has been assessed rather significant 110(i) penalties for the violations which will also be paid by Mr. Mize. I have taken this overlapping effect of the penalties into

account in the assessment of the personal penalties. I find the penalties proposed by the Secretary are disproportionate to the size of the mine vis a vis the income of the agents, and their lack of personal histories for previous violations.

The tax returns document that Robert Mize's wife receives Social Security disability payments for a disabling medical condition. He also supports two adult daughters and one grandson whom he claimed on this income tax as dependents. I do not take into consideration those expenses incurred on behalf of his daughters or grandson as legal obligations or within the Commission's rulings in *Ambrosia I or II* in determining the appropriate amount of penalties.

1. Penalties against Robert Mize

I have previously stated my findings with respect to gravity and negligence. Based upon the evidence of record, I assess the following penalties:

a. Citation No. 6507102 $500.00

b. Order No. 6505709 $500.00

c. Order No. 6505714 Dismissed

This violation was of significant and substantial gravity resulting from moderate negligence but not an unwarrantable failure as discussed previously. For the same reasons I found this violation to be of a lesser degree of negligence than that assessed by the Secretary, I find that a 110(c) penalty is not appropriate.

d. Order No. 6505715 $500.00

Total: $1500.00

2. Penalties Against Clayborn Lewis

Taking into account that Mr. Lewis is a paid employee of Mize, and not the owner, but otherwise for the same reasons set forth above regarding Mr. Mize, I assess the following penalties.

a. Citation No. 6507102 $300.00

b. Order No. 6505709 $300.00

c. Order No. 6505714 Dismissed

d. Order No. 6505715 $300.00

Total: $900.00

ORDER

I. Citation Nos. 6505712 and 6505717 are vacated. Citation Nos. 6507102, 6507104, 6505710, 6505711, 6505713 and 6505716 are affirmed and Mize Granite Quarries is directed to pay the total penalties of $8,871.00, for the violations charged therein within 40 days of the date of this decision. Order Nos. 6505709, 6505714 and 6505715 are affirmed, and Mize Granite Quarries is directed to pay total penalties of $16,940.00 for violations charged therein within 40 days of the date of this decision.

II. The charge herein against Robert W. Mize under Section 110(c) of the Act, based upon Order No. 6505714 is dismissed. The charges against Robert W. Mize based upon Citation No. 6507102 and Order Nos. 6505709 and 6505715 are affirmed and he is directed to pay total penalties of $1500.00 within 40 days of the date of this decision. The charge herein against Clayborn Lewis under Section 110(c) of the Act which is based on the violation charged in Order No. 6505714 is hereby dismissed. The charges herein against Clayborn Lewis based on the violation charged in Citation No. 6507102 and Order Nos. 6505709, and 6505715 are hereby affirmed and Clayborn Lewis is directed to pay total civil penalties of $900.00 within 40 days of the date of this decision.

Priscilla M. Rae
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001
April 20, 2011

SUSAN A. LUCERO,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2010-636-D
v.	:	Case No. DENV-CD-2010-01
	:	
	:	Mine: North Antelope Rochelle Mine
POWDER RIVER COAL, LLC.,	:	Mine ID: 48-01353
Respondent,	:	

DECISION

Appearances: Ms. Susan Lucero, representing herself
Kristen L. Johnson, Esq.; Kristen White, Esq, on behalf of Powder River Coal LLC

Before: Judge David F. Barbour

This case is before me on a complaint of discrimination brought by Susan A. Lucero againstPowder River Coal, LLC ("Powder River") under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 815(c)(3)(2006). Lucero contends that she was "interfered with and bullied" because she reported safety concerns at Powder River's North Antelope Rochelle Mine, a surface coal mine located in Campbell County, Wyoming. Complt. 4. She also contends that she was not promoted because of her concerns. *Id.* At the time of the alleged discrimination, Lucero primarily operated a coal haul truck and a rubber tired bulldozer ("rubber tired dozer" or "RTD").

Powder River answers by denying all of Lucero's allegations and by specifically asserting that Lucero did not suffer any adverse action, or if she did that the adverse action was not motivated in any part by her protected activity. Powder River asserts that any action the Company took with regard to Lucero's employment was based on "legitimate and nondiscriminatory reasons." Answer 2.

PROCEDURAL BACKGROUND

Following the receipt of Powder River's answer, the matter was assigned, and I ordered Lucero to clarify her complaint with respect to her claims of protected activity and adverse action. In her amended complaint, Lucero describes safety complaints she made to her acting supervisor on April 17, 2009. In the early morning of April 17, 2009, she noticed large holes in the road leading to the mine's Middle Pit (the "pit"). She feared the holes posed a danger to haul trucks. Around 6:00 a.m., Lucero reported the problem over the radio to her acting supervisor, Scott Earnest. Am. Complt. 2. The shift ended at 6:30 a.m. Earnest was highly annoyed with her

report and he responded sarcastically and angrily about the timing of Lucero's concern. Id. He said nothing about its substance. Am. Complt. 1-2.

Five days later, on Wednesday, April 22, Powder River conducted a safety meeting for all miners working on Lucero's shift. Am. Complt. 2. At the meeting Lucero described Earnest's reaction to her April 17 safety complaint. *Id.* According to Lucero, when she finished Earnest yelled from the back of the room, "It was 6:00 o'clock." *Id.* Lucero maintains that rather than support her, Charles ("Chuck") Davis, a management official, stated that safety was a "matter of opinion." *Id.*

Lucero was asked to stay after the safety meeting for another meeting with management officials. Am. Complt. 2. At the second meeting Lucero contends that management officials made excuses for Earnest and made it seem as though Lucero was the problem in order "to protect [Earnest]." *Id.* She adds, "Management did not address my concerns in a way that [my] fears reasonably should have been quelled." *Id.* In addition, Lucero further maintains that because of the April events, between May 10, 2009 and December 3, 2009 she was denied a promotion to which she was entitled. *Id.*

In responding to Lucero's amended complaint, Powder River continues to deny all of her allegations. It emphasizes that after hearing Lucero's concern about the condition of the haul road, Earnest contacted other haul truck drives to determine if corrective actions were needed and then ordered the holes in the road filled and the bed leveled. Resp't. Am. Answer 2. It also states that at the second April 22 meeting, management officials explained to Lucero the steps that had been taken to respond to her concerns; that Earnest agreed he had not responded to Lucero "as nicely as he should," that he apologized to Lucero, that Lucero refused to accept the apology and that she angrily left the meeting. *Id.* Powder River maintains that Lucero was in no way the subject of adverse action because she reported the condition of the road, and that although she was denied a promotion subsequently, it was because she failed to demonstrate the necessary skills when she was evaluated by her trainer. *Id.* 4. It further states that it continued to work with Lucero to get her to the point where she could be promoted and that she was promoted in December 2009. *Id.* 4-5. Powder River also claims the decision to promote Lucero was essentially made before the Company received a copy of the discrimination complaint Lucero filed with MSHA.[1] *See id.* 5-6.

The matter was heard in Gillette, Wyoming. Powder River was represented by counsel. Ms. Lucero represented herself.

THE STIPULATIONS

At the start of the hearing counsel for Powder River read the following joint stipulations

[1] Ms. Lucero's complaint to MSHA, a copy of which is attached to the complaint that she filed with the Commission, is dated December 8, 2009.

into the record:

> 1. [Powder River] is an operator within the meaning of the Mine Act.
>
> 2. Powder River . . . [and the mine are] subject to the jurisdiction of the [Mine Act].
>
> 3. At all times relevant to this proceeding . . . Lucero was a miner within the meanings of Section 3(g) and Section 105(c) of the Mine Act. [30 U.S.C. §§ 802(g), 815(2006).]
>
> 4. The Administrative Law Judge has jurisdiction in this matter.
>
> 5. Susan Lucero began work at [the mine] on March 10, 2008, as a production technician.
>
> 6. Susan Lucero is assigned to Coal Crew [No.] 3 and has been since March 10, 2008.
>
> 7. Susan Lucero was recommended for advancement to C-Tech level on June 18, 2008.
>
> 8. On April 22, 2009 a meeting was held at [the [m]ine with Don Curtis, [a] coal crew team leader; Chuck Davis[, another] coal crew team leader; Jim Blonigen, [Coal Crew 3 supervisor]; Scott Earnest, [s]tep-up [s]upervisor; and Susan Lucero.[2]
>
> 9. Jim Blonigen held an evaluation meeting with Susan Lucero on August 22, 2009.
>
> 10. A meeting was held with Jim Blonigen, Don Curtis, Shantel Moore, [an] H.R. representative, and Susan Lucero on October 5, 2009.

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[2] There are two coal team leaders at the mine. Coal team leaders are responsible for making sure there is enough coal to fill customers' orders. They also help with personnel evaluations, review promotion recommendations and review reported safety incidents. Tr. 449-450.

11. [Powder River] provided to Ms. Lucero an action plan for Advancement on Rubber Tire Dozer[s] to B-Tech at the October 5, 2009 meeting.

12. Jim Blonigen held an evaluation meeting with Susan Lucero on December 13, 2009.

13. On December 13, 2009, Jim Blonigen notified Susan Lucero that she qualified for advancement to [B-]Tech retroactive to November 10, 2009.

14. On or about January 6, 2010, MSHA determined that no discrimination occurred under Section 105(c) of the Mine Act. [30 U.S.C. § 815(c)(2006).]

15. On or about February 1, 2010, Susan Lucero filed a discrimination complaint with the . . . Commission pursuant to [s]ection 105(c)(2) of the Mine Act. [30 U.S.C. § 815(c)(2)(2006).]

Tr. 18-20.

In addition to these 15 stipulations, two more stipulations were added by counsel and Lucero at the hearing:

1. [O]n or about December 8, 2009, Lucero filed a discrimination complaint with MSHA under [s]ection 105(c) of the Mine Act. [30 U.S.C. §815(c)(2006) .]

2. [T]he exhibits to be offered [by] the parties are . . . authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

Tr. 20-21.

FACTUAL BACKDROP TO THE COMPLAINT

THE MINE AND LUCERO'S JOBS

During the course of her opening statement, counsel for Powder River described the mine, the work schedule at the mine, Lucero's place in that schedule, and the Company's advancement policies. The information was confirmed during the hearing, and counsel's

description was a helpful backdrop to the testimony that followed.

Counsel explained that the mine is one of the largest surface coal mines in the United States. Tr. 26. Coal is mined by draglines which are located in the mine's pits. *Id.* Once extracted, coal is loaded into haul trucks and hauled to hoppers at the mine where it is crushed and conveyed to silos for storage. *Id.* It is then loaded into trucks and hauled to railcars for shipping. *Id.*

Miners work 12 hour shifts. Tr. 27. The shifts are rotated between day and night every 28 days. *Id.* There are four coal crews at the mine. *Id.* At all times, Lucero has been assigned to Crew No. 3, and her primary supervisor has been Jim Blonigen. *Id.*

Ms. Lucero has operated three types of heavy equipment: haul trucks, blades, and rubber tired bulldozers. Tr. 27. Although Lucero has usually operated a haul truck, she was being trained for advancement as an RTD operator. *Id.*

POWDER RIVER'S PROMOTION POLICY AND LUCERO

Miners who work for Powder River begin their employment at an entry level. (This entry-level policy applies to all miners, no matter their prior experience.) Entry level miners are called "technician inductees" or "tech inductees." Tr. 28. During an inductee's first 360 hours of work, the inductee is evaluated by a trainer or supervisor to determine which of three pieces of equipment (haul truck, blade or RTD) he or she can operate. *Id.* Upon completion of the initial 360 hours of work, if the miner is determined by the trainer or supervisor to have the skills necessary to operate one of these pieces of equipment, the miner is recommended for placement at C-Tech level. Tr. 28. This is the highest level at which a miner can be placed after completing his 360-hour period. *Id.*

After a miner is advanced to C-Tech, the miner is not eligible for further advancement to B-Tech until one year after his placement date. Tr. 30. To qualify for B-Tech the miner must demonstrate consistent mastery of the necessary advanced skills. In addition, the miner cannot have experienced a chargeable safety incident during the year. *Id.* If the miner has a chargeable safety incident, there is an automatic 90-day hold placed on the miner's advancement. Tr. 30-31.

Shantel Moore, a human resources ("H.R.") representative at the mine, explained that the Company has adopted a written advancement policy entitled the "Technician Concept." Tr. 509-510; Resp't. Exh. 17. As just noted, every new employee is hired as a tech inductee. There are three types of tech inductees; production techs, maintenance techs, and maintenance support techs. Production technicians are equipment operators who work in the pit or miners who work in the plant. Resp't. Exh. 17 at 61; Tr. 511-512.

Lucero worked as a production tech in the pit. On May 10, 2008, Lucero completed her 360 hours of training. However, her evaluation did not take place until June 18, 2008, at which

time Blonigen recommended Lucero for placement at C-Tech level. Tr. 29, *see also* Tr. 233; Resp't. Exh. 11. Her placement date was May 10, 2008. Once she advanced to C-Tech, Lucero received a retroactive pay increase.[3] *Id.*

Moore confirmed that all newly hired employees are classified as inductees for their first 360 hours of work. Tr. 512-513; *see also* Tr. 529. Powder River views the induction period as a chance for the inductee to show his skills and abilities on various pieces of equipment. *See* Tr. 294. If an employee is hired as an equipment operator, during the induction period the employee is given an opportunity to demonstrate basic skills on the equipment. *Id.* Further training is given to improve the miner's skills after the employee has qualified. *Id.* At the end of 360 hours the highest level at which a new employee can qualify is C-Tech. Tr. 515. The date the inductee is placed in his first tech level is his "placement date." One year after the placement date the miner is eligible to advance to a higher tech level. Tr. 516. If an employee is evaluated and advanced after his placement date, the employee is paid retroactively to his placement date. *Id.* In other words, once an employee is advanced, he is always paid retroactively to the date he became eligible to advance. Tr. 546. Either a miner's supervisor can evaluate a miner for advancement or the supervisor can request that someone from the training department observe the employee and evaluate the miner for advancement. Tr. 528. If an employee is not recommended for advancement, the employee can be evaluated again in 90 days. Tr. 519. The end of the 90-day period becomes the miner's new placement date if he is advanced.

LUCERO'S MAY 2008 EVALUATION

Lucero testified she began work on March 10, 2008 and was eligible for her initial tech level evaluation on May 10, 2008, 360 hours after March 10. Tr. 232-233. However, it was not until June 18, 2008, that Jim Blonigen, Ms. Lucero's primary supervisor, performed her initial tech level evaluation. *See* Resp't. Exh. 2 at 10-4.[4] As a result of his observations, Blonigen recommended Lucero for advancement to C-Tech. Tr. 307. He noted many positive things about Lucero's job performance. He found that Lucero was not afraid to ask questions, came to work prepared, accepted job assignments without complaint, did whatever she was asked, got along well with other members of her crew, asked for help when she needed it, had zero safety incidents and perfect attendance. Resp't. Ex. 11 at 3; Tr. 54-55, 298. Blonigen recommended

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[3] Counsel asserts that it is not unusual for a miner to be evaluated after the date the miner becomes eligible for advancement and that a delayed evaluation does not harm the miner because the pay increase that corresponds with the advancement is always made retroactive to the date the miner became eligible for advancement. Tr. 29-30.

[4] Blonigen explained that an evaluation can take place after the placement date because of a number of reasons. For example, more important things may be happening or a miner may be scheduled for a vacation. Tr. 296. In addition, before a miner is officially advanced, the evaluation and recommendation must be reviewed by H.R. personnel and higher management officials. *Id.*

that Lucero work on her skills on RTDs, haul trucks and other equipment. *Id.* He added, "She is a little bit rusty, but things are going well as she spends more time on the equipment." Resp't. Ex. 11 at 3.

Earlier Blonigen had completed a form concerning Lucero's qualification on a blade. *See* Compl. Ex. 2 at 10-4. Eighteen tasks involving operation of the equipment are listed on the form and the person who completes the form must indicate whether or not the employee can perform the tasks. Blonigen checked "yes" for each of the 18 tasks. *See* Complt. Ex. 2. He also hand wrote the following comments in the "Experience & Comments" part of the form: "Susan does a good job of keeping large oversize out of [the] road, keeps drainages open, does not run wind rows across traffic patterns and communicates well with other operators." *Id.*; Tr. 55.

Also on June 12, 2008, Blonigen filled out and signed an RTD Qualification Form for Lucero. He again checked "yes" with regard to the satisfactory performance of each of the 18 tasks in which a dozer operator must show proficiency. He handwrote the following comments in the "Experience and Comments" part of the form: "Susan understands what is expected of her[. She] uses her blade appropriately and keeps a level floor[. She] communicates with shovels and trucks well." Compl. Ex. 10-5; Tr. 55-56. But Blonigen emphasized that his evaluation was based on an assessment of Lucero's basic, not advanced skills. Tr. 394-395.

As stated, Lucero's placement at the C-Tech level was effective as of May 10, 2008 (Tr. 295; Resp't. Ex. 11) and May 10, 2008 became the start date for her future evaluations. Tr. 95. This meant that Lucero was eligible to be evaluated for B-Tech on May 10, 2009. However, as discussed below, Lucero was not eligible to be advanced in May. Because of a chargeable accident her advancement date was deferred for 90 days, which meant that she did not become eligible for advancement until August 10, 2010. When the evaluation was conducted Lucero was denied advancement. As will be discussed, the Company maintains Lucero was not promoted because she did not consistently exhibit a mastery of the skills required for advancement, but Lucero believes the Company's reason is pretextual. In Lucero's view, the real reason she was not promoted in August 2009 is that the Company was retaliating against her for her protected activities of the previous April.

THE INCIDENT OF APRIL 17

On April 16, 2009 -April 17, 2009 Scott Earnest was acting as the night shift's "step up" supervisor, meaning he was taking the place of regular supervisor, Jim Blonigen, who was elsewhere.[5] Tr. 95, 100, 104. Lucero, who was operating a haul truck, stated that around 6:00 a.m., she called Earnest to report an unsafe condition where she and other miners were working. Tr. 185. It had been raining a lot that week making the pit road rough, muddy and full of the

[5] Lucero described a "step up" as being "like a relief foreman." Tr. 39. She explained that when Blonigen was absent, "one of the techs steps up to be the foreman that day." *Id.* The step up foreman serves until the regular foreman returns. Tr. 39-40; *see also* Tr. 101.

holes. Tr. 187. Prior to 6:00 a.m., Earnest sent a bulldozer into the pit to smooth out the floor. However, after looking at the conditions, the bulldozer operator left the pit. Tr. 186. Lucero also left. *Id.* She returned around 6:00 a.m. *Id.* While she was gone, the condition of the road deteriorated badly. *Id.* According to Lucero, there was so much water, traffic was down to one lane. *Id.* Fortunately, there were two or three places where coal haul trucks could pull over and let other trucks and equipment pass. Tr. 187. Lucero pulled into one of the places to let a loaded truck that was leaving the pit go by. Tr. 186-187. The truck ran into a deep hole in the road. Tr. 187. As it came out of the hole, the truck's front tires went into the air and slammed back down. *Id.* It appeared to Lucero that the driver of the truck lost all control. *Id.* She feared she was going to be hit by the out of control truck. *Id.* She called "dispatch" using her truck's radio and reported the hazardous condition of the road. Tr. 187. Fixing the road would have required shutting it down, which would have the effect of shutting down the pit, and Lucero testified that the miners working in dispatch told her they had no authority to close the pit. *Id.* She therefore called acting supervisor Earnest. *Id.*

It was very near the end of the shift, and Earnest had left the pit and gone to the mine office to do some final paper work before leaving for home. Tr. 106. When Lucero called and reported the hazardous road condition to Earnest and stated that the road needed to be shut down, Earnest was angry. He responded, "Oh, I suppose it just happened." Tr. 185-186, *see also* Tr. 188. Lucero answered, "No, it just didn't happen [*sic.*]." Tr. 186. Earnest did not ask her anything about the condition of the road and made no further comment about her complaint. Lucero was upset because Earnest did not ask her about the road and how it could be fixed. Tr. 188. She maintained that two other coal haulage truck drivers came on the radio and "backed [her] up and confirmed that . . . [the road's condition] was bad." *Id.* She received no further communication from Earnest.

Lucero believed that Earnest did not respond appropriately to her safety concern, and that the manner in which he responded to her was discriminatory. Tr. 258. She stated that, "[It] was retaliation or humiliating and discriminatory . . . . I didn't feel confident or I didn't want to put myself in that position or raise any concerns if I was going to be talked to like that." Tr. 188.

April 17, 2009 was a Friday. Following her conversation with Earnest, Lucero left the mine for the weekend. Tr. 259. Lucero did not then know, but at the start of the next shift, a bulldozer was sent to smooth the road. Tr. 258. In addition, rock was put down to fill the holes and to improve traction.[6] Blonigen stated that it was, "the proper thing to do." Tr. 76. Blonigen believed the actions addressed Lucero's safety concern. Tr. 76. He also agreed that it was proper for Earnest to call other miners to see how they assessed the situation. Blonigen stated, "I do that all of the time. I verify through other people." Tr. 77.

Lucero did not return to the mine until Monday, April 20. On both Monday, April 20 and

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[6] The road was never shut down, as Ms. Lucero requested. Once the maintenance work was completed on the morning shift, the shift ran normally. *See* Tr. 469-470.

Tuesday, April 21 Lucero participated in pre-shift meetings with her crew. During these meetings she did not raise with Blonigen, who had resumed his role as supervisor, any concerns about the way Earnest responded to her on April 17. Tr. 259-260, 342, 481.

When Earnest finished his shift on the morning of April 17, he went home and did not think any more about Lucero's call or his response. ("I thought it was done and over[.]" Tr. 115.) He heard nothing further from Lucero about the April 17 incident until the Company safety meeting on April 22. Tr. 116.

THE APRIL 22 SAFETY MEETING

On Wednesday, April 22, the Company conducted a "safety stand down" meeting for all miners on Lucero's crew. Tr. 117, 343. The miners were asked to think and to talk about safety. Tr. 343. Lucero remembered coal crew team leaders Don Curtis and Chuck Davis telling the pit crew that the Company wanted all safety related conditions reported. Tr. 189. They also urged the reporting of conditions that did not present immediate issues but that might "turn into" safety problems. *Id.* They asked if anyone "had any concerns." *Id.* According to Blonigen, it was at this point that Lucero asked what miners were supposed to do if they brought a safety concern to a supervisor and the supervisor chastised the miner over the radio or ignored the miner. Tr. 343. Lucero recalled that Earnest, who was in the back of the room, yelled, "It was 6:00 [a.m.]" Tr. 190; 260. Lucero believed Earnest's response was hostile. She stated, "Safety doesn't have a time. It doesn't matter if it's the beginning of the shift, the end of the shift, or what." Tr. 190.

In Lucero's opinion, Chuck Davis then made matters worse by stating, "It's totally a matter of opinion." *Id.;* 260. Lucero believed that Davis's statement "was like another slap in the face."[7] Tr. 191. From the tone of his voice, Lucero was sure that Davis was defending Earnest. Tr. 263. More than that, in Lucero's opinion, Davis, like Earnest, was showing hostility and animosity toward her for reporting safety conditions. Lucero stated, "I felt that he was making me sorry that I brought . . . up [the April 17 incident] because he was insinuating that it . . . wasn't unsafe, and [that] would definitely inhibit me from saying anything in front of the crew again."[8] Tr. 262. According to Lucero, because upper management believed she had put Earnest "in a bad light" in front of the entire crew, management started retaliating against her. Tr. 191-192.

THE SECOND MEETING ON APRIL 22

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[7] Davis describe his response as "talk[ing] about differences of opinion" with regard to safety concerns. Tr. 455. He explained, "One person may see different situations as being unsafe, where others may see it as being fine." *Id.*

[8] However, Davis denied that he was demeaning or discrediting Lucero. He said he meant that Lucero "[might] have [seen] one thing, where other people during the same shift had not." Tr. 460.

At the close of the first meeting on April 22, management officials decided to hold a second smaller meeting involving Lucero, Earnest and other management personnel. Don Curtis suggested the second meeting. Tr. 482. Curtis stated, "I recognized that [Ms. Lucero] had a concern and I requested that we take it . . . [up] after the [first] meeting so the rest of the miners could head to the pit and we could address the situation she was concerned with." *Id.*

The second meeting was attended by Lucero, Earnest, Blonigen, Davis, Curtis and H.R. representative Shantel Moore.[9] Tr. 192-193; 456. Davis stated that the purpose of the meeting was to make sure everyone understood that Lucero had expressed a safety concern on April 17 and that the concern had been "looked at and had been taken care of." Tr. 457. Blonigen testified that he was afraid Lucero would not report unsafe conditions because of what happened on April 17. Tr. 346. He wanted to make sure that she felt secure to reporting things that were not safe. *Id.* Lucero explained that Blonigen "was concerned . . . that I wouldn't report things, and he wanted to make sure that I felt secure in reporting. And he was encouraging me to report more unsafe conditions, and I assured him that I would." Tr. 193. Davis also wanted everyone to know that because of the concern, management officials "went out to the pit, did an investigation, and found out what was going on."[10] Tr. 457. As Moore understood it, Lucero felt she had not been treated fairly or respectfully after raising a safety concern. Tr. 554-555.

At the second meeting the participants talked about Lucero's call to Earnest, his response to her and the fact that Lucero felt she had been disrespected. Tr. 483. Davis recalled that those present discussed that Earnest "was maybe short with [Lucero], and maybe demeaned" her. Tr. 461. Earnest admitted that he responded inappropriately and he apologized. Tr. 483. Davis remembered Earnest said that if he had been short with Lucero or demeaned her, it was not his intention. Tr. 461. In Davis's opinion, "with the apology and/or at least the attempt to apologize . . . there should have been some resolution." Tr. 461-462. Blonigen recalled reminding Lucero that April 17 had been a long night for Earnest. Tr. 345. He suggested that Earnest felt he was under pressure and therefore said something he normally would not. Tr. 345.

Earnest testified that he apologized to Lucero "for coming across the way I did," but she remained "upset." Tr. 119. Earnest agreed he did not respond appropriately to Lucero on April

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[9] As a H.R. representative, Moore was in charge of recruiting, retention and discipline. Her specific responsibilities were the employees of the coal department, including the coal group in which Ms. Lucero worked. Tr. 507-508. Moore's immediate supervisor was John Kertesz, the mine's H.R. manager. Tr. 507.

[10] Davis stated that as part of his job, he wanted to investigate the conditions that led to Lucero's complaint and what, if anything, was done about them. Tr. 458. He stated that he asked the day shift supervisor what had happened and the supervisor told him that in response to the condition of the road on the night of April 16-April 17, the scrapers had leveled the road and dumped rock in the low spots. Tr. 458-459. Davis believed this action appropriately addressed Lucero's concern. Tr. 459.

17. Tr. 121. But he maintained that he tried to explain to her that he was annoyed that she requested a shut down of the road at the very end of the shift. Shutting down the road had the effect of shutting down the pit.[11] Tr. 120. Lucero did not accept Earnest's apology. *Id.* She wanted to leave the meeting, but Davis and Curtis asked her to stay so the situation could be discussed more. Tr. 346. However, when it appeared nothing would be resolved, everyone went back to work. *Id.*

JUNE 11, 2009 INCIDENT

After the meeting on April 22, Lucero's already tense relations with Blonigen and Earnest deteriorated further. For example, on June 11, 2009, Lucero called Earnest on the radio and told him that the mud was so bad on the pit floor that a hopper needed to be shut down. Tr. 107. Lucero testified that she had tried five or six times to back up to the hopper, but each time, the mud made the truck slide dangerously close to the hopper. Tr. 196. Shawn Palmer, who was working in the pit that night and who was called as a witness by Lucero, remembered the problems Lucero was having. Tr. 165. He too found it difficult to back to the hopper. He stated, "it wasn't ideal conditions." *Id.* Palmer testified that Lucero called him on the radio and asked if he could tell if she was doing anything wrong and if there was anything different she could do to reach the hopper. Tr. 166. Palmer responded that all of the truck drivers were "having problems." *Id.* At this point Lucero called Earnest. *Id.* According to Palmer, Earnest responded by shutting down the hopper and sending bulldozers to clean up the area near the hopper so the trucks more easily could back up to the hopper. *See* Tr. 264. But Lucero added that before it happened, Earnest called another haulage truck driver, Mike Dugan, who was "one of his buddies" and asked Dugan if he was having problems backing to the hopper. Tr. 198. Lucero claimed that because Dugan was Earnest's friend, Dugan replied, "No, No, I'm not. I'm doing just fine." *Id.; See* Tr. 265. Lucero believed that by calling Dugan over the radio where other miners could hear, Earnest was trying to "humiliate" her and "discredit [her] skill." Tr. 198. Lucero later stopped Blonigen to report Earnest's reaction to her safety complaint. *Id.* According to Lucero, all Blonigen did was reply, "Some people are more sensitive than others." Tr. 198-199. When she told Blonigen she believed Earnest was trying to discredit her, Blonigen said that he would look into it, but he never got back to her. Tr. 198-199.

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[11] Curtis testified that when asked to do something that resulted in shutting down the pit, a supervisor "probably would get a second or third opinion . . . [and] send maybe a more experienced person to look at the conditions." Tr. 489. He added, "[W]e usually put two or three opinions together before we make the call." *Id.*; *see also* Tr. 503-504. Moore agreed that not all employees are empowered to shut down the pit. According to Moore, while employees should "feel free and . . . empowered to call safety and say, I'm going to stop this truck, this isn't safe . . . that doesn't mean that [management] is going to stop the whole job." Tr. 558-559. She added, "[I]t's a fine line." Tr. 558.

THE MAY 2009 AND AUGUST 2009 EVALUATIONS

Because of his touchy relationship with Lucero, Blonigen consulted with Chuck Davis and then asked Aimee Conner of the Company's training department to participate in Lucero's upcoming evaluation. Tr. 321-322. Blonigen explained, "[I]f I got the training department involved, maybe [Lucero] would take their advice and their ideas a little better than coming from me." Tr. 348. Davis testified that it was not at all unusual to have the training department evaluate employees, that he did it "[a]ll the time." Tr. 466. Moore agreed, she stated she found nothing out of the ordinary about Conner's assistance. "[Y]ou can't supervise 48 people effectively and evaluate all of their skills. That's what the training department is for." Tr. 551. Conner stated she did employee evaluations for supervisors five or six times a year. Tr. 409.

Lucero was evaluated in May 2009, even though she was not eligible for advancement until August 10, 2009 due to the chargeable accident. Tr. 239; Resp Ex. 9 at 2; Tr. 240, 300-30, 310; Resp't. Ex. 14. Blonigen asked Conner to observe how Lucero performed her assigned tasks, especially how she operated an RTD. Tr. 407-408, 416. Therefore, Conner followed Lucero as she performed her job. Tr. 407-408, 416. Although she could not recall the dates and hours she watched Lucero, Conner testified that it was more than once. *Id.* She described herself as being "close enough . . . [to] see what [Lucero] was doing" but far enough away that she did not inhibit Lucero. Tr. 417.

As a result of her observations, Conner gave Blonigen a written evaluation in which she critiqued Lucero's performance. Tr. 411-412; Resp't. Ex. 13. Although she praised the manner in which Lucero conducted her walk around examinations, Conner was critical of Lucero's operational skills. She reported that Lucero needed to use the blade of the RTD more effectively. Tr. 419-420. But Conner believed that Lucero could improve with some guidance from the Company. Resp't. Ex. 13 at 13; Tr. 412-413.

A task an RTD operator is expected to accomplish is to quickly clean up around the shovels. *See* Tr. 292, 308, 390. Blonigen thought that Lucero's cleanups could be more efficient and timely. As a result of what he observed and what Conner recommended, Blonigen suggested that Lucero meet with the shovel operators and talk about how they wanted RTDs to cleanup. Tr. 308. He suggested this because although he previously had asked Lucero to meet with shovel operators ("It's something that I ask [all new RTD operators] . . . to do." Tr. 321), up to that time she had only met with one. *Id.* Lucero felt meeting with the operators would put her in a hostile environment. Tr. 309. Therefore, Blonigen offered to have other employees go with Lucero when she spoke with the shovel operators. *Id.*

As a result of Conner's evaluation, Blonigen recommended that Lucero not advance to B-Tech. Tr. 302-303, Resp't. Ex. 13. His reasons were her involvement in a chargeable safety incident and because Lucero did not meet the more advanced skill requirements for RTD

operators.[12] Tr. 303; *see also* Tr. 537. Blonigen conveyed the reasons to Ms. Lucero in an evaluation meeting. In notes documenting the meeting, Blonigen stated:

> I tried to stress the positive and future. She feels I am putting her in a bad situation asking her to get on [the] shovels. I offered to have . . . [other miners] go with her. . . . [I read her] Amiee Conner's evaluation skills so she understood what was needed, [I]stressed [that] the RTD incident would not affect [the next] B-[T]ech [evaluation] . . . unless she had an another incident.

Resp't. Ex. 19 at 23.

Lucero was next eligible for advancement in August 2009. For consistency, Blonigen asked Conner to again help him assess Lucero's skills. Tr. 322. Conner stated that she therefore observed Lucero on two different days for a few hours each day so she could evaluate Lucero in relation to her normal duties. Tr. 440. Lucero saw things differently. She believed that when Conner and/or Blonigen watched her work they were trying to intimidate her and negatively affect her performance. Tr. 211-212.

As a result of her observations of Lucero, Connner again noted that she did some good things, including one of the best walk around examinations of an RTD that Conner had seen.[13] However, Conner also believed that Lucero needed to use the blade of the RTD more effectively when she moved material. Of the twenty tasks Conner evaluated, she found that Lucero "frequently exceed[ed]" in her performance of nine of the tasks and "consistently exceed[ed]" in her performance of 11. She needed to "consistently exceed" in all 18 skills to be advanced. Tr. 204.

However, Lucero noted that when she was rated in May she "frequently exceed[ed]" in her performance of five of the skills and "consistently exceed[ed]" in her performance of 15. Tr. 204; Compl. Ex. 2 at 10-17, 10-11. Even though Blonigen stated in August that her skills had "improved in the last two months" (Compl. Ex. 2. at 10-17), Lucero observed that if her August rating was to be believed, she had "in fact . . . gone down in [her] performance." Tr. 204. She added, "[I]f I improved, I should have had less check marks [in the "frequently exceeds" column,

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[12] Davis agreed with Blonigen's recommendation that Lucero not advance. He testified, "[S]he's going from C-Tech to . . . B-Tech, which is . . . advanced skills. She had an incident during that period and her skills do not qualify on [RTDs]." Tr. 468.

[13] Other good things were noted in August. Blonigen observed that Lucero "got on the shovels with almost all of the shovel operators as I had asked her to do and [that she] . . . show[ed] a positive attitude towards this process." Resp't. Ex. 14 at 16.

because] you have to have all of them [']Consistently Exceeds[’] to qualify [for advancement]." *Id.* Therefore, Lucero found her evaluations to be "all bogus and . . . part of [management's] retaliation." *Id.*

Conner conducted her evaluation on August 11, 2009. Resp't. Ex. 14 at 17; Tr. 323. While she stated that "[o]verall [Ms. Lucero did] a good job," Conner concluded that Lucero was "still learning how to control the blade [of her RTD] . . . to efficiently do the task that's assigned." Tr. 419. She also felt that Lucero needed to become better at leveling the pit floor. *Id.; see* Resp't. Ex. 13 at 13. Conner added, that if Lucero was made "aware of the areas that she needs to improve on she can improve." *Id.* at 13. Lucero thought that Conner did not recommend her for advancement at Blonigen's direction. Tr. 235-236.

Based on Conner's evaluation, Blonigen recommended that Lucero not advance. After he completed the August evaluation, he again met with Lucero. Tr. 326. In his notes of the meeting he stated:

> [Lucero] . . . did not get B-Tech because [of the] training department evaluation that she did not meet [the] criteria [for] B-Tech. She feels that she is being held back because of other things that have happened, mainly the meeting on April 22 . . . . [Lucero] also feels that it is unfair that I have the training department evaluate her[.]

Resp't. Ex. 19 at 23-24; Tr. 327.

Later that month when mud again made it difficult to operate an RTD, Lucero was having problems getting close enough to the shovel to clean up. Conner came to the area and got on the RTD, taking over its operation. Tr. 436. Conner cleared some of the mud away. *Id.* After she had finished, Lucero threw up her hands and said she was "done," "tired," "frustrated," and she could not operate the RTD anymore. Tr. 437. Conner responded that Lucero was doing a good job and just needed to keep at it. *Id.*.

Lucero was eligible for another evaluation and possible advancement on November 10, 2009. Tr. 204, 245, 328, 548-549. In the meantime, Lucero told Blonigen that she wanted to speak with someone in HR, someone other than Moore. Blonigen told Lucero he would get back to her about it. When he did not, Lucero contacted John Kertesz, the head of H.R., and he told her they would speak on September 8. Tr. 208-209. When Blonigen learned this, according to Lucero, he "just lost it and started ranting and raving." Tr. 209.

EVENTS OF OCTOBER, NOVEMBER AND DECEMBER 2009

Before her next evaluation, Powder River's H.R. department instituted a program that it maintained was designed to help her succeed. Tr. 561. Moore testified an October 5 meeting was

scheduled to advise Lucero of the advancement plan. Prior to the meeting Blonigen wrote down some things he believed Lucero needed to work on, and Moore "put [them] in a form that was easy to understand." Tr. 330; *see also* Tr. 489. The resulting document was titled, "Goal to Acquire Sufficient Advancement Skills on the Rubber Tire [Dozer] To Advance to B-Tech." Tr. 212-213; Resp't. Ex. 15. Lucero, Curtis, Blonigen, Moore and Kertesz attended the meeting. Tr. 562. At the meeting Curtis explained to Lucero that management was trying to help her reach B-Tech by providing her with additional training. Tr. 491. Pursuant to the plan, Conner was assigned to spend more time with Lucero and to work with her until November 10, 2009 to help her qualify. Tr. 245-246.

At first, Lucero did not want to participate in the plan. Tr. 490. She told those at the meeting that she no longer wanted to advance on an RTD and that she felt she was being spied on. Tr. 492. Moore testified that Lucero, "stated that we weren't trying to help her, that we were . . . stalking her, that we were trying to hold her back . . . that we weren't treating her fairly." Tr. 563. Lucero stated that she was done with the advancement process and that she did not want further training. Tr. 566. According to Moore, management officials were surprised and asked Lucero to think about the offer before making a final decision. Tr. 566-567. Moore testified that Curtis and Blonigen told Lucero her advancement was "not far off," provided she improved in the length of time it took to clean up around the shovels, improved how she cut and leveled the floor, and shortened the time it took to work at the hopper. Tr. 567-568. Conner testified that she told Lucero she would do what she could to help and Lucero responded that she was afraid to say "no," because the Company would think she was negative. Tr. 445. As a result Conner and Lucero briefly worked together.

Conner described some of the further training: "[W]e . . . talk[ed] about what we could do to help her on the [RTD,] different techniques [of] how to utilize the blade to the fullest advantage. We talked about the cut and fill, and I explained a little bit about the [RTD,] the controls . . . and the steering wheel and stuff." Tr. 429-430.

Conner offered to work with Lucero every day and at first Lucero agreed, but on October 8, Lucero declined to work again with Conner. Tr. 247-248. Lucero explained, "I was stressed and intimidated, upset, [and] I just couldn't bear the thought of Aimee [Conner] following me anymore." Tr 216; *see* Tr. 445.

On November 3, 2009, Lucero had an accident while operating a haulage truck.[14] Tr. 84. As a result, Lucero was out of work on November 4. When she returned on November 5, she was restricted to light duty, which meant that she could not be evaluated because she could not operate the equipment required for evaluation. Tr. 256. Following that she had seven days off as part of her regular schedule. Tr. 255-256. Lucero did not return to the mine until November 20.

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[14] Lucero was found not to be responsible for the accident, so a hold was not placed on her advancement. Tr. 272.

Tr. 256. According to Lucero, when she returned, she asked Blonigen if her evaluation was completed, and "he started ranting and raving again." Tr. 219.

Blonigen emphasized that the evaluation was delayed because "in order to remain consistent" (Tr. 337), he wanted Conner to do it, and Conner's and Lucero's work schedules had to correspond for the evaluation to take place. Tr. 337-338, *see also* Tr. 354. According to Blonigen, the delay would cause no harm to Lucero because if she was advanced, she would be paid back to the date she became eligible to advance. Tr. 338; *see also* Resp't. Ex. 19 at 24; Tr. 339. He added that Lucero "was not very happy" about the delay and that she "stated it was all bull and that I should have it done." Tr. 339. Blonigen maintained that he told Lucero he was sorry, that he would finish the evaluation when the documentation was completed and that "it was not uncommon for them to be late." *Id.* He did not remember yelling at Lucero. Tr. 339-340.

On December 2, 2009, Lucero was called to another meeting, this one was with Davis, Curtis and Moore in Moore's office. Moore testified that the purpose of the meeting was to offer Lucero the opportunity to change crews (Tr. 569) because "of the problems [she] was having with [Blonigen] and other[s]." Tr. 221. Davis viewed the offer as a way to alleviate some of Lucero's dissatisfaction with her work situation. Tr. 463-464. The change would have given Lucero a supervisor different than Blonigen and a step-up different than Earnest. Tr. 470.

Curtis stated that the offer "was not received very well" and Moore agreed. Tr. 495. Moore remembered Lucero telling management officials that they were "trying to get rid of her." Tr. 572. Moore asked Lucero to think about the offer on her forthcoming days off and let the Company know whether she was interested. Lucero never responded to the offer. Tr. 575, *see also* Tr. 496, 504.

Also, on December 2, Lucero was assigned to clean up at a hopper and a management official commented to Conner about the good job Lucero was doing. Tr. 225. This was after Lucero felt that Blonigen criticized her for not working fast enough. Tr. 226. When Conner repeated the compliment to Lucero, Lucero stated, "[O]ne moment Jim [Blonigen] is insinuating that I'm just sitting there all the time and I was busting my butt. And then . . . a couple of minutes later, Aimee [Conner] told me that [the management official] said I was doing . . . a good job." *Id.*

LUCERO'S DECEMBER 2009 EVALUATION

In early December, Conner, at Blonigen's request, evaluated Lucero's performance. Tr. 438. Conner testified that she observed Lucero at work for more than one shift. *Id.* As a result of what she saw, Conner found that Lucero "consistently exceeded" in the performance of all 20 of the required skills. Tr. 439. Conner recommended Ms. Lucero for advancement to B-Tech. *Id.* On December 3, Blonigen countersigned Conner's evaluation (Resp't. Ex. 16 at 22; Tr. 439), and on December 10, he signed a recommendation for Lucero's advancement. Resp't. Ex. 16 at 19; Tr. 250, 336. Curtis concurred that Lucero should be advanced, and he signed and dated the

recommendation on December 12, 2009. Resp't. Ex. 16 at 10, Tr. 500. On December 13, Blonigen met with Lucero to review the evaluation and to tell her of her promotion. Tr. 336. He told Lucero he knew they had not always seen "eye to eye" and that he "hoped in the future . . . [they would] work better together." Tr. 340. He shook Lucero's hand. *Id.* Blonigen and Lucero signed the evaluation on December 13 and Lucero was promoted to B-Tech retroactive to November 10. Resp't. Ex. 16 at 21.

Prior to her advancement Ms. Lucero filed a discrimination complaint with MSHA. MSHA received the complaint on December 8, 2009 and mailed a copy to the Company's office in Gillette, Wyoming. There it was received and signed for by the Company's mail agent on December 11, 2009.[15] Tr. 253. Curtis testified that he was not aware of the complaint when, on December 12, he concurred with Blonigen's recommendation to advance Lucero. Tr. 501. Blonigen testified he too was unaware of the complaint when he met with Lucero on December 13. Tr. 341. Lucero asserts that these claims are not credible, that she was only advanced because management officials knew she had filed the complaint. Tr. 227, 251, 254.

OIL ON THE WIRES INCIDENT OF DECEMBER 2, 2009

Lucero also questioned witnesses about an incident that occurred on December 2, 2009, when she spoke with Company skills trainer, Allan Schaefer, about oil on the electrical wires of a haul truck. Tr. 174. According to Shaefer, the standard procedure at the mine is to shut down the equipment. Tr. 170. It is the responsibility of the person operating the equipment to initiate the shut down. Tr. 173.

Lucero testified that when she noticed oil on the electrical wires of the haul truck, she called Blonigen about the oil, and she asked Blonigen to back her up with the maintenance department. Tr. 222. Lucero recalled that Blonigen reacted angrily to her report. He told her that he did not have time and that he would get to her problem when he could. *Id.* Shortly thereafter, Shaefer drove up. Tr. 222-223. Lucero asked him if equipment with oil dripping on electrical wires was an automatic "down," and Shaefer stated it was. Tr. 223. Just then, Blonigen arrived. Tr. 223. He looked at the equipment and told Lucero to take the truck to the shop and have the maintenance personnel make the decision whether the truck should be taken out of service. *Id.*

At the shop, several mechanics told her she should speak with their supervisor. Tr. 223. Lucero claimed it took speaking with three bosses and five mechanics to get the equipment "downed." Tr. 224. However, Lucero also agreed that as the operator of a haul truck, she had the authority to "down" the truck and take it out of service prior to this. Tr. 268.

Blonigen testified that the question of whether automatically to down equipment with oil on its electrical wires is "kind of . . . tricky." Tr. 290. He explained that in general a report of oil on electrical wires means an automatic downing of equipment, but "if it's old oil . . . we might

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[15] Lucero also received a copy of the complaint from MSHA on December 11. Tr. 253.

wash it off just to see if there is fresh oil coming on it." *Id.* He emphasized that when the truck was in route to and in the shop it was out of production and effectively "downed." Tr. 364.

BACKUP INCIDENT OF JUNE 4, 2010

Finally, Lucero raised an incident that occurred on June 4, 2010, when she was a passenger in a Company van. Tr. 229. Also in the van were Blonigen, miners Travis Ahern and Jody Sisson and another miner identified only as "Jason." Tr. 139. The group was coming back from a Company safety meeting. Blonigen was driving the van. Tr. 140. He backed up, and did not first honk. *Id.* Lucero commented to all in the van that Blonigen did not honk before he backed up. *Id.* According to Sisson, Blonigen responded that he did not have to honk because the van was a light duty vehicle. Tr. 140. Lucero stated that Blonigen "screamed and yelled" (Tr. 229), but Sisson stated that Blonigen "just spoke up." Tr. 140. Lucero maintained that Blonigen was "pretty intimidating and I was sorry . . . I brought . . . up" the issue. Tr. 229. She noted that Blonigen's outburst came after a safety meeting in which the Company encouraged miners to watch out for one another and in which Company officials discussed the proper way to react to safety concerns when they were expressed. *Id.* Later Lucero asked Conner if vans had to honk when they backed up, and Conner told Lucero that it was "courtesy" for light vans, not a requirement. Tr. 231.

THE LAW

The legal principals under which this case must be decided are well known. In order to establish a prima facie case of discrimination under section 105 (c)(1) of the Mine Act, a miner must demonstrate by a preponderance of the evidence "(1) that [the miner] engaged in a protected activity, and (2) that the adverse action of which the miner complains was motivated in any part by the protected activity."[16] *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2

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[16] Section 105(c)(1) of the Mine Act provides :

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any

FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). Under Section 105(c)(1) safety complaints are specifically mentioned as activity that warrants protection. 30 U.S.C. §820(c)(1) (2006). Generally, an adverse action is an act or omission by the operator that subjects the affected miner to a detriment in his employment relationship or to discipline. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-1848 (Aug. 1984). Adverse actions include discharge, suspension, demotion, coercive interrogation and harassment over the exercise of protected rights. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). They also include the denial of a promotion.

The Commission has noted 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. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The Commission also has noted that while direct evidence of discriminatory motivation is rare, circumstantial evidence of discriminatory intent is not. Circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510. The more hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.*

Once the complainant has established a prima facie case "[t]he operator may attempt to rebut [the] prima facie case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that he was motivated by both the miner's protected and unprotected activities and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818.

I conclude that Lucero has failed to establish a prima facie case of discrimination. Therefore, I deny her complaint.

PROTECTED ACTIVITY

The parties agree that Lucero complained to Earnest, her step-up supervisor, about the condition of the pit haul road near the end of the shift on the morning of April 17. The also agree

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such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act. 30 U.S.C. § 815(c)(1) (2006).

that on April 22, she questioned the way the Company, through Earnest, responded to her April 17 complaint. On April 17, her concern was about the hazards posed to herself and others by specific road conditions. On April 22, her concern was about the way Company supervisors responded to employees who reported safety hazards. Both of these concerns directly related to safety, and they were protected. Also, Lucero's December 2 report, of oil on the wires of a haulage truck was protected, as was her June 4 observation about Blonigen's failure to sound the van's horn prior to backing up. Concerns about oil on electrical wires and sounding the van's horn related directly to safety.

In each of these four instances, Lucero established that she engaged in protected activity. The question is whether she suffered adverse action because of the activity, and I find that she did not.

ADVERSE ACTION

I. INCIDENT OF APRIL 17

Although Lucero maintains that Earnest did not address her safety concern about the road, the record indicates otherwise. It supports finding that following her call, Earnest alerted the supervisor of the next shift about the condition of the road and that at the beginning of the next shift the holes in the road were filled and its bed was smoothed. Tr. 75-76, 258, 469-479. This is exactly the kind of functional response the Act envisions when a valid safety complaint is brought to a supervisor's attention.

Lucero's real complaint is that when addressing her on April 17, Earnest did not respond about the substance of her complaint and that the tone of his response was angry. Lucero asserts that as a result she was intimidated and reluctant to again raise a safety concern with a supervisor. Tr. 188. The Commission has recognized that there are situations in which the response of a supervisor to a miner's protected complaint may constitute interference with the exercise of the miner's right to complain. *See Moses v. Whitley Development Corporation,* 4 FMSHRC 1475, 1478-1479 (August, 1982), *aff'd* 770 F.2D 168 (3rd Cir. 1981). The Commission has stated that the question of whether a management official's response constitutes interference proscribed by the Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Secretary on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (January, 2005) (*quoting Moses* at 1479 n.8). The question essentially is whether a reasonable miner in Lucero's position and under the same circumstances would have been reluctant to raise future safety concerns because of Earnest's response. *See Gray, 27 FMSHRC at 9 (Quoting American Freightways Co.,* 124 NLRB 146, 147 (1959)). While it is conceivable that a response like Earnest's might in some situations intimidate a complaining reasonable miner, under the particular circumstances of this case, I conclude that it would not.

It is important to emphasize that Earnest's response while an angry one, was not directed at the fact Lucero was reporting a hazard, but rather at the timing of the report. Earnest was

getting ready to go home. The shift had been a hard one. It had been raining for days and the condition of the haul road had caused problems. Tr. 121. Now, at the very end of the shift, he was being asked to address the situation. His comment, "Oh, I suppose it just happened," and the angry tone of his voice, reflected his exasperation at the timing of the report. Tr.185-186. But what he did not say is telling. He did not disagree with Lucero's assessment of the hazard. He did not refuse to address the condition. He did not threaten Lucero for raising a valid concern. He simply got "growly" (Tr. 91) and essentially questioned why she raised the issue so late in the shift. He also, all be it unbeknownst to Lucero at the time, addressed the issue so that the hazard was eliminated at the start of the next shift and the haul road never had to be closed. Tr. 76-77, 112, 258. I find that under these circumstances, a reasonable miner in Lucero's position would have understood Earnest's comment and his tone to be directed at the timing of the complaint.

While the record is void of direct evidence on the question, it is reasonable to infer that Lucero became aware the safety issue she raised had been addressed when she next returned to work on April 20 and April 21, 2009. Since closing the road meant shutting down the pit, the record supports finding that the subject road was the primary haul road, and perhaps the only haul road, into and out of the pit. The record also supports finding that at the time, Lucero was primarily operating a haulage truck. I infer from this that either Lucero traveled the road on April 20 and April 21 and therefore knew the road's defects had been remedied, or that one of her co-workers told her the holes had been filled and the road bed smoothed. If this were not the case, it would have been reasonable for Lucero to inquire about the road on April 20 or April 21 during the pre-shift meetings with her crew, which she did not. Tr. 259-260, 342, 481.

In concluding that a reasonable miner in Lucero's situation would not have been intimidated by Earnest's response, I also, find it important that there is no evidence in the record the Company has a history of ignoring safety complaints and retaliating against miners who make them. If Lucero established such a history, her professed intimidation might have appear more reasonable. However, rather that a history of hostility, the record supports finding that Powder River made efforts to be responsive to Lucero's concerns. Its desire to respond is why the second meeting on April 22 was convened.

In addition, Lucero, despite her claimed reluctance to again raise safety concerns (Tr. 188), was far from shy about speaking up at the safety stand down meeting on April 22. Tr. 343. More than that, at the second meeting on April 22, she assured Blonigen that she would continue to raise such concerns. Tr. 193. Lucero stated, "Jim [Blonigen] stated that he was concerned that . . . I wouldn't report things, and he wanted to make sure that I felt secure in reporting. And he was encouraging me to report more unsafe conditions, and I assured him that I would." Tr. 193.

Lucero was as good as her word. The record shows that following the April meetings, on June 11, 2009, December 2, 2009 and June 4, 2010, Lucero continued to raise concerns and Powder River responded to them.

For all of these reasons I conclude that a reasonable miner in Lucero's circumstances would not have been deterred from raising future safety concerns by Earnest's April 17 response. Moreover, I find that in fact, Lucero was not so intimidated. Therefore, I conclude Earnest's April 17 response did not constitute an adverse action and that Lucero has failed to establish a *prima facie* case of discrimination with regard to it.

Of course, I recognize that it would have been far preferable for Earnest to address the substance of her concern on April 17, but his failure to do so does not under the particular circumstances of this case constitute an adverse action. Moreover, while a professional, courteous response would also have been desirable, as will be noted later in this decision, the Act does not necessarily protect a miner from a supervisor's ill-tempered, even angry retorts.

II. MEETINGS OF APRIL 22

At the first meeting, on April 22, Lucero raised the issue of Earnest's "growly" reply of April 17. She did so in response to management's question about whether miners had safety-related concerns. She asked what miners were supposed to do if they brought a safety concern to a supervisor and the supervisor ignored and/or chastised the miner. Tr. 71; Tr. 343. Blonigen believed that after Lucero asked her question Curtis asked her to whom she was referring, and she replied Scott Earnest. Tr. 344. Earnest then yelled, "It was 6:00 [a.m.]" (Tr. 190) and Davis interjected that safety was a matter of opinion. Tr. 191, 455.

I have found that Lucero's inquiry was protected, but I do not view Earnest's gratuitous statement that "It was 6:00 [a.m.]" as constituting an adverse action. Tr. 190, 260. If anything, the statement makes even more clear the fact that Earnest's response on April 17 was motivated by the timing of Lucero's report, not by hostility to its substance, something a reasonable miner would have apprehended. In addition, although Lucero believed that Davis's observation that safety was a matter of opinion would "inhibit [her] and anyone else from bring up safety concerns," her belief was not well founded. Tr. 191, *see also* Tr. 262. On the contrary, I find that in the context of the meeting, a logical interpretation of Davis's statement is that he was simply expressing the truism that a supervisor must evaluate whether a safety concern is reasonable given all the circumstances. *See* Tr. 262, 455. Davis's observation would not have inhibited a reasonable miner under similar circumstances. As cases that arise under the Mine Act repeatedly show, what is or is not safe often is a "matter of opinion," and reasonable minds can, and frequently do, differ. Further, and as already noted, the comment did not, in fact, inhibit Lucero from raising subsequent concerns.

For these reasons I find that Lucero did not suffer an adverse action as result of the events that occurred in the first meeting on April 22.

In addition, I find nothing in the second meeting on April 22 constituted an adverse action on the Company's part. Unlike Earnest's response on April 17, on April 22 management officials moved quickly to address the substance of Lucero's concern in a manner that would have satisfied

a reasonable miner. They immediately convening the second meeting. Tr. 192, 482. They agreed with Lucero that Earnest's April 17 response was inappropriate, and they directed Earnest to apologize, which Earnest did. More than that, Blonigen expressly stated that he was concerned that Ms. Lucero would feel reluctant to report safety issues. Tr. 193. He wanted to make sure she felt "secure in reporting." *Id.* Lucero testified she told Blonigen that she would continue to raise concerns. Tr. 193. Her response was the response of a reasonable miner. The facts do not demonstrate that Lucero was intimidated by the statements made at the meeting nor would a reasonable miner in Lucero's position be intimidated by the statements. Accordingly, I find no adverse action was suffered by Lucero as a result of remarks made at the second meeting.

III. OIL ON THE WIRES INCIDENT OF DECEMBER 2, 2009

On December 2, 2009, Lucero observed oil on a haul truck's electrical wires. Tr. 222. Lucero reported the problem to Blonigen over the radio. In so doing, she engaged in protected activity. Blonigen responded angrily that she would have to wait until he could come to the scene and look at the truck. Tr. 222. Although Blonigen testified that he did not recall the incident in any detail (Tr. 389), I accept Lucero's testimony that he came to the site, looked at the truck's wires and told her to take the truck to the maintenance shop where the mechanics could look at it. Tr. 222-223. Lucero did this and the truck was taken out of service. Tr. 224.

I do not find that Ms. Lucero suffered any adverse action as a result of her reported safety concern. Blonigen responded to her complaint by taking timely action to correct the problem. Lucero credibly testified that Blonigen was angry when she spoke with him over the radio. Tr. 222. However, he also responded in a fashion that squarely addressed her concern. Tr. 222-223. Moreover, because he responded by addressing her concern, his angry response prior to arriving on the scene would not have reasonably hindered Lucero or other miners from reporting future safety concerns.

IV. BACK UP INCIDENT OF JUNE 4, 2010

On June 4, 2010, Lucero asked whether Blonigen, who was driving a Company van in which Lucero and other miners were riding, should have honked before he backed up. Tr. 131. Blonigen responded that honking was not required because the van was a light duty vehicle. Tr. 229. Lucero testified that in making his response Blonigen "screamed and yelled." *Id.* However, miner Jody Sisson, who was a passenger in the van, stated that Blonigen, "just spoke up". Tr. 140. Conner later told Lucero that honking before backing up a light van was a courtesy, not a requirement. Tr. 231.

I find that Lucero did not experience an adverse action due to Blonigen's response. Blonigen addressed Lucero's protected concern with information that was corroborated by Conner. Lucero did not like how he did it. She testified that she felt "pretty intimidat[ed]." Tr. 229. Although I find it more probable than not that Blonigen in fact yelled at Lucero, the fact he raised his voice in response to her valid, but misinformed safety concern, should not have

intimidated Lucero and would not have intimidated a similarly situated reasonable miner from engaging in future protected activity. Mining is a rough business in which the "nicities" of work place communication are frequently honored in the breach. The Mine Act is not so fastidious as to per se outlaw an angry outburst by a supervisor who is responding to a valid, but misinformed safety complaint.

V. DENIAL OF ADVANCEMENT

Lucero established that following her protected activities of April 17 and April 22 she was denied advancement to B-Tech.[17] Clearly, Lucero suffered an adverse action when she was denied a promotion. I conclude, however, that Ms. Lucero did not establish that the Company's failure to advance her was motivated by her protected activities and therefore did not establish a *prima facie* case of discrimination in this regard. *Pasula*, 2 FMSHRC at 2799-2800. Rather, I find that she was not promoted until December 13, 2009, because she did not until then consistently exercise the skills required for advancement.

Lucero began working at the mine on March 10, 2008. Tr. 232. As Moore explained, Lucero, like all other employees, was hired as a "production tech". Tr. 509-511. Under the Company's "Technician Concept" policy, Lucero, became eligible for advancement upon the completion of her first 360 hours of work, that is on May 10, 2008. Tr. 512-513, 515. Blonigen recommended her for advancement on June 18, 2008 [[18]], and she was advanced effective May 10, 2008. Tr. 298; Tr. 534, 536. Under the Company's personnel policy, May 10, 2008, became Lucero's "placement date." Tr. 45, 51-52, 95. Under the same policy, Lucero became eligible for advancement to B-Tech one year from her placement date, May 10, 2009. Tr. 29, 233; Resp't. Ex. 11. Lucero was not advanced on or effective that date, and the reason is clear. In July 2008, Lucero was involved in an accident for which she was held to be at fault. Tr. 293-294. When an "at fault" accident happens to an employee, Company policy is to hold up any advancement recommended for the employee for a corrective period. In her case, Lucero had a 90-day hold placed on her advancement, which means that even if she had been recommended for advancement, she would not have been advanced until August 10, 2009. Tr. 301-302, 310; Tr. 539-540.

In fact, however, Lucero was not recommended for advancement on or effective May 10. Rather than finding her failure to advance was caused by her safety concerns of April 17 and April 22, I find that her lack of advancement was caused by her supervisors' conclusion that she did not

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[17] Lucero does not assert that her protected activity of December 2, 2009 played a part in her failure to advance.

[18] I find nothing contrary to the Mine Act in the fact that decisions regarding Ms. Lucero's advancement were made on dates later than those on which she became eligible to advance. I accept Blonigen's common sense testimony that evaluations for advancement are frequently delayed for any number of more important business reasons. Tr. 296.

consistently exhibit the skills necessary to advance. This was Blonigen's consistent testimony, and it was credible. It also was the credible testimony of Moore. Tr. 538.

The record further reveals that Blonigen, realizing that Lucero did not fully trust him to give her an honest evaluation, sought to shield himself from charges of bias by having an "outside" person help him evaluate Lucero's skills. Conner was asked to do the job. Tr. 407-408; 416. I accept Conner's testimony that there was nothing out of the ordinary in what she was asked to do and that she did such evaluations for supervisors five or six times a year. Tr. 409. There is no basis in the record to conclude that Conner evaluated Lucero in anything other than an objective, fair way.

The evidence fully supports finding that Conner's May and August 2009 evaluations of Lucero were solely motivated by her assessment of Lucero's performance. Lucero was trying to qualify for B-Tech on an RTD. Conner was knowledgeable in the proper operation of RTDs. She watched Lucero perform her assigned tasks. Tr.416- 417, 440. Based on what she observed, Conner found that Lucero did not display the skills necessary for advancement. Tr. 412-412, 419, 435-436; Resp't. Ex. 13 at 13. Blonigen accepted Conner's analysis of Lucero's performance, and denied Lucero a promotion to B-Tech. Tr. 321-322, 326.

From all that appears on the record I find that Blonigen based his denial of advancement on Conner's evaluation, and I accept as a fact that when Lucero was not recommended for advancement in August 2009, it was because Lucero needed to improve her skills when operating an RTD, just as Conner found and just as Conner testified. Tr. 412-413; Resp't. Ex. 13 at 13. In short, I conclude that the Company's failure to advance Lucero in August 2009 was motivated by Lucero's job performance, not by her protected activity of the previous April.

Of course, Lucero believed Conner's evaluations and Blonigen's decision not to recommend her for promotion were motivated by the Company's hostility to her expressions of her reported safety concerns. *See e.g.*, Tr. 235-236. However, I detect almost nothing in the evaluations and Blonigen's failure to recommend her that supports her suspicion.[19]

In fact, the record leads to the conclusion that Company officials went out of their way to help Lucero succeed by offering her additional training and even, later in the year, by offering her the opportunity for a "fresh start." In October 2009, the Company presented Lucero with a plan – the "action plan" – to help improve her skills on the RTD and to advance. Resp't. Ex. 15; Tr. 329-

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[19] While Conner's August finding that Lucero "consistently exceeded" in her performance of four less tasks than in May could be interpreted as inconsistent with Conner's May finding and hence as evidence that the August evaluation was skewed against Lucero (*see* Tr. 204), it could equally be interpreted as simply reflecting the state of Lucero's performance at the times Conner watched Lucero work. For this reason and because there is nothing else in the record that supports it, I reject Lucero's argument that the two evaluations are evidence the evaluation process was "bogus." Tr. 204.

330; 489-491, 560-561. In addition, in early December Company officials offered her the opportunity to change work crews and supervisors. Tr. 221; Tr. 463-464, 569.

Lucero was next eligible to advance on November 10, 2009. Tr. 245, Tr. 328. Again, Blonigen asked Conner to evaluate Lucero, which Conner apparently did either late in November or in early December. (Conner completed the check list on which she recommended Lucero for advancement on Demember 3. Resp't. Ex. 16, Tr. 334-336, 437-439.) I accept the credible testimony of Blonigen that Lucero was not fully evaluated until December because Lucero was out of work in early November and because of difficulties in coordinating Lucero's and Conner's schedules. Resp't. Ex. 19; Tr. 336-340. Nothing supports finding that the delay was intended to punish Lucero for her protected activity.

Moreover, I accept as a fact that on December 3, 2009, Conner found that Lucero consistently exceeded in her performance of the skills required to advance to B-Tech and that based on Conner's assessment, on December 10, 2009, Blonigen recommended Lucero be promoted. Tr. 250, 336, 439; Resp't. Ex. 16. She was, in fact advanced to B-Tech on December 12, when Blonigen's supervisor, Curtis concurred with Conner's and Blonigen's recommendation. Tr. 500; Resp't. Ex. 16 at 19. She was advised of her promotion on December 13. Her December advancement is not surprising. Since August, Lucero had acquired additional experience and received additional training. It is reasonable to assume that with her added experience and training her skills in fact improved, just as Conner found. Tr. 439.

Nor do I find that the Company's motives in denying Lucero advancement until December 12, 2009 are made suspect by the fact that Lucero filed a discrimination complaint with MSHA on December 8, 2009. In fact, Lucero filed her complaint with MSHA five days after Conner found that Lucero should be advanced. Resp't. Ex. 16 at 22. While it is true that Blonigen recommended Lucero for advancement on December 10, this was a day before a copy of the complaint was received in the Company's Gillette office.

Curtis credibly testified he did not know of Lucero's complaint when he concurred with Blonigen's recommendation, and there is no evidence in the record to establish that the copy received in Gillette on December 11 reached the mine or was otherwise brought to Curtis's attention before that date. However, even if Curtis knew of Lucero's complaint when he agreed to her promotion on December 12, I would not find his knowledge to cast significant doubt on why Powder River advanced Lucero. Curtis's approval of her advancement was based on his acceptance of Conner's and Blonigen's recommendations. The recommendations were made before the complaint copy reached the mine's Gillette office, and it was upper management's practice to accept the promotion recommendations of immediate supervisors and evaluators.

ORDER

Having concluded that Lucero has not established that she was unlawfully discriminated against, **DISMISS** this her complaint and this proceeding.

David F. Barbour
Administrative Law Judge

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April 21, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 2004-158 A.C. No. 36-08746-26477 LVY
PBS COALS, INC., Respondent	:	Quecreek No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 2004-152 A. C. No. 36-08746-26478 KQN
MUSSER ENGINEERING, INC., Respondent	:	Quecreek No. 1 Mine

DECISION ON REMAND

Before: Judge Lesnick

These consolidated civil penalty proceedings brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (hereinafter the "Mine Act" or "the Act"), have been remanded by the Commission for reassessment of the civil penalty assessed against PBS Coals, Inc. ("PBS") for a violation arising from the July 24, 2002 nonfatal entrapment of nine miners for three days at the Quecreek No. 1 Mine, located in Somerset, Pennsylvania. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010). The miners broke through from the Quecreek mine to the abandoned workings of an adjacent mine that was full of water. They did so in reliance upon an inaccurate mine map prepared by PBS, which was in turn based on a map prepared by Musser Engineering, Inc. ("Musser"). Water from the abandoned mine flowed forcefully into the Quecreek mine and entrapped the miners. The Secretary of Labor's Mine Safety and Health Administration ("MSHA") cited PBS and Musser for violating

30 C.F.R. § 75.1200, which requires coal mine operators to keep on the mine site "an accurate and up-to-date map of such mine drawn on scale."

On cross motions for summary decision, I concluded that PBS and Musser violated section 75.1200 as alleged by the Secretary. *Black Wolf Coal Co.*, 28 FMSHRC 699, 709, 716 (July 2006) (ALJ). As to the civil penalties proposed by the Secretary, there remained outstanding questions of material fact that precluded summary decision. *Id.* at 711, 717. After the matter went to hearing, I concluded that PBS and Musser acted in a grossly negligent manner, that the violations they committed were of the highest gravity, and that imposition of the maximum penalties provided for in the Mine Act was appropriate. *PBS Coals, Inc.*, 30 FMSHRC 1087, 1095-96 (Nov. 2008).

The Commission granted petitions for discretionary review filed by PBS and Musser. In a two-to-one vote, the Commission found that Musser was a mine operator because it provided more than *de minimis* engineering services to PBS in relation to the Quecreek No. 1 Mine. *Musser Engineering, Inc.*, 32 FMSHRC 1257 at 1266-1270 (Oct. 2010) (opinion of Commissioner Cohen, joined by Chairman Jordan). In another two-to-one vote, however, the Commission found that Musser's "preparation of the Pennsylvania environmental permit map was too attenuated a circumstance to justify imposition of liability for the erroneous mine map under 30 C.F.R.§ 75.1200, even though the location and boundaries of the Harrison No. 2 Mine were identical on both maps. Musser was not involved with the preparation or submission of the section 75.1200 mine map to MSHA. It had no direct control over the submission of the map to MSHA." *Id.* at 1275-1279 (opinion of Commissioner Cohen, joined by Commissioner Duffy).

Although the finding that Musser is not liable under the Mine Act is the law of the case, at least so long as it survives any appeals that might be taken, I respectfully take issue with what I view as a usurpation by the Commission majority of my role as fact finder.[1] In its decision to absolve Musser of any liability under the Mine Act, the Commission majority did not articulate the standard of review under which it reviewed my decision and reached its determination, though Commissioner Jordan, writing in dissent, states quite accurately in my view that the majority "conclu[des] that substantial evidence does not support the judge's determination that Musser can be held liable." *Id.* at 1287.

I found Musser liable under binding legal precedent stating that a mine operator who is an independent contractor can be held liable for violative conditions over which it exercises some control or supervision. *Sec'y of Labor v. Nat'l Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009). I based this finding on undisputed facts stipulated to by the parties as to the degree of control Musser exercised over the ultimate mapping of the Quecreek No. 1 Mine. 28 FMSHRC at 715. The Commission majority, however, summarily dismisses my finding because it is "based on the concept of foreseeability." *Musser*, at 1277. The Commission majority goes

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[1] As precedent for my commenting upon the Commission's dismissal of Musser, *see Speed Mining, Inc.*, 28 FMSRHC 773, 773-774 (Sept. 2006).

on to conclude that "[i]f unforeseeable conduct may not be used as a defense to liability under the Mine Act, then conversely, the foreseeability of injury caused by an actor's conduct should not generally be relevant to establish liability [under the Mine Act]." *Id.* at 22. I could not disagree more with this *non sequitor*. In fact, the exact opposite is true. While unforeseeability of injury is not a defense to liability, foreseeability of injury *is* evidence of liability. This is so because strict liability subsumes the lesser standard of negligence. Consequently, while foreseeability of the potential injury caused by an operator's conduct need rarely, if ever, be addressed where strict liability applies, such evidence of negligent conduct cannot be ignored to absolve Musser of liability.

What the Commission majority ignores in formulating its broad pronouncement is that this case involves an engineering firm that prepared an inaccurate map that was used as a template for future maps. So long as maps have been made, map makers have held in their hands the fates of countless persons. This "control" is an inherent part of making a map. It strikes me as nonsensical that a map maker should be absolved of responsibility for preparing an inaccurate map because a finding of liability necessarily rests to some degree upon facts establishing that they had actual knowledge that inaccuracies in their map might at some future date lead to catastrophic consequences. Inaccurate maps are, by definition, ticking time bombs, and in fact, the law generally holds map makers to producing maps that "accurately depict what they purport to show" so as to avoid catastrophe. *See Reminga v. United States*, 631 F.2d 449, 452 (6th Cir. 1980) (holding the federal government liable for the death of a pilot who relied upon an inaccurate aeronautical chart produced by the Federal Aviation Administration). I found that the facts here established that Musser knew that if it provided PBS an inaccurate map of the Quecreek No. 1 Mine, catastrophe could ensue. After all, Musser was acting on behalf of companies it knew were in the business of the underground mining of coal – if only by virtue of the names of the companies: PBS *Coals*, Inc. and Black Wolf *Coal* Co. To suggest that Musser could not foresee the uses to which its map would be put by companies who chose to identify themselves with the word "coal" in their corporate names is simply hard to swallow.[2] To suggest that such foreseeability is irrelevant because Musser is held to a *higher* standard of strict liability is incongruous.

The Commission majority cites a case arising under section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the broad proposition that engineering firms should not be found liable when "the firm's work was too attenuated from potential violations arising from the construction work performed [by the firm]." 32 FMSHRC at 1279 (citing *United States v. Sargent County Water Resource Dist.*, 876 F. Supp. 1081, 1088-89 (D. N.D. 1992)). However, as even the Commission notes, unlike the Clean Water Act, the Mine Act imposes strict liability against the

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[2] Although the majority opinion states that "[c]learly, PBS knew what Musser knew with regard to the boundaries of the Harrison No. 2 Mine," Tr. 144-46, one of these two Commissioners states elsewhere in his dissent: "Moreover, whatever personal doubts Mr. Lucas [a technical assistant employed by Musser] might have had, his testimony does not indicate that these concerns were shared with PBS." *Musser*, at 1298.

operator of a mine in which a violation occurs. Despite this substantial difference in the two regulatory schemes, even if the concepts governing Clean Water Act liability had any relevance to Mine Act liability, the District Court case the Commission majority cites as having a bearing on this case is distinguishable on a number of grounds. Sargent County in North Dakota hired Moore, an engineer, and Radniecki Construction Co. to perform work on a drainage ditch that bisected three sloughs. 876 F. Supp. at 1084. Although Moore "provided drawings to the County . . . *[t]he record shows conclusively that Moore's drawings were not relied upon by the contractor [Radniecki Construction]*." *Id.* at 1088 (emphasis added). Nor did Radniecki rely upon stakes placed by Moore. *Id.* at 1089. Clearly, here, it is beyond dispute that PBS relied very heavily upon the mapping done by Musser. In addition, the *Sargent County* case did not involve the lives of workers placed in the utmost peril by a string of events and failures to act set in motion by the preparation of an inaccurate map, and should not be relied upon for controlling guidance.

This record offers substantial evidence for the conclusion that Musser had sufficient control over the ultimate contents of the section 75.1200 map, at least at it pertained to the adjacent workings.[3] When the Commission dismissed my findings, its determination, in my view, set aside the settled principle of law that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

A unanimous Commission also remanded this case to me for the purpose reassessing a penalty against PBS. The Commission explained: "In finding that the $55,000 penalty was appropriate considering the size of PBS's business and its ability to stay in business, the judge erroneously based his conclusion on the stipulations, which were entered into on the basis that the penalty would be $5,000. It is apparent that, given the judge's substantial increase in penalties for PBS, he did not give PBS an adequate opportunity to address the two criteria once the proposed penalty was increased." *Musser*, at 1290.

After the parties were directed to address these two points, the Secretary stated in an email that "PBS and the Secretary have agreed to enter into the following stipulation: 'Payment of a

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[3] As Chairman Jordan noted in her dissent, the record provides substantial evidence for the conclusion that "Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map on which the section 75.1200 map was based. Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy. 28 FMSHRC at 716." *Musser*, at 1277.

$55,000 penalty would not affect Respondent PBS' ability to remain in business.'"[4] I therefore find that imposition of a penalty in the amount of $55,000 will not affect the ability of PBS to stay in business.

The parties also provided data on the size of PBS which are not relevant to determining the company's size for purposes of assessing a penalty. The data relate to production, but PBS does not produce coal, so the data are necessarily comprised of zeros. Instead, PBS performed engineering and permitting work at the Quecreek mine. For purposes of assessing a penalty, I find that in light of its ability to pay a penalty of $55,000, PBS is a medium sized operator, and that a penalty of $55,000 is appropriate to its size.

Although in light of these findings, I have followed the directions set forth in the Commission's remand order, I note that when the Secretary stated in her reply brief that a penalty of $55,000 was warranted, the burden was placed upon PBS to file an objection and offer of proof that such an amount would affect its ability to stay in business. The company's failure to do so led me to presume that no such effect would occur, this in keeping with well established Commission precedent. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) ("[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur."), *aff'd* 763 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994).[5]

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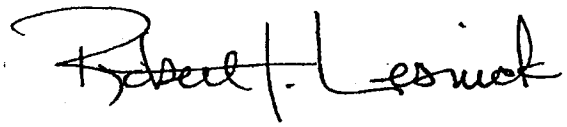
[4] Email from Timothy Williams, Senior Trial Attorney, U.S. Department of Labor, to Chief Judge Robert J. Lesnick, copy to Ralph H. Moore, attorney for PBS Coals, Inc. and Marco M. Rajkovich, attorney for Musser Engineering, Inc. (November 12, 2010, 19:35 MST) (on file with FMSHRC).

[5] By the Commission's logic, a judge is barred in most cases from raising a penalty unless the Secretary so moves -- or the judge will face a remand. As any contested penalty may be raised and subjected to a hearing de novo, any operator should be aware that once contested, any penalty may fall to $0 *or be raised to the maximum by the Judge sua sponte*, which, in this case, was $55,000. The notion that the company should have no expectation of paying a penalty higher than that initially recommended by MSHA invites the increased contest of penalties.

ORDER

Consistent with this Decision, **IT IS ORDERED** that PBS Coals, Inc., shall pay a total civil penalty of $55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322488.

Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters **ARE DISMISSED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

April 27, 2011

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 2009-1367-R
v.	:	Order No. 6623515; 04/02/2009
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID: 46-09091
	:	Mine: Horse Creek Eagle
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 2008-386
	:	A.C. No. 46-08297-133173-02
v.	:	Mine: White Queen
MARFORK COAL COMPANY, INC. Respondent	:	Docket No. WEVA 2008-717
	:	A.C. No. 46-09092-138615-02
	:	Mine: Allen Powellton Mine
	:	Docket No. WEVA 2008-719
	:	A.C. No. 46-09091-138614-02
	:	Mine: Allen Powellton Mine
	:	Docket No. WEVA 2008-720
	:	A.C. No. 46-08837-138612
	:	Mine: Coon Cedar Grove
	:	Docket No. WEVA 2008-1094
	:	A.C. No. 46-09048-146206-02
	:	Mine: Slip Ridge Cedar Grove
	:	Docket No. WEVA 2008-1126
	:	A.C. No. 46-08837-146204

: Mine: Coon Cedar Grove
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: Docket No. WEVA 2008-1130
: A.C. No. 46-09091-146208-02
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2008-1187
: A.C. No. 46-08837-149678
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: Mine: Coon Cedar Grove Mine
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: Docket No. WEVA 2008-1391
: A.C. No. 46-09193-153039
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: Mine: Parker Peerless
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: Docket No. WEVA 2008-1460
: A.C. No. 46-09091-153033
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2008-1466
: A.C. No. 46-08297-153023-02
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: Mine: White Queen
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: Docket No. WEVA 2009-9
: A.C. No. 46-09193-162143
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: Mine: Parker Peerless Mine
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: Docket No. WEVA 2009-268
: A.C. No. 46-08315-164914
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-270
: A.C. No. 46-09092-164922-01
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: Mine: Allen Powellton
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: Docket No. WEVA 2009-271
: A.C. No. 46-09092-164922-02
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: Mine: Allen Powellton
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: Docket No. WEVA 2009-272
: A.C. No. 46-09193-164927-01
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: Mine: Parker Peerless Mine
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: Docket No. WEVA 2009-273
: A.C. No. 46-09193-164927-02
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-452
: A.C. No. 46-09048-167882
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: Mine: Slip Ridge Cedar Grove Mine
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: Docket No. WEVA 2009-453
: A.C. No. 46-09193-167889
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: Mine: Park Peerless Mine
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: Docket No. WEVA 2009-459
: A.C. No. 46-08315-167873
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-460
: A.C. No. 46-08551-167877
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: Mine: Marsh Fork Mine
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: Docket No. WEVA 2009-552
: A.C. No. 46-09193-170811-01
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-553
: A.C. No. 46-09193-170811-02
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-625
: A.C. No. 46-08315-170794
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-626
: A.C. No. 46-08297-170793
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-627
: A.C. No. 46-08837-170800-01
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: Mine: Coon Cedar Grove
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: Docket No. WEVA 2009-628
: A.C. No. 46-08837-170800-02
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: Mine: Coon Cedar Grove
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: Docket No. WEVA 2009-630
: A.C. No. 46-09091-170805
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2009-631
: A.C. No. 46-09092-170806
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: Mine: Allen Powellton
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: Docket No. WEVA 2009-718
: A.C. No. 46-08315-173687
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-732
: A.C. No. 46-09048-173692
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-902
: A.C. No. 46-08297-176257
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: Mine: White Queen
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: Docket No. WEVA 2009-903
: A.C. No. 46-08315-176258
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-904
: A.C. No. 46-08374-176259
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: Mine: Marfork Processing
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: Docket No. WEVA 2009-906
: A.C. No. 46-08551-176261-02
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: Mine: Marsh Fork Mine
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: Docket No. WEVA 2009-907
: A.C. No. 46-08837-176262
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: Mine: Coon Cedar Grove Mine
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: Docket No. WEVA 2009-909
: A.C. No. 46-09048-176264-02
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-910
: A.C. No. 46-09092-176267
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: Mine: Allen Powellton
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: Docket No. WEVA 2009-1045
: A.C. No. 46-08297-178767
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: Mine: White Queen
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: Docket No. WEVA 2009-1046
: A.C. No. 46-08315-178768
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-1047
: A.C. No. 46-08374-178769
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: Mine: Marfork Processing
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: Docket No. WEVA 2009-1049
: A.C. No. 46-09048-178773-02
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-1052
: A.C. No. 46-08551-178770
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: Mine: Marsh Fork
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: Docket No. WEVA 2009-1054
: A.C. No. 46-09092-178776
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: Mine: Allen Powellton Mine
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: Docket No. WEVA 2009-1381
: A.C. No. 46-09193-181461
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-1422
: A.C. No. 46-09092-184531
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: Mine: Allen Powellton Mine
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: Docket No. WEVA 2009-1425
: A.C. No. 46-08837-184525
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: Mine: Coon Cedar Grove
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: Docket No. WEVA 2009-1426
: A.C. No. 46-09091-184530
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2009-1463
: A.C. No. 46-08551-184520
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: Mine: Marsh Fork
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: Docket No. WEVA 2009-1464
: A.C. No. 46-09048-184528
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-1693
: A.C. No. 46-09193-187356
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-1797
: A.C. No. 46-09048-190388
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-1799
: A.C. No. 46-09193-190395
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: Mine: Parker Peerless
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: Docket No. WEVA 2009-1881
: A.C. No. 46-09048-193231
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2009-1885
: A.C. No. 46-08297-193226
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: Mine: White Queen
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: A.C. No. 46-08315-193227
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: Mine: Brushy Eagle
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: Docket No. WEVA 2009-1887
: A.C. No. 46-08551-193229
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: Mine: Marsh Fork
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: Docket No. WEVA 2010-36
: A.C. No. 46-08551-197139
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: Mine: Marsh Fork
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: Docket No. WEVA 2010-39
: A.C. No. 46-09048-197153
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: Docket No. WEVA 2010-40
: A.C. No. 46-09193-197159
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: Mine: Parker Peerless
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: Docket No. WEVA 2010-59
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: A.C. No. 46-08315-197136
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: Mine: Brushy Eagle
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: A.C. No. 46-09092-197156
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: Docket No. WEVA 2010-163
: A.C. No. 46-08315-200289
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: Mine: Brushy Eagle
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: Docket No. WEVA 2010-164
: A.C. No. 46-08374-200290
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: Mine: Marfork Processing
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: Docket No. WEVA 2010-165
: A.C. No. 46-08551-200293
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: Mine: Marsh Fork
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: Docket No. WEVA 2010-166
: A.C. No. 46-09048-200301
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2010-325
: A.C. No. 46-09193-203774
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: Mine: Parker Peerless
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: A.C. No. 46-08551-203767
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: Mine: Marsh Fork
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: A.C. No. 46-09048-203769
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: Mine: Slip Ridge Cedar Grove
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: Mine: Horse Creek Eagle
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: Mine: Allen Powellton
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: Docket No. WEVA 2010-374
: A.C. No. 46-09092-203771-02
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: Mine: Allen Powellton
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: A.C. No. 46-08315-206643
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: Mine: Brushy Eagle
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: A.C. No. 46-09048-206650
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: Mine: Slip Ridge Cedar Grove
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: Docket No. WEVA 2010-518
: A.C. No. 46-09091-206651-02
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2010-519
: A.C. No. 46-09092-206652
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: Mine: Allen Powellton
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: Docket No. WEVA 2010-586
: A.C. No. 46-09048-208972
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: A.C. No. 46-09091-208974
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: Mine: Horse Creek Eagle
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: Docket No. WEVA 2010-616
: A.C. No. 46-09193-208978
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: Mine: Parker Peerless
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: Docket No. WEVA 2010-669
: A.C. No. 46-08315-208967
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: Mine: Brushy Eagle

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

These captioned proceedings are before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a comprehensive settlement agreement and to dismiss the 83 captioned dockets. A reduction in total civil penalty from $784,659.00 to $627,714.00 is proposed.

The specific settlement terms are as noted in the comprehensive settlement agreement appended to the electronic version of this decision approving settlement, and posted online at the Commission's website: *http://www.fmshrc.gov*. The above captioned contest docket has been resolved by the terms of the comprehensive settlement agreement. The originally assessed and agreed upon civil penalties for each docket are as follows:

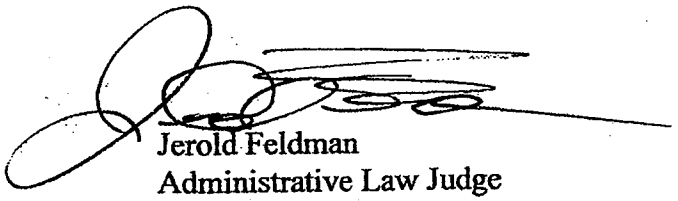
Docket No.	Originally Assessed Penalty	Proposed Settlement
WEVA 2008-386	$425.00	$425.00
WEVA 2008-717	$1,009.00	$610.00
WEVA 2008-719	$499.00	$499.00
WEVA 2008-720	$722.00	$615.00
WEVA 2008-1094	$392.00	$392.00
WEVA 2008-1126	$1,752.00	$1,171.00
WEVA 2008-1130	$582.00	$582.00
WEVA 2008-1187	$263.00	$263.00
WEVA 2008-1391	$968.00	$688.00
WEVA 2008-1460	$1,457.00	$1,457.00
WEVA 2008-1466	$392.00	$392.00
WEVA 2009-9	$615.00	$476.00
WEVA 2009-268	$5,555.00	$3,511.00
WEVA 2009-270	$499.00	$499.00
WEVA 2009-271	$2,980.00	$2,245.00
WEVA 2009-272	$811.00	$300.00
WEVA 2009-273	$285.00	$285.00

WEVA 2009-452	$53,563.00	$42,420.00
WEVA 2009-453	$5,549.00	$5,231.00
WEVA 2009-459	$12,644.00	$10,333.00
WEVA 2009-460	$9,275.00	$4,830.00
WEVA 2009-552	$8,405.00	$8,038.00
WEVA 2009-553	$100.00	$100.00
WEVA 2009-625	$10,003.00	$4,900.00
WEVA 2009-626	$9,158.00	$9,158.00
WEVA 2009-627	$585.00	$300.00
WEVA 2009-628	$392.00	$175.00
WEVA 2009-630	$9,128.00	$7,661.00
WEVA 2009-631	$4,549.00	$4,159.00
WEVA 2009-718	$8,893.00	$2,000.00
WEVA 2009-732	$1,746.00	$1,746.00
WEVA 2009-902	$6,617.00	$6,617.00
WEVA 2009-903	$17,594.00	$8,800.00
WEVA 2009-904	$1,620.00	$1,240.00
WEVA 2009-906	$65,735.00	$49,995.00
WEVA 2009-907	$8,848.00	$5,136.00
WEVA 2009-909	$26,971.00	$23,650.00
WEVA 2009-910	$3,912.00	$2,704.00
WEVA 2009-1045	$2,282.00	$2,282.00
WEVA 2009-1046	$25,840.00	$14,901.00
WEVA 2009-1047	$460.00	$460.00
WEVA 2009-1049	$15,793.00	$9,696.00
WEVA 2009-1052	$35,577.00	$29,608.00
WEVA 2009-1054	$5,785.00	$5,785.00
WEVA 2009-1381	$30,176.00	$24,472.00
WEVA 2009-1422	$8,031.00	$6,587.00

WEVA 2009-1425	$1,002.00	$818.00
WEVA 2009-1426	$21,506.00	$19,208.00
WEVA 2009-1463	$2,901.00	$2,901.00
WEVA 2009-1464	$15,752.00	$12,356.00
WEVA 2009-1693	$1,597.00	$1,597.00
WEVA 2009-1797	$277.00	$277.00
WEVA 2009-1799	$76,599.00	$59,650.00
WEVA 2009-1881	$2,665.00	$2,162.00
WEVA 2009-1885	$127.00	$127.00
WEVA 2009-1886	$4,946.00	$4,946.00
WEVA 2009-1887	$38,345.00	$34,036.00
WEVA 2010-36	$4,329.00	$4,329.00
WEVA 2010-39	$2,442.00	$2,442.00
WEVA 2010-40	$10,761.00	$9,844.00
WEVA 2010-59	$12,392.00	$11,203.00
WEVA 2010-99	$6,956.00	$5,078.00
WEVA 2010-100	$16,894.00	$16,056.00
WEVA 2010-163	$3,143.00	$1,700.00
WEVA 2010-164	$2,138.00	$1,846.00
WEVA 2010-165	$13,583.00	$12,572.00
WEVA 2010-166	$6,628.00	$5,971.00
WEVA 2010-325	$21,442.00	$21,442.00
WEVA 2010-370	$5,158.00	$5,158.00
WEVA 2010-371	$3,419.00	$2,746.00
WEVA 2010-372	$100.00	$100.00
WEVA 2010-373	$2,473.00	$2,473.00
WEVA 2010-374	$3,888.00	$3,888.00
WEVA 2010-513	$9,302.00	$3,353.00
WEVA 2010-514	$6,918.00	$5,901.00

WEVA 2010-516	$8,472.00	$8,472.00
WEVA 2010-518	$9,912.00	$7,330.00
WEVA 2010-519	$17,450.00	$15,659.00
WEVA 2010-586	$4,229.00	$4,229.00
WEVA 2010-587	$2,369.00	$2,369.00
WEVA 2010-616	$24,885.00	$22,113.00
WEVA 2010-669	$11,222.00	$5,968.00
TOTAL	**$784,659.00**	**$627,714.00**

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and pursuant to the parties' agreement, Marfork Coal Company, Inc. **IS ORDERED** to pay the $627,714.00 civil penalty within 30 days of this order in satisfaction of the 83 dockets at issue.[1] Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge
And for Judges Barbour, Bulluck, Gill, Lesnick, McCarthy, Melick, Moran, Paez, Rae, Sippel, and Weisberger

Distribution:

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Sarah G. Korwan, Esq., Dinsmore & Shohl, LLP, Huntington Square, 900 Lee Street, #600, Charleston, WV 25301

/jel

[1] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please provide the Docket Nos. and A.C. Nos. noted in the above caption along with the check(s).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001-2021
Telephone No.: 202-434-9950
Facsimile No.: 202-434-9949

April 28, 2011

CAM MINING, LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2008-390-R
	:	Citation No. 7428799; 12/07/2007
v.	:	
	:	Docket No. KENT 2008-391-R
SECRETARY OF LABOR,	:	Citation No. 7428800; 12/07/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Mine ID 15-17659
Respondent	:	Three Mile Mine #1
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Docket No. KENT 2008-942
Petitioner	:	A.C. No. 15-17659-145919
	:	
v.	:	
	:	Mine: Three Mile Mine #1
CAM MINING, LLC.,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Mark E. Heath, Esq., Spilman, Thomas, & Battle, PLLC, Charleston, West Virginia, for Cam Mining, LLC.

Before: Judge Weisberger

These cases are before me based upon Notices of Contest filed by the operator, Cam Mining, LLC., ("Cam"), and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary.") These filings were in response to two citations the Secretary issued to Cam alleging, respectively, violations of 30 C.F.R. § 77.1000 (failure to follow the mines ground control plan), and 30 CFR § 77.1303 (h) (failure to remove persons from a blasting area).

The cases were scheduled and heard in Kingsport and Jonesboro, Tennessee. Post-hearing, following the granting of various requests for extensions of time, each party filed a brief. The parties were afforded an opportunity to file a reply brief. Cam filed a reply brief; the Secretary did not.

Subsequently, in a telephone conference call, the parties were informed that their initial briefs did not clearly discuss various matters at issue. On December 29, 2010, an order was issued ("Order") directing the parties to file a post-hearing statement. On February 18, 2011, the Secretary filed a "Response to Order," ("Response") and Cam filed a "Post-Hearing Statement" ("Statement").

I. Introduction

Cam operates the Three Mile Mine #1, a surface mine. As part of Cam's normal coal mining process, surface material is removed by blasting. In July 2007, 92 blasting holes had been drilled, each approximately 20 feet deep. The holes, seven and seven eighths inches in diameter, contained approximately ten feet of explosives. Bags of dirt materials were placed in some of the holes to limit the explosive force and control the direction of the blast. The parties stipulated that the "minimum hole spacing is 12 feet by 12 feet; the maximum is 25 feet by 25 feet." (Tr. 324-26). There was at least 18 feet of material beyond the first row of holes toward the "free space of the open face."[1] (Tr. 424).

On July 16, 2007 at approximately 4:35 p.m., two shots were detonated in sequence along the edge of the area in question.[2] These shots resulted in flyrock,[3] which traveled in excess of 1,570 feet, and struck a mechanic working in an equipment staging area, killing him instantly.

The Three Mile Mine had not had any previous incidents of material leaving the blasting area, and there were no previous incidents of flyrock on the Three Mile Job.[4]

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[1]The parties stipulated regarding that the term "open face" means "that it's daylight, there's no longer material there." (Tr. 424).

[2]The shots were referred to as"no spoil" shots, meaning the shot is designed so that rock and overburden does not leave the permitted area boundary.

[3]Flyrock is defined as "material that leaves the blasting shot and the blasting area set up by the blaster as a safety zone." (Joint Stipulation, Par. 6)

[4]The Three Mile Job is the site in question.

II. Citation No. 7428800

A. Violation of Section 77.1000, *supra*

Citation No. 7428800 alleges a violation of section 77.1000, *supra*, which provides that "[e]ach operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971 which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability."

In her initial brief, the Secretary asserted that the ground plan "was not sufficient to prevent the creation of flyrock during the shot that fatally injured the victim." (Sec. Br. at 8). Subsequently, in a response to the order issued on December 29, 2010,[5] the Secretary asserts inter alia, as follows:

> "the ground control plan did not provide sufficient protection to assure proper drilling and blasting precautions to provide adequate burden to prevent blowout of blast holes along the blast site."[6]

(Response p. 13).

The record contains three pages from the ground control plan for the mine at issue. (Gov. Ex. 2 pp. 1-3). It does not appear that there is any material on these pages that pertain specifically to certain drilling or blasting requirements or procedures to eliminate or minimize the creation of flyrock. Nor does the plan stipulate specific steps to be taken to avoid, eliminate, or cure conditions that could lead to flyrock. It is significant to note that Respondent does not refer to any references in the ground control plan pertaining to avoidance of flyrock.

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[5]The order required the Secretary, inter alia to set forth in a statement whether she alleges either that the ground control plan was insufficient, or that the operator's procedures violated the plan. The Secretary was further ordered as follows:

> The Secretary shall set forth the opinion or evidentiary facts adduced at the hearing which support its position that either the plan was insufficient or that certain procedures violated the plan. Each opinion or specific fact alleged shall be set forth in a separately numbered sentence followed by a transcript page and lines, or an exhibit number and page.

(Order).

[6]In support of this assertion, the Secretary cites the testimony of her expert witness, Edward Lobb. In this connection, Lobb indicated that he agreed that "drilling and blasting precautions were not adequate." (Tr. 431).

For all the above reasons, I find that, on its face, the ground control plan was not sufficient to prevent flyrock. Therefore, I find that it has been established that Cam violated section 75.1000, *supra*.

B. Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981.)

In *Mathies Coal Co.*, the Commission explained its interpretation of the term "significant and substantial" as follows:

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

6 FMSHRC 1, 3-4 (Jan. 1984).

In *United States Steel Mining Company, Inc.*, the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

7 FMSHRC 1125, 1129 (Aug. 1985) (emphasis added).

As set forth above, the failure of the ground control plan to prevent flyrock resulted in the hazard of flyrock, and constituted a violation of a mandatory standard. Further, it is uncontested the blast at issue resulted in flyrock which caused a fatal accident. I thus find that the third and fourth elements set forth in *Mathies*, *supra*, have been met. Accordingly, I find that the violation

was significant and substantial.

C. Penalty

In assessing a civil monetary penalty, the following factors must be considered: the operator's history of previous violations, the appropriateness of such penalty to the size of the operator, the operator's negligence, the effect on the operator's ability to continue in business, the gravity of the violation, and the operator's demonstrated good faith. 30 U.S.C. §820(i).

The gravity of the violation was relatively high inasmuch as it resulted in a fatal injury. There is not any evidence in the record that would argue for an increase or decrease in penalty based upon consideration of Cam's history of violations, or its size. Nor is there any evidence that the imposition of the penalty would have an adverse affect on Cam's ability to remain in operation. Cam abated the violation, and there is not any evidence that it did not act in good faith in abating the violation. There is not any evidence in the record that Cam either knew, reasonably should have known, or had been put on notice that its operating ground control plan was not sufficient. I thus find that the level of Cam's negligence was low.

For all of the above reasons, and placing significant weight on the low level of the operator's negligence, I find that a penalty of $1,000 is appropriate for this violation.

III. Citation No. 7428799

A. Violation of Section 77.1303(h), *supra*

Citation No. 7428799 alleges a violation of section 77.1303(h), *supra*, which provides that "[a]ll persons shall be cleared and removed from the blasting area unless suitable blasting shelters are provided to protect men endangered by concussion or flyrock from blasting." The term "blasting area" is defined as "the area near blasting operations in which concussion or flying material can reasonably be expected to cause injury." 30 C.F. R. § 77.2(f).

In *Hobet Mining & Constr. Co.*, the Commission held as follows:

> To establish a violation of the standard based on a failure to clear and remove all persons from the blasting area, the Secretary must prove that an operator has failed to clear and remove all persons from the "blasting area" as that term is defined in section 77.2(f). This requires the Secretary to establish the factors that a reasonably prudent person familiar with mine blasting and the protective purposes of the standard would have considered in making a determination under all the circumstances posed by the blast in issue. The Secretary must then prove that the factors were not properly considered or employed.

9 FMSHRC 200, 202 (Feb. 10, 1987) (emphasis added).

Basically, the Secretary is required to (1) establish factors that would have been used by a reasonably prudent person to determine the blasting area and (2) prove that these factors were not properly considered.

1. Factors that would have been used by a reasonably prudent person

According to Arnold J. Stewart, Cam's supervisor of blasting coordinators, among the factors to be considered are the history of prior detonations, the distance between blast holes, the depth of the holes, the presence of cracks in the material to be blasted, and the amount of overburden. He indicated, in essence, that in the blasting sequence the closer the holes to be blasted get to the face, the more the amount of overburden[7] is reduced. The blasting area should accordingly be extended to compensate for the decreased amount of overburden. He also opined that the presence of cracks in the material to be blasted increase the chances of flyrock.

Thomas Edward Lobb was offered by the Secretary as an expert in explosives and blasting.[8] He testified that a determination of what constitutes a blasting area is based "[o]n previous issuances of flyrock, the type of material that they're (sic.) blasting, the timing of the individual blastholes, and any material that's in front of the blast, such as an old spoil." (Tr. 365) It also is based on geology, the accuracy of the drilling, and the types of explosives being used (Tr. 366).

The Secretary also infers from the testimony of Lobb that the following factors are pertinent and should be taken into account in setting the blasting area:

> The blaster should have considered the diameter of the drill holes, the distance between drill holes, the amount of the rock in front of the drill holes in the empty pit, the timing of the blast, the amount of the room left by the first holes for the material in the second holes to travel, any geological conditions such as where the blast is located in relation to the crop line where the ore body meets the air on the side of the mountain, and the presence of cracks which causes loss of confinement in the blast.

(Response p. 4).

In addition, the Secretary relies on the following factors as set forth in the testimony of Stewart as apparently affecting the production of flyrock as follows: the consistency of the material being blasted, the location of the blast in relation to the distance to the open face, the pattern of shots, the presence of muck in front of the first row of loaded holes, the depth of the

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[7]Overburden is the amount of material between a shot hole and the open face.

[8]Respondent did not object to Lobb testifying as an expert in explosives and blasting.

holes, and the amount material in front of the first holes to be blasted. (*Id.*)[9]

The above cited testimony by Stewart and Lobb was not impeached or contradicted. I accordingly conclude that a reasonably prudent blaster would have used the factors testified to by Stewart and Lobb, in determining the blasting area.

2. Factors that were not properly considered

The Secretary, in her Response, sets forth various physical factors that she alleges "[t]he blaster should have considered." (Response p. 3) It might thus be inferred that she is alleging that the factors "should have been considered," but were not. The factors alleged are as follows:

> The diameter of the drill holes, the distance between drill holes, the amount of rock in front of the drill holes in the empty pit, the timing of the blast, the amount of room left by the first holes for the material in the second holes to travel, any geological conditions such as where the blast is located in relation to the crop line where the ore body meets the air on the side of the mountain, and the presence of cracks which causes loss of confinement in the blast.

(Response p. 3).

These factors are essentially those that a reasonable prudent blaster would have considered as testified to by Lobb and Stewart at the hearing. Johnny Wayne Sexton, Cam's drill and blasting coordinator, provided similar testimony in his deposition. (Gov. Ex. 8).

[CONTINUED ON NEXT PAGE]

[9]On direct examination, he was asked about the "... kind of numbers [that he] would have been interested in in the way the blast was set up before it was detonated," (Tr. 375). He responded as follows: "The diameter of the drill holes, the distance between the drill holes, the amount of rock in front of the drill holes into the empty pit ...the burden, the amount of rock between the drill holes and the air." (Tr. 375-376). I thus find, that the factors discussed by Lobb do not relate specifically to the determination of the blasting area.

However, neither of these individuals testified that any of the above factors were not considered by Goble in determining the blasting area.[10]

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[10]The Secretary in support of her assertion that these factors "should have been considered" by the blaster, which implies that they were not, cites only Lobb's testimony on the following pages of the transcript: "Tr. 375, Line 22 to 376 Line 5, Tr. 377, Lines 17- 22, Tr. 387, Lines 9-12 and Lines 22-25, Tr. 380, Lines 13-21." (Response p. 3). The cited testimony is as follows:

A. I would be looking for all of the construction details; the diameter of the drill holes, the distance between the drill holes, the amount of rock in front of the drill holes into the empty pit–
The Court: Excuse me. The amount of rock in front of the drill holes?
The Witness: Yes, sir. The burden, we call that.

(Tr. 375-76).

Q. Are there any other things you would be looking for on measurements?
A. Yes, ma'am. The timing of the blast is critical for the direction it goes. The first holes that are initiated leave room for the next holes for the material to go.

(Tr. 377).

The Court: When it hits a crack, it reflects 80 percent?
The Witness: Yes, sir. Approximately 80 percent of it reflects.
The Court: Which causes what?
The Witness: Which causes the explosives to not break the rock up really good. It also can cause loss of confinement, which is typically associated with flyrock.

(Tr. 380).

Q. That right?
A. Yes, ma'am. There were numerous rocks.
Q. Where did you see the rocks that were involved in that?

(Tr. 387).

A. Flyrocks in that area.
The Court: Okay. The record isn't that clear as to where–
Ms. Taylor: I think I can clarify it,

(Tr. 387).

3. Further discussion

On July 16, 2007, John Chester Goble, II, was the blaster in charge of the shots at the site in question, and was responsible for setting the blasting area. As such, it would appear that Goble is the only individual who has personal knowledge of the blasting area that was established, and the factors that were taken into account in establishing that area.[11] In this connection, Respondent's proffered the deposition testimony of Goble who had been deposed by the Secretary on December 9, 2009.[12] Goble's deposition[13] testimony indicates that he determined the blasting area, and moved a "powder truck" to "a place that [he] thought was outside the blast area." (Ex R3 p. 63). This truck was approximately 1,200 feet from the shots.[14] It thus might be inferred that Goble had determined the blasting area to be approximately 1,200 feet. The balance of his testimony regarding the setting of a blasting area and its distance from the shot area is lacking in detail as to totally minimize its probative value. Thus, Goble acknowledged that he determined the blasting area but was unable to remember what he "consider[ed]" it to be (Ex. R-3 p. 64-65). Nor did he testify specifically as to the factors that he took into account in setting the blasting area. Nor did any individual testify regarding any conversations with Goble prior to the blast in which the latter stated what the blasting area was, or what the factors were that were taken into account in designating the blasting area.[15]

The above testimony is clearly not germane to the issue at bar, and certainly does not establish that Goble did not consider any of the above physical factors in setting the blasting area.

[11]Goble, who normally worked another shift, was assigned as a blaster to the blasting area in question on July 16. The area had been blasted the day before but the blaster on that day, Eric Belcher, was not called as a witness by either party to testify regarding the blasting area that he had determined.

[12]Neither party called Goble to testify at the hearing in this matter. Subsequent to the hearing, in a telephone conference call on January 21, 2011, the parties were offered an opportunity to request a supplemental evidentiary hearing to adduce further testimony. Neither party made a request to supplement the record by having Goble testify.

[13]The deposition was admitted as Exhibit R-3.

[14]Also, Goble had instructed a foreman, John Colvin, where to locate his truck to "guard the blast area" (Tr. 288). This truck was parked approximately 1,300 feet form the shot.

[15]The Secretary did not adduce any detailed evidence setting forth a specific blasting area that should have been determined prior to the blast. The only evidence relating to this issue consists of the testimony of Lobb that he would have included the parking lot as part of the blasting area. (Tr. 429) In response to a leading question, he agreed that this was "based on a reasonably prudent standard." (*Id*) However, he did not testify further regarding any specific factual basis for this opinion. Hence, it is not accorded much probative value.

Based on all the above, I find that the record fails to establish that Goble, as the blaster, did notconsider any of the above factors in determining the blasting area. To the contrary, as set forth above, Goble testified that he noted the presence of cracks. This testimony was not impeached, nor was it specifically contradicted by any witness who had personal knowledge based on observations of Goble's actions. Further, the Blast Report filled out by Goble prior to the blast sets forth the following factors: the diameter of the blast holes, the distance between the holes, the amount of burden, and the "delay types." (Gov. Ex. 1.) As such, it might be inferred that these factors were considered by Goble in setting the blasting area.[16]

4. The Secretary's arguments regarding failure of execution and Cam's practices

In order to clarify and organize the record adduced at the trial, the order issued on December 29, 2010 required the Secretary, inter alia, to set forth the specific factor/factors that it alleges that were not properly considered by the operator followed by a citation to the record that establishes that the alleged factor had not been considered. The Secretary alleged several factors she considered to be "failures in execution:

[FOOTNOTE 15 CONTINUED]

I note that Goble testified in his deposition that, prior to the blast, for purposes of ascertaining the powder factor and number of yards blasted, Goble took into account the depth of the blast holes and the diameter of the drill bit, and applied a certain formula. (Ex. R-3 pp. 50-53)

Also, the Report Of Blasting Operation ("Blast Report"), that had been prepared by Goble prior to the blast on July 16 sets forth the following:

> The total number of holes, the diameter of the holes, the distance between the holes, the powder factor, the depth of "stemming," the type of material blasted, the total spacing, the minimum number of holes "per delay," and maximum weight of explosives "per delay."

(Gov. Ex. 1).

It thus might be inferred that a number of factors set forth above were considered by Goble in making a determination as to the blasting area.

[16]In addition, I note that there was not any history of previous flyrock at the site at issue. Although the blasting area may not be based "solely" upon previous projections of flyrock or lack thereof, it is a factor to be considered. *See Hobet, supra*, at 203.

a. Relevance of failures in execution and Cam's practices

The Secretary, in her response, incorporated by reference "failures in execution" set forth on page nine of MSHA's Physical Factors Report of the accident at issue. (Gov. Ex. 7 p. 9) (emphasis added). This report sets forth the following "practices that should be reexamined prior to blasting at this site" (*id*):

- The drillers and blasters do not communicate together to construct the blast as the blast was designed. . . .
- Both drillers were drilling blastholes on a smaller pattern than was reported on the blast records. . . .
- Both drillers used their own judgment to determine the location of the blastholes on the outside rows of blastholes next to the high wall. . . .
- Blasters need to pay close attention to their high wall burdens. . . .
- Surveying equipment is available to profile the high walls[17]. . . .

(Gov. Ex. 7 pp. 9-10).

The Secretary also set forth the following as specific factors that were not considered:

a. The blaster did not maintain communication with the driller;

b. The blaster encountered cracks in the middle of loading the shot but kept no record of the location or size of the cracks ;

c. The blaster failed to distribute the powder factor enough in the blast because of his lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth and dimensions. The powder distribution is critical in determining the blast area;

d. The Blaster did not measure the distance between the drill holes or check each hole for voids or cracks as they were loaded;

e. The blaster did not measure the amount of muck or spoil in front of the

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[17]According to the report, these practices should be reexamined "prior to blasting" at this site. (Emphasis added) (*id.*) There is not any indication in the report that these reexaminations should have been done in determining the blasting area. Further, for the reasons set forth below, evidence of practices are not germane, and are not accorded any probative value.

highwall prior to setting up the blast area;

f. The blaster left the shot that day while the helpers loaded the holes. He was gone for a time to show the mechanics where to put a handrail on another powder truck. He was gone for about an hour that morning while the helpers stemmed the holes that had been loaded;

g. The blaster allowed for removal of muck or spoil from the pit after the drill holes were loaded with explosives;

h. The blaster did not measure or examine the distance between the first set of drill holes and the edge of the highwall bench set for blasting;

i. The loaders had undercut the drill bench while removing muck as was evidenced by the physical factors from the blast.

j. The blaster failed to distribute the powder used to execute the blast evenly which resulted in a stiff blast;

k. The blaster was focused on avoiding the rock rolling off the back of the shot and leaving the permit zone;

l. While the blaster did have a mirror for using to measure the shot, he did not use the mirrors for each hole loaded; and

m. The blaster failed to give the persons working in the parking lot area directly in front of the shot notice that it was time for a blast

(Response pp. 5-7).

These factors and the "failures in execution" set forth in the Physical Factors Report (Gov. Ex. 7 p. 9) refer to practices and actions as opposed to physical factors. As set forth by the Commission in *Hobet, supra* at 202, the Secretary's burden at this stage is to establish "factors" that would have been used by a reasonably prudent person in determining the blasting area. The Commission clarified the "factors" to be considered "may include, but are not limited to, the amount and type of explosives used, the depth of the holes that constitute the shot, the topography, and the experience and prior experience of the blaster." *Hobet, supra* at 203. Thus, it is clear based on these examples, that under *Hobet, supra,* the Secretary's burden relates to establishing the physical conditions or factors that a reasonably prudent person would have considered in determining the blasting area. As such evidence of practices or actions are not germane and are not accorded any probative value.

b. Whether the Secretary's assertions regarding specific practices

have been established

Moreover, even assuming relevance of Cam's practices, the evidence fails to establish her assertions as discussed below, *infra*.

i. "The Blaster did not maintain communication with the driller." (Response p.5).

The Secretary's assertion of a lack of proper communication is predicated upon the testimony, inter alia, of Lobb who conducted an investigation of the accident at issue and interviewed a number of the principals including "a driller and one of the blasters." (Tr. 392). According to Lobb, these persons indicated different distances between the blast holes. However, the record lacks critical information regarding the identity of these individuals, and the specific statements they made.[18] Thus, Lobb's testimony is not accorded much weight.

The Secretary also relies on the testimony of a foreman, John Colvin, that the blaster was responsible for instructing a driller how to drill. Colvin did not specifically testify to any lack of communication between Goble and the driller. I thus find that Colvin's testimony does not support an assertion that Goble did not communicate with the driller.

Also relied upon is the testimony of James Gregory Clevinger who worked the shift that ended on the morning of July 16, 2007. However, he did not specifically testify regarding any communication or lack of communication between Goble and the driller.

Considering all the above, I find that the evidence fails to establish any alleged failure by the blaster to communicate with the driller.

ii. "It is alleged that the blaster failed to distribute the power factor enough in the blast because of his lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth, and dimensions."(Response p. 6).

The record does not contain any factual support for this assertion. In support of its assertion the Secretary cites only the following testimony of Lobb:

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[18]MSHA's Report of Investigation states only that "miners and mine management officials, deemed to have knowledge of the facts regarding the accidents were interviewed on two separate occasions." (Gov Ex 3 p. 2). Robert J. Newberry, MSHA's accident investigator listed in the Report of Investigation, did not testify at all regarding any interviews with miners.

A. The powder distribution is the critical thing. Their powder factor that they used was good, but their powder distribution wasn't distributed enough.

(Tr. 474).

This testimony set forth Lobb's opinion that powder distribution was not distributed "enough." (*Id.*) However, he did not indicate the factual basis for this opinion. More importantly, Lobb did not adduce any facts regarding the blasters "lack of knowledge of particulars relating to the drill holes, cracks, voids, hole depth and dimension as alleged by the Secretary. (Response p. 6). Hence, I find that the record does not support this assertion.

iii. "[T]he blaster did not measure the distance between the drill holes or check each hole for voids or cracks where they were loaded." (*Id.*)

The Secretary's factual assertions are not supported by the testimony of any person with personal knowledge of the asserted facts. As support for its assertion, the Secretary cites the following testimony of Lobb:

Q. What significance did you find in what you've heard about the communication between the blaster and the driller?

A. I did talk to a driller and one of the blasters, and no one could tell me the same numbers for the blast that was initiated that was involved in the accident. I've heard 15 feet. I've heard 18 feet.

The Court: That is the distance between what and what, sir?

The Witness: Between the blast holes. On the blaster's report, it was supposed to be 18 feet; and I've heard reports of 15 feet, 18 feet and 16 feet, so. . . And one person told me 14 feet.

By Ms. Taylor:

Q. Then you said something about drilling blast holes in a smaller pattern than was reported on the blast records?

A. That's correct.

Q. What lead you to believe that?

A. Different people had different distances.

(Tr. 392).

Q. Did he take any measurements of the space between the holes?

A. I can't remember that, no.

Q. Did you ever see him measure the distance between the front, the open space, and the first row of holes?

A. I didn't see him measure between holes.

(Tr. 248).

This testimony relates solely to a discrepancy between persons whom Lobb interviewed regarding the spacing between holes. Neither of the individuals are mentioned by name, nor was any testimony adduced from such individuals. Also, Lobb's testimony does not set forth any facts, based on personal knowledge, that Goble did not check for cracks or voids as the holes were loaded with explosives.

The Secretary also cites the testimony of John Henry Holbrook, who helped Goble with the shot on the date in question. Holbrook testified with regard to the taking of measurements by Goble as follows:

Q. Did he take any measurements of the space between the holes?

A. I can't remember that, no.

Q. Did you ever see him measure the distance between the front, the open space, and the first row of holes?

A. I didn't see him measure between the holes.

(Tr. 248).

I find this testimony too ambiguous and thus not sufficient to meet the Secretary's burden of establishing by a preponderance of clear and convincing evidence that the blaster did not measure the distance between the holes. Also, for the same reasons, I find Holbrook's testimony insufficient to contradict Goble's deposition testimony that he (Goble) checked the blast holes for cracks, and sealed them with bags of dirt that he placed in the holes (Ex. R-3 pp. 32-35). I thus find that the Secretary has failed to establish the above assertion.

iv. "[T]he blaster did not measure the amount of muck or spoil in front of the highwall prior to setting up the blasting

area." (Id.)

The Secretary cites Holbrook's testimony as the basis for its allegation that Goble failed to measure the amount of muck as follows:

> Q. Did you ever see Mr. Goble get down in the area that was in front of the first–below the first shot in the open shot
>
> A. No, not that I know of. I don't know.

(Tr. 254).

I find this testimony insufficient to contradict Goble's testimony that on the day of the shot in issue he measured fifteen feet out from the first row of holes, and marked that distance with colored boxes that he set out. (Ex. R-3 p. 26). I also note the following deposition testimony of Goble:

> Q. So there is spoil that goes out at least fifteen feet in front of the highwall that's going to be your first shot?
>
> A. Well, more than that, probably.

(Id.)

Thus, it can reasonably be inferred that Goble did take cognizance of at least fifteen feet of spoil in front of the shots that he measured. I thus find that the Secretary has failed to establish the above assertion.

v. "[T]he blaster did not measure or examine the distance between the first set of drill holes and the edge of the highwall bench set for blasting." (*Id.*)

I note that Goble, in his deposition, set forth various measurements that he made regarding the distance between the first set of drill holes and the edge of the highwall bench. The Secretary has not presented the testimony of anyone with personal knowledge to contradict that testimony. Therefore, I find that the Secretary has not established the above assertion.

vi. "[T]he loaders had undercut the drill bench while removing muck as was evidenced by the physical factors from the blast." (*Id.*)

In support of this assertion the Secretary cites the testimony of Lobb as follows: " So the procedures that I heard when I was at the mine site, as well as the observation of the area, left me

the conclusion that a good portion of the highwall had been over-dug to get that much flyrock." (Tr. 413). I find the testimony too vague and unspecific to establish the Secretary's factual assertion of the Secretary regarding any action of loaders. I thus find that the Secretary has failed to establish the above assertion.

vii. "[T]he blaster failed to distribute the powder used to execute the blast evenly which resulted in a stiff blast." (*Id.*)

In support of the above assertion the Secretary relies on Lobb's testimony as follows:

Q. Does the powder factor play any role if you have a rigid pattern setup?

A. The powder factor is important. It's been used for over 180 years for blasting design, but, also, powder distribution is the important part of blasting.

An example, if you put 1,000,000 tons of explosives under the middle of a mountain and blow it up, you know, you could have a powder factor like they used here of .5 or .5, and you wouldn't get a good break on the mountain. But if you distribute that same powder in a thousand blastholes, the rock would break uniformly, or more uniformly. So the powder distribution is as important or more so than what the powder factor is.

Q. Is there anything in the powder distribution in this blast that concerned you?

A. I think the powder distribution is too concentrated. In other words, the holes are too big in diameter.

Q. Too what? Answer: Too large a drill hole. Question: Why is that?

A. Because the stiffness ratio that we just discussed is 1 instead of 3 to 4.

Q. Why would it be necessary to have a less concentrated powder distribution when you have that stiffness ratio?

A. If we distribute the powder more evenly, then when the explosives detonate, the intersecting cracks in the rock have less chance to break up the blast forces and you have more uniform breakage of the rock and a lot less potential for flyrocks. Question: Would one – Could you read the last answer back, please. (The last answer was read back.) Okay.

Q. How would the powder distribution have been– in you opinion, if a reasonably prudent blaster had done this blast, how would the powder distribution, the design of the blast change?

A. A reasonable prudent blaster should have used smaller drill hoes and more of them. The powder factor was reasonable and the other parameters of the burden and so forth were reasonable, but the holes were too big for this area.

(Tr. 397-99).

I find this testimony unclear and confusing, and accord it little probative value. Further, the testimony does not set forth with any degree of specificity the factual basis for the conclusion asserted by the Secretary that the blaster failed to distribute the powder used to execute the blast evenly. Nor does it provide any factual basis as to how the powder was actually distributed. I thus find that the Secretary has failed to establish the above assertion.

viii. "[T]he blaster was focused on avoiding the rock rolling off the back of the shot and leaving the permit zone." (Response p. 7).

In support of the above assertion the Secretary relies on Stewart's testimony as follows:

Q. Is there some kind of violation with the Office of Surface Mining or with the state DNR if you have rock that goes beyond the permit line?

A. Yes, there are

Q. And do you know what the ramifications of that is?

A. It varies. It's according to the severity of the flyrock.

Q. So is every rock that goes beyond the permit line considered flyrock?

A. Yes, if it leaves the permitted area.

Q. You can get different amounts of civil penalties?

A. Exactly.

Q. Can it also be taken into consideration on granting further permits?

A. Yes.

Q. As a blaster, do you take very careful consideration of where the permit line is when you get close to it?

A: Yes, I do.

Q. Okay. Do you develop – and do you call all the shots that are close to that permit line "no spoil shots"?

A. Yes.

(Tr. 63).

I find that the above cited testimony fails to establish the Secretary's assertion of what Goble was "focused on." (Response p. 7).

In the same fashion, The Secretary also relies on the following testimony by Stewart:

Q. So you're getting the very last burden off you can get without messing up and going off permit there?

A. Exactly. Question: So it's critical to stay and make it all go in one direction; is that right?

A. Yes.

(Tr. 91).

I find that the Secretary's assertion as to what Goble was focused on to be hypothetical and without support in the record regarding his state of mind. I further find that the cited testimony of Stewart relates solely to general blasting practices, and does not address the specific factors not considered by Goble.

ix. "[W]hile the blaster did have a mirror for using to measure the shot, he did not use the mirrors for each hole loaded." (Response p. 7).

In support of the assertion that Goble did not use the mirrors for each hole loaded, the Secretary relies on the testimony of Holbrook who was present on the date in issue. Holbrook was asked whether he did it for every hole and his answer is as follows: "I don't think he used them on every hole, but he usually does." (Tr. 248). I find this testimony to be insufficient to establish, by a preponderance of clear and convincing evidence, that Goble did not use mirrors in every hole. I thus find that the above assertion has not been established.

x. "[T]he blaster failed to give the persons working in the parking lot area directly in front of the shot notice that it was time for a blast." (Response p. 7).

In support of this assertion the Secretary relies on the testimony of Terry Monroe Adams, Jr. who was on the site on July 16 working with mechanics. He was asked whether anybody told him or whether he heard on the CB radio that there was going to be a blast. He answered as follows: "nobody commented on it." (Tr. 265). This testimony certainly falls far short of establishing that a notice was not given regarding a blast. Moreover, the fact that any warning had not been communicated to Adams is not sufficient to negate the testimony of Goble, based on his own action on the day in question, that he gave a siren warning and said into the CB radio: "fire in the hole." (Ex. R-3 p. 66).

B. Conclusion

Based on all the above, I conclude that (1) the Secretary failed to establish a preponderance of clear and convincing evidence the blasting area that was designated by Cam prior to the blast, (2) the Secretary has failed to establish the specific blasting area that a reasonably prudent person familiar with mine blasting would have established prior to the blast, *See Central Appalachian Mining,* 29 FMSHRC 430 (June 2007) (ALJ); *Austin Powder Co.,* 5 FMSHRC 83, 122 (Jan. 1983) (ALJ), and (3) The Secretary has failed to establish the specific physical factors that would have been used by a reasonable prudent blaster in establishing a blasting area that were not considered by Cam.

For all these reasons, I conclude that the Secretary has failed to establish that Cam violated section 77.1303(h), *supra.*

ORDER

It is ordered that Citation No. 7428799 be dismissed. It is further ordered that within 30 days of this decision, Cam shall pay a civil penalty of $1,000 for the violation of section 77.1000, *supra*

Avram Weisberger
Administrative Law Judge

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April 29, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2010-312 A.C. No. 46-07908-203763
v.	:	
PINE RIDGE COAL COMPANY, LLC, Respondent	:	Mine: Big Mountain No. 16

DECISION

Appearances: Jessica R. Hughes, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Melissa M. Robinson, Esq., and Rodney W. Stieger, Esq., Charleston, West Virginia, for Respondent.

Before: Judge McCarthy

I. Statement of the Case

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Pine Ridge Coal Company, LLC ("Pine Ridge" or "Respondent"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

Respondent operates a large mine called Big Mountain No. 16 in Boone County, West Virginia. This case involves one section 104(d)(1) Order No. 8093139 issued by MSHA inspector Brandon Ellison on August 17, 2009,[1] alleging an unwarrantable failure to report a roof fall accident to MSHA within 15 minutes under 30 C.F.R. § 50.10.

30 C.F.R. § 50.10 provides, inter alia, that the operator shall immediately contact MSHA at once without delay and within 15 minutes once the operator knows or should know that an accident has occurred . . . ." 30 C.F.R. 50.2(h)(8) defines accident to mean "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage."

[1]All subsequent dates are in 2009, unless otherwise indicated.

The condition specifically alleged in the August 17 Order is as follows:

> "The mine operator has failed to immediately report a roof fall that occurred on 8-13-2009 that was above the anchorage zone. This fall pulled out 2 roof bolts and damaged 2 roof bolt plates. The fall was in the 6 left face on the 020-0 MMU and fell onto the continuous miner on the day shift. The fall measured 8' wide x 20' long x 7' high. Six foot torque tension bolts were being used in ths area. A 103 (k) Order was issued on 8-17-09 @ 1220 when discovered by MSHA to protect the health and safety of the miners on the 020-0 mmu (East Section). Reference order # 8093136. After the roof fall occurred, the operator has allowed mining to continue on the East Section. Mine Management has engaged in aggravated conduct constituting more than ordinary negligence by not immediately reporting the fall on 8-13-09 within 15 minutes of learning of the condition. This condition is an unwarrantable failure to comply with a mandatory standard."

G. Ex. 1.[2]

On August 20, said Order was modified based on the results of MSHA's additional investigation on August 18. The modified Order reads:

> Upon further investigation, in addition to having a roof fall at or above the anchorage zone in the #6 left face that pulled out 2 permanent roof supports (roof bolts), ventilation to the #6 face has been impaired due to the roof fall and the severe adverse roof conditions in the area. The ventilation control in the form of a line curtain is approximately 47' from the last row of roof bolts and approximately 75' from the unsupported face when measured with a digital range finder. Passage of persons has also been impeded to the last row of roof bolts in the #6 entry. This face area has not been examined by the operator since the occurrence of the roof fall on August 13, 2009. A set of breaker posts dangering the #6 heading off were placed approximately midway from the mouth of #6 heading to the projected #6 left cross cut due to the hazardous conditions present.

The 104(d)(1) Order alleged the gravity of the violation as no likelihood of injury, no lost workdays, and non-significant and substantial (non-S&S), with one miner affected. Negligence was alleged to be "reckless disregard."

The parties stipulated to jurisdictional issues, authorized representative status, and the authenticity of the violator data sheet in G. Ex. 1. Respondent's Answer to the Petition for Civil Penalty denies the following: any violation; the validity of the proposed $2,000.00 civil penalty; the unwarrantable failure finding; and the gravity and negligence findings, particularly "reckless disregard."

An evidentiary hearing was held in Charleston, West Virginia. The parties introduced

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[2]In this Decision, the Petitioner's or Government's exhibits are designated G. Ex. #, Respondent's exhibits are designated R. Ex. #, and volumes one through three of the transcript are designated as Tr. I, II, or III, followed by the transcipt page number(s).

testimony and documentary evidence. Witnesses were sequestered.[3]

Respondent moved for partial summary judgment with respect to the unwarrantable failure issue, contending that any violation was of a regulation and not a mandatory safety standard. See *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). Procedurally, the Secretary opposed the Respondent's motion as untimely filed.[4] Substantively, the Secretary argued that the original regulation was re-promulgated as a mandatory standard in a December 8, 2006 Final Rule published pursuant to Title 1 of the Act. I reserved ruling at the outset of the hearing, pending further briefing on the issue of whether MSHA gave fair notice of its intention to enforce the § 50.10 reporting requirement as a mandatory standard.

For the reasons set forth below in Section III A, I deny Respondent's motion for partial summary decision and find that Respondent's failure to report the roof fall within 15 minutes of its occurrence constitutes an unwarrantable failure to comply with a mandatory safety standard. I increase the penalty from the proposed statutory minimum of $2,000.00 to $6,000.00.

On the entire record, including my observation of the demeanor of the witnesses,[5] and after considering the extensive post-hearing briefs and Respondent's reply brief, I make the following:

II. Findings of Fact

A. The August 13 Unreported Roof Fall

During the day shift on Thursday, August 13, Respondent had one miner crew, one bolt crew, four coal hauler operators and a scoop deployed on the 020-0 MMU (East Section). (Tr. II. 184, 242). John Pauley was the foreman in charge of the East Section (Tr. II 180). Pauley reported to erstwhile mine manager, Dave Belcher, who had been promoted to mine superintendent by the time of the hearing. (Tr. II 193-94, 298, 311). The whole East Section had adverse roof conditions in every entry as Respondent drove on the outcrop with low cover. (Tr. II 243).[6] There were very bad roof conditions and cracks across the section, which were very

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[3]Respondent's direct examination of its witnesses was replete with leading questions, despite repeated admonitions from the bench.

[4]Prior to the hearing, I declined to dismiss the motion as untimely filed since Respondent would likely raise the issue by way of alternative motion at hearing. The motion was held in abeyance for further briefing and argument, particularly on the fair notice issue.

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

[6]The immediate roof of the 8-10-foot coal bed being mined varied form less than a foot to 5 feet of shale. Above that was 5- 80 feet of sandstone. (Tr. II 379; Ex. 9, p. 2; R. Exh. 3, p. 1). The mine had considerable subsidence and had been extensively undermined (Dorothy coal

dangerous. (Tr. I 72-73, 76-77; Tr. III 433-34).

Steve Kinder was operating the high-voltage continuous mining machine remotely in the 20-foot wide No. 6 entry, turning the left cross cut. Lee Daniels was his helper. (Tr. II 190, 345; Tr. III 193). The primary air intake from the blowing ventilation system went from right (No. 6 entry) to left (No. 1 entry). (Tr. I 81; Tr. II 20, 345; Tr. III 46). Six-foot torque tension bolts with 24 inches of resin or glue (grout) were used for roof support in the entry. (Tr. I 213-15, 249; Tr. II 351; G. Ex. 9, p. 2 para 2(e); R. Exh. 3, p. 2, para. 2(e)). There were two parallel surface cracks in the roof where the miner was taking the first cut in the No. 6 left cross cut. (Tr. II 221-22).[7] Reflectors were hung two roof bolts back to indicate the red zone,[8] and to signal against walking inby the danger area where cutting was taking place in unsupported top. (Tr. II 198, 223-24). Prior to the roof fall, a ventilation line curtain hung from a roof bolt about four feet from the right rib and had been advanced to within three rows of the roof bolts where the No. 6 left cross cut was being turned. (Tr. II 225, 226, 345).

Toward the end of the day shift, after several haulers had been loaded and the left crosscut had been turned about 20 feet deep, a large piece of sandstone fell between surface subsistence cracks from unsupported top onto the drum of the continuous miner as it was cutting. (Tr. II 186-87, 286-89, 353, 416; G. Ex. 8, p. 5). Although Kinder and Daniels were both employed by Respondent at the time of the hearing, neither were called by Respondent to testify about the fall. (Tr. II 222-23). Nor did the Secretary subpoena them or take their depositions.

Pauley was not present when the rock initially fell on the continuous miner. (Tr. II 221, 289). He was standing in the last open crosscut, where ventilation check flies were present, about 60-70 feet away. (Tr. II 209-10). Pauley heard the fall, however, and Kinder and Daniels hollered. (Tr. II 211, 290). When Pauley approached, he noticed that the two miners were visibly shaken up. (Tr. II 288, 290). Kinder and Daniels told him that a big rock fell out between the parallel cracks onto the continuous miner as they took a cut. (Tr. II 292). Contrary to Order No. 8093139, which represented an approximation, I find that the height of the rock varied between about 4.5 feet and 5.5 feet high, as set forth in R. Ex. 10.

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seam) and over-mined (Lewis Stockton) (Tr. II 436; G. Ex. 8, p. 4 and 6; R. Ex. 3, p.1), but had no history of liberating methane. (Tr. III 40, 43).

[7]Belcher testified that similar parallel surface cracks existed across the entire East Section. In addition, there was an unusual block of coal that had separated from the roof in the No. 3 entry, and one could look over top of it to the next entry 100 feet away. Belcher had never seen anything like that in 31 years of mining. Tr. II 354. Further, Belcher explained that it was dangerous to mine where double parallel surface cracks were present, because rock was likely to fall. See Tr. 350-51.

[8]Belcher testified that when tramming the continuous miner, the red zone extended from the end of the boom to the cutting head of the miner, but when mining coal, miners were allowed to be in that area and a "red zone area is in an active working place." (Tr. II 364, 367).

Pauley testified that the rock was not anchored to the roof and the entire rock fell in one solid piece. (Tr. II 188, 210). Pauley, Kinder and Daniels collectively decided to raise the miner head up against the roof and back the machine up so the rock could slide off the miner and fall to the floor. (Tr. II 189, 288, 291, 294). Pauley testified that when they did so, the miner pulled or dragged the rock into the supported area of the No. 6 entry. (Tr. II 203-04, 274-76). The rock fell to the ground in both supported and unsupported top after being dragged by the miner. (Tr. II 274-76, R. Ex. 10).[9]

According to Pauley, during this process, the continuous miner tore out a couple of roof bolts that were at the edge of the cut (Tr. II 189, 193, 201), and the boom of the miner caught the line curtain and pulled it down. Thereafter, the line curtain was never moved back up to comply with the 50-foot waiver that MSHA had granted Respondent. (Tr. II 228).[10] Pauley testified that when a curtain is down, ventilation is automatically compromised. (Tr. II 279). Shortly thereafter in testimony, Pauley volunteered that a downed curtain impedes ventilation (Tr. II 280), and then testified that it always impairs the volume of air in the area. (Tr. 280).

After the rock fell to the ground, the continuous miner was backed out to the last open crosscut. (Tr. II 191). Sometime during the next 10 minutes, miner representative, Charlie Mullins, who runs a roof bolting machine, became aware of the incident and had a discussion with Kinder, Daniels, and Pauley. (Tr. II 297-98). Pauley described the discussion as a "confrontation" regarding whether there was a [reportable] roof fall (Tr. II 190-91). "They were making the decision that it was a roof fall." (Tr. II 298). Pauley told them, however, that it was not a roof fall. (Tr. II 298, 236). Pauley made the determination that the event was not reportable. (Tr. 191-93). In his testimony, Pauley explained that it was just a piece of rock coming down in unsupported top during normal mining practice, and it did not damage the bolts in the intersection where the roof supports were present, or compromise the anchorage of the roof bolts in the area. (Tr. II 191-93). Rather, Pauley determined that the roof bolts were damaged by the cutter head of the continuous miner as the rock was raised up to the roof, and the miner was backed up in an effort to remove the rock. (Tr. II 189, 193, 201).

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[9]All maps or diagrams of the rock fall establish that it extended several feet into the bolted No. 6 entry from unbolted 6 left, about half way to the second row of roof bolts. (G. Ex. 5, p. 4; G. Ex. 6, p. 6; R. Ex. 10).

[10]At one point, Pauley testified that the line curtain was put back up before the crew left the section (Tr. 231), but later testified that there was a piece of curtain missing after the area was dangered off. (Tr. 251). I discredit Pauley's testimony that the line curtain was put back up to ventilate the face, when the day shift left the section. (Tr. II 231). Pauley's own inconsistent testimony (Tr. II 228), and the testimony of his boss, Dave Belcher, establish that after the fall, the line curtain was no longer within 50 feet of the face. For example, on cross-examination, Belcher testified that when he examined the rock fall the next day, the line curtain was 70 feet outby the No. 6 face and had been torn down. (Tr. II 369).

Pauley had enough reservations about his determination, however, to call Belcher on the surface. (Tr. II 193-94, 298). Pauley explained what happened, including his discussion with Mullins and crew. Based on Pauley's explanation, Belcher agreed that the roof fall was not reportable. (Tr. II 194, 299-300). Belcher had to rely on what Pauley told him based on Pauley's observations at the scene. (Tr. II 237-38). As Belcher put it, "I had to trust his judgment, what he told me on the mine phone that day," to meet the 15-minute reporting requirement. (Tr. II 404). "If I'm wrong, I'm wrong: if I'm right, I'm right." (Tr. II 406).

Belcher testified that the reporting issue was not even a "close call" based on what Pauley told him. "I mean, to me, it's - it's everyday mining. ... To me, it's not a roof fall until you support it with roof bolts. And then if it's above those roof bolts and falls out, then that's a reportable roof fall, in my opinion." (Tr. II 416-17). A truncated version of Belcher's conversation with Pauley follows:

> And John called outside and said, you know, "We had a piece of rock fall up here in the 6 break left." He said, "I just want to try to get some leeway. Do you think I need to report?"
>
> I said, "Well, what's happened?"
>
> He said, "Well, during the cut, the rock fell out."
>
> I said, "Well, did it tear out bolts?"
>
> He said, "No."
>
> And I said, "Well," I said, "unless it's above anchorage or it impedes passage, John, or it impedes your ventilation," I said, "no, it's not reportable."
>
> And he said, "Well, that's what I thought, but," he said, "I just wanted to make sure."
>
> I said, "Well, there's nothing wrong with that."
>
> . . . .
>
> He said, "Well, it's got a -- it fell on top the miner. It's got a bolt in it." He said, "When we backed out with the miner, we broke that bolt off." I said, "Well, John, it still ain't -- you know, it's not above anchorage, so it's not reportable."

(Tr. II 314-17).

After Pauley called out the fall, Belcher told him to put up reflectors because Respondent was going to clean the rock up and roof bolt the area. (Tr. II 194). Pauley testified that the crew had safe passage past the fallen rock to leave the No. 6 entry at the end of their shift. (Tr. II 205, 209).[11]

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[11]Although the crew exited safely, I find that the unsupported top created by the dislodged roof bolts between parallel surface cracks made travel in the area hazardous, as Respondent admitted in August 17 and 18 shift reports (R. Ex. 8, pp. 26-27), and through the testimony of Belcher that travel in the No. 6 entry was unsafe after the fall. (Tr. II 348-49).

Pauley testified that he did not indicate what happened in the August 13 on-shift report because he saw no reason to do so. (Tr. II 213). Although acknowledging that he would report dangers in the on-shift book, Pauley testified, "I didn't have no potential hazard ... I didn't see no potential hazard." (Tr. II 214). Pauley's pre-shift report for August 13 for the No. 6 entry under the heading "Violation or Hazardous Condition," indicates that a "scrap" cut was called out at 3:18 p.m. (Tr. II 240; R. Ex. 8, p. 5). Consistent with his discussion with Belcher, Pauley was expecting the next shift to clean up the rock and bolt the area. (Tr. II 240-41).

Instead, the evening shift "dangered off" the No. 6 entry and left crosscut, as reflected in the on-shift report. (Tr. II 241; R. Ex. 8, p. 6). Belcher explained that when he lined out miners for the evening shift, he asked shift manager Jim Martin to "at least go up there and look at [the fall], see if you think we need to do anything additional . . . ." According to Belcher, Martin called back outside, "Dave, this is just normal procedure. We – you know, we've encountered this before. This ain't reportable." (Tr. II 318).

Based on Martin's report, Belcher did not think it was necessary to examine the fall. (Tr. II 32). Belcher further testified that normally, if it was a reportable fall, he would examine the fall immediately and make a judgment call. (Tr. 320). This testimony makes little sense, however, if Belcher could not reach the fall site within 15 minutes to determine reportability, and thus was forced to rely on the reports of others, such as Pauley's report in this case. Moreover, according to Belcher, Martin did not review the fall until around 5 p.m. on the evening shift, about an hour and one-half after the incident, well past the 15-minute reporting deadline. (Tr. II 337). Thus, Belcher had to rely on the judgment of Pauley, as it took more than 15 minutes, indeed about 45 minutes, to reach the site of the fall from the surface. (Tr. I 78; Tr. II 404). Moreover, Belcher did not speak to operator Kinder until later that evening, when Belcher learned that Kinder had expressed concerns to Pauley about reportability, that Pauley had told Kinder that the fall was not reportable, and that Pauley was going to call Belcher and make sure. (Tr. 390). Like Kinder and Daniels, Martin did not testify. I give Belcher's testimony about his conversation with Martin little weight.

Despite Belcher's account of Martin's report, Belcher testified that he then told Martin to "breaker off" the entry. Belcher testified:

> "Well, with the multiple cracks that's in that entry, No. 6 entry," I said, "let's just go ahead and breaker it off." I said, you know, "The rock fell in there." I said, "For the safety and health of -- you know, of everybody that's supposed to be in there, let's just go ahead and breaker it off." And that's what we did.

(Tr. II 318).

Belcher considered the No. 6 entry stopped at that point. As he put it, "[w]e was no longer going to proceed into that crosscut because our ultimate goal was to punch outside [through another entry] and get to pillaring." (Tr. II 318). ". . . [W]e was trying to butt off and punch outside." (Tr. II 324). Frederick Collins, senior safety manager for Respondent's parent, Patriot Coal Corporation, confirmed that Respondent only needed one of the entries "punched to the outside to finish that unit up and get completely out of there, so it wasn't necessary for us to mine that place, in those bad conditions." (Tr. II 435).

B. The Day After the August 13 Roof Fall

Belcher recalled a conversation on Friday, August 14, with state inspector Kerry Herron from the West Virginia Office of Miners' Health Safety and Training (WVOMHST). According to Belcher, Herron had issued a roof control violation during the hoot owl shift on August 13-14 for adverse conditions that required supplemental bolting throughout the East Section. (Tr. II 320, 334).[12] Also according to Belcher, Herron told Belcher that Pine Ridge had done an "outstanding" job on the section, but Herron just wanted to see more. (Tr. II 334).

Belcher testified that when he asked Herron about "6 break left," Herron replied, "Well, you've got that breakered off." When Belcher then asked what Herron thought about the fall yesterday, Herron purportedly replied, "Well, just a normal rock fall, just like getting a cut of coal. I did see the surface cracks in there, but I didn't go inby the breaker line." (Tr. II 322). On questioning from the bench, Belcher testified, as follows:

> And then, of course, I did ask him about the rock in No. 6 left, just for a simple reason, just to try to clear my conscious [sic] a little bit. Because anytime something like that comes up, you want to make sure about something. So not only did my section boss tell me that he didn't think it was reportable, I had a shift manager tell me the same thing.
>
> So I asked Kerry the same question, "Did you think that was a reportable roof fall?"
>
> He said, "Roof fall?" He said, "Well, no, that's just part of the cut, ain't it?"
>
> I said, "Well, that's my opinion too. I just wanted to know what you thought, because there was a question brought up yesterday about should we have reported or not, by the boss, you know, John -- when John had called out." And I said, "I'm just trying to get some confirmation on it." That was pretty much the end of us discussing that in 6 left.

(Tr. II 334-35).

I do not credit Belcher's recollection of this hearsay from Herron. I give it no weight. It is self-serving testimony on the critical legal issue of unwarrantable failure. It is uncorroborated by any notes from Respondent, by any documentation of the alleged August 14 inspection or

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[12]WVOMHST inspector Herron, a former Pine Ridge employee, had worked under current safety and training manager, Dave Ashby. Ashby was Respondent's non-sequestered representative and the last witness to testify at the hearing. (Tr. III 71, 105-06). Herron provided Respondent's counsel with a notarized affidavit dated November 15, 2010 (R. Ex. 13), which I received in evidence over strenuous hearsay and relevancy objections from Petitioner's counsel, who also raised standing objections to receipt of any evidence from WVOMHST. (Tr. 1, 17-26, 33-34; Tr. 11, 322-25; Pet. Br. at 22-26). As I informed the parties in pre-trial conferences and reaffirmed at the hearing, I find Herron's affidavit and the WVOMHST hearsay relevant to the unwarrantable failure issue and admissible evidence under Commission Rule 63. As explained herein, however, I give such evidence no probative weight.

violation, or by Herron's own affidavit. (Tr. 372-75; R. Ex. 13). In fact, Herron's affidavit makes no mention of this conversation with Belcher. (R. Ex. 13). Significantly, Herron's affidavit places his examination of the fall about a week after the incident, not the day after. Herron's affidavit specifies that "[a]pproximately one week after the fall occurred...," he examined the fall from the breaker line while traveling with an unidentified Pine Ridge supervisor. (R. Ex. 13, para. 3 and 7).[13]

Similarly, I place minimal weight on Herron's November 15 affidavit.[14] Herron did not testify because Respondent never effected service of its subpoena on him. Accordingly, Petitioner was unable to cross examine Herron on the truth of the matter being asserted -- his opinion that the fall was not reportable -- and the basis for that opinion. Similarly, the Petitioner was precluded from inquiring into potential bias in light of Herron's past employment by Respondent. Likewise, Petitioner was precluded from exploring the circumstances surrounding Respondent's counsel's preparation of Herron's affidavit and how Herron obtained personal knowledge of the facts alleged therein. Thus, while Herron's hearsay opinion on the ultimate issue is admissible as relevant evidence under Commission Rule 63 and Fed. R. Evid. 704(a), I find the evidence unreliable and sufficiently lacking in circumstantial guarantees of trustworthiness.

Despite Belcher's testimony that he saw no need to view the roof fall after receiving Martin's report, Belcher and superintendent Ryan Toler did examine the roof fall the next day from the breaker line.[15] Belcher testified that he saw one roof bolt in the rock with the plate still on it, and "as you looked up where it fell out, you could see where it sheared off." (Tr. II 385-87, 389). Belcher unequivocally testified that when he viewed the fall with Toler on August 14, he saw one damaged bolt, which still had the plate on the bottom of it. (Tr. II 386, 388, 391, 398, 416, 419).[16] When shown R. Ex. 10, a diagram of the roof fall prepared by Respondent's surveying agent about a week after the fall, Belcher admitted that if a roof bolt was pulled out by

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[13]As found below, Herron was part of the state inspection party present on August 18, which was five days after the roof fall at issue, and a day after the 104(d)(1) Order had been issued and thereafter reported by Respondent. Also as found below, on August 18, state roof specialist, John Griffith, issued a control order (R. Ex. 14) and violation for adverse roof conditions throughout the section (R. Ex. 15).

[14]In his affidavit, Herron opines that the roof fall was not a reportable "accident" under West Virginia law §22A-2-66(a)(8), which is identical to the definition of "accident" in 30 C.F. R. 50.2(h)(8). (R. Ex. 13, para. 4; R. Ex. 4)). Herron's opinion is consistent with Respondent's defense on the anchorage zone issue. Herron's affidavit, however, does not address whether the roof fall impaired ventilation or impeded passage.

[15]Belcher "thinks" he told Toler about Pauley's description of the fall. (Tr. II 413-14). Toler did not testify.

[16]Collins testified, however, that there was a roof bolt protruding out of the rock with residue on the bolt, and there was another roof bolt that was sheared off. (Tr. III 33).

the fall as indicated on R. Ex. 10, then the roof support going across that entry would be compromised. (Tr. II 395-96).[17] Belcher further testified that the fallen rock was pie-shaped and about 4.6 feet tall where the bolt went through it, and that two rows of roof bolts had been compromised by the roof fall, as shown on R. Ex. 10. (Tr. II 396, 414-15).

Nevertheless, on cross examination, Belcher testified that the missing roof bolts did not impede access to the No. 6 face, and that a certified foreman would be able to walk inby to fireboss that face by staying over on the right rib side where the roof bolts were intact. (Tr. II 397-98). I find, however, that safe passage to the No. 6 face was impeded. I emphasize Belcher's previous testimony on direct examination that he set the breaker lines because travel to the No. 6 face was unsafe for anybody that worked in the No. 6 entry after the fall. (Tr. II 348-49). In addition, Collins credibly testified that safe travel to the No. 6 face had been breakered off, and the No. 6 entry was pre-shifted at the breaker line. (Tr. III 29-30, 34). Similarly, on cross, Pauley conceded that Respondent was unable to go up to the No. 6 face to conduct required exams every two hours. (Tr. 245). Instead, pre-shift and on-shift exams were conducted outby the breakers. (Tr. 245, 436-37).

In addition, it is noteworthy that Respondent's own pre-shift and on-shift reports indicate unsafe travel impeding passage to the No. 6 face after the fall. The pre-shift exam for the August 13-14 hoot owl shift and for the succeeding shift indicates that the No. 6 entry and left cross cut were dangered off, although no reason was given to communicate what hazard was present or why the area had been dangered off. (Tr. II 244-48, R. Ex. 8, p. 7 and 9). The on-shift report for the first shift on August 14 again indicates "dangered off," and under "action taken," indicates "danger off - breaker off." (Tr. II 249; R Ex. 8, p. 10).

Pauley conceded that the No. 6 entry was so dangerous that it had been breakered off with timbers by August 14. In fact, the pre-shift report for the No. 6 entry indicated "stopped," meaning no one was going inby the timbers (Tr. II 250–51; R. Ex. 8, p. 110). Pauley testified that no one went inby the timbers to the No. 6 face to ensure compliance with the ventilation plan, or to replace the piece of curtain that the continuous miner had torn down. The No. 6 entry was not sealed off, however, and remained in the primary air intake with an incomplete crosscut to the No. 5 entry. (Tr. II 251-52, 256-57).[18]

Belcher opined that the ventilation to the No. 6 face was not impaired by the rock fall because there was a sufficient amount of air traveling up the primary intake. (Tr. II 345-47).[19]

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[17]R. Ex. 10 indicates where a roof bolt was pulled out by the fall, where a roof bolt plate and head were missing, and where a roof bolt had a damaged plate.

[18]MSHA inspector Ellison testified that Respondent's ventilation plan required connection of the entries, but the ventilation plan is not in evidence. (Tr. I 87). Absent such best evidence, I decline to credit any testimony about the actual contents of the ventilation plan.

[19]Similarly, Collins testified that while he was at the breaker line in the primary intake on August 18, he did not see any evidence of impaired ventilation as the curtain "came up to the breaker line" and pre-shift exams were taken at the breaker line. (Tr. III 28-29). Collins did not

Belcher acknowledged, however, that the line curtain takes noxious gas, coal dust, and bad air down the return and back out, and that all ventilation curtains or controls should be in place, even when the section is idle. (Tr. II 346-47). Furthermore, on cross, Belcher admitted that breakering off the No. 6 entry did not relieve Respondent of the obligation to ventilate the No. 6 face (Tr. II 369-70, 392), and he was compelled to concede that the ventilation curtain should have been in place. (Tr. 369-70). Similarly, on unrelenting cross examination, Collins conceded that Respondent could have accounted for the safety of its miners and called MSHA to get a waiver of the requirement that the curtain be within 50 feet of the face. (Tr. III 44-46).

C. MSHA's August 17 Inspection and 103(k) and 104(d)(1) Orders

The August 17, 2009 pre-shift exam was called out at 7:20 a.m. and indicates that the No. 6 entry was "dangered off." Midnight shift foreman Dale Helmandollar wrote, and then crossed out and initialed, "H2O to face." (Tr. II 246, 262-64; R. Ex. 8, p. 23).

At about 9 a.m. on August 17, 2009, certified MSHA inspector, Brandon Ellison, from the District 4 field office in Madison, West Virginia, traveled to Big Mountain No. 16 mine to continue his quarterly EO1 inspection. (Tr. I 51–53, 69, 71).[20] It took several months to inspect the whole mine and Ellison had already completed his inspection of the 020-0 MMU (East Section) (Tr. I 55, 73).

When Ellison arrived, the United Mine Workers of America (UMWA) representative asked him to look at some specific conditions on the previously inspected 020-0 MMU (East Section) because of some very bad roof conditions and cracks across the section, which were very dangerous. (Tr. I. 72-73, 76-77). Ellison checked the pre-shift/on-shift reports. As noted, they indicated that the No. 6 entry was dangered off without explanation of hazard. Moreover, Respondent's safety supervisor, Justin Ray, could not provide Ellison with any rationale for the danger. (Tr. I 73-75, Tr. II 122).

An inspection party of Ellison, Ray and Mullins then traveled underground for about 45 minutes on what Ray described as an "imminent danger" run to the East Section and No. 6 entry. (Tr. I 78; Tr. II 126). As noted, the No. 6 entry had been dangered off with timbers and Ellison could see a single, large rock of varying thickness, approximately 20' feet long, 8' wide and 7'

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know, however, how far the curtain extended past the breakers. (Tr. III 48). Collins further testified that the line curtain was allowed to stay 50 feet from the unsupported face, and although he did not know how many feet away it was when he saw it on August 18, he acknowledged that if it was more than 50 feet, it would not be in compliance with Respondent's ventilation plan. (Tr. III 40-42).

[20]At the time of the inspection, Ellison had been been with MSHA only 14 months, since June 2008. He had three prior years of experience in the mining industry as a general laborer and safety technician for a coal company. While not green, Ellison was not very seasoned. (Tr. I 51-52).

feet thick.[21] Ellison also saw 6 to 8 inches of two, six-foot-long, tension rebar roof bolts with resin glue at the end, protruding upward through the rock. Ellison credibly testified that the rock had fallen under cracked roof that dropped three or four inches. (Tr. I 78-80, 91-93).

When Ray and Mullins could not answer Ellison's inquiries about the fall, they summoned Pauley. (Tr. I 103; Tr. II 127). Pauley told Ellison that the fall occurred about the end of the day shift on August 13, and that Pauley reported to management (Belcher) that a rock had fallen on top of the miner, which was the last Pauley heard about the incident. (Tr. I 105).[22]

After viewing the fall, the August 17 inspection party traveled across the rest of the section. (Tr. II 128). A scoop operator was rock dusting in the No. 5 entry about 120 feet from the fall. (Tr. I 83). Somewhere en route, Kinder told Ellison in Ray's presence that the roof fall came close to hitting Daniels, although Ray does not recall the remark. (Tr. I 107-08; Tr. II 169). Based on demeanor and Pauley's testimony that Kinder and Daniels were visibly shaken after the fall, I credit this hearsay testimony from Ellison.

After traveling the East Section, the inspection party returned to the No. 6 entry so Ellison could ask additional questions and take another look at the fall. (Tr. II 128). Ellison traveled about four to five feet inby the breaker posts, but two parallel cracks that extended from the fall across the whole entry, impeded Ellison's further safe passage inby the fall. "You could see where the roof had sat down, where the top had been broken," Ellison testified. (Tr. I 86).

Ellison further testified that despite the fall, Respondent was still obligated to examine the No. 6 face as part of its pre-shift and on-shift examinations, and to ensure that there was actual air movement at said face to eliminate dust, gas and other hazardous conditions, even though actual mining had ceased in that entry. Ellison opined that Respondent could not meet such obligations without conducting examinations at the No. 6 face, and the "[t]he conditions were too bad for anyone to travel up to that area." (Tr. I 87-90). He testified that one could not travel to the face under fully supported roof because the fall had pulled out two bolts and broke two of the plates off. (Tr. 96).

In addition, Ellison testified that a line curtain extended about three rows of bolts past the breaker posts and was much more than 50 feet from the No. 6 face, thereby exceeding Respondent's ventilation waiver from MSHA. Since the line curtain was not providing the ventilation the way it should have been, Ellison concluded "there's no way they could've really had the No. 6 face ventilated with the location of the curtain." (Tr. I 96-97, 111-12: G. Ex. 3). In fact, Ellison's contemporaneous notes state, "no way to ventilate face" and "pulled out two roof bolts above anchorage." (Tr. I 111, 113; G. Ex. 5, p. 3 and 5). Ellison explained that he could see the bolts with resin sticking out of the top of the rock, thereby indicating that the two-foot or 24-

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[21] As noted, contrary to Ellison's approximation of a rock 7 feet thick, I find that the height of the rock varied at points between about 4.5 feet and 5.5 feet high, as set forth in R. Ex. 10.

[22]Pauley could not recall speaking to Ellison on August 17. (Tr. II 265).

inch anchorage zone had been compromised. (Tr. I 113).[23]

After revisiting the rock fall, and noting several other hazardous conditions during his "imminent danger" run across the section, Ellison issued 103(k) Order No. 8093136 at 12:10 p.m.[24] That control order prohibited all activity on the East Section from spad #13331 inby until MSHA determined that it was safe to resume normal operations in this area. Only those persons selected from company officials, state officials, miner's representative(s) and others deemed by MSHA to have information relevant to the investigation were permitted to enter the affected area. G. Ex. 2.

At 3 p.m., Ellison issued the 104(d)(1) Order No. 8093139 at issue. Ellison explained why, in his opinion, the roof fall met each of the three disjunctive prongs of the regulatory definition of "accident," and should have been immediately reported. First, the operator should have recognized that the fall pulled roof bolts out and was above the anchorage zone. In addition, the area could not be traveled due to the hazardous conditions caused by the fall. Finally, by breakering off the No. 6 entry, the area could not be properly ventilated. (Tr. I 114).[25]

On direct examination by counsel for the Secretary, Ellison was presented with each of the Commission's factors for determining whether Respondent's failure to report the roof fall was an unwarrantable failure. Ellison testified that he considered each factor. I find that Ellison did not independently assess each factor before preparing the 104(d)(1) Order as he could not recall each of the factors when I questioned him. (Tr. I 221). I find, however, that Ellison was generally familiar with the relevant factors and credibly testified about his general thought processes and considerations at the time he issued the Order.

Ellison considered the extent of the hazardous condition, a large roof fall that occurred in

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[23]Contrary to the testimony of Ellison and the other MSHA inspectors, Belcher, Collins, and Ashby testified that there was nothing in Respondent's minimum roof control plan (see R. Ex. 3; G. Ex. 9) that informed them what the "anchorage zone" was for the six-foot torque tension bolts in use in the No. 6 entry. (Tr. II 341-44, 440-41; Tr. III 9, 130). Nor does MSHA provide any definition of anchorage zone. (*See also* Tr. III 131-132). Based on decades of collective mining experience, Belcher, Collins and Ashby testified that reportability was triggered at or above the length of the bolt, and that MSHA had never informed them differently. (Tr. II 344, 440-41; Tr. III 12, 152-154).

[24]Section 103(k) of the Act provides: "In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal."

[25]As District 4 Supervisor Terry Price told Ellison when observing the roof fall with an inspection party the next day, "[t]his looks like they hit the trifecta here," a roof fall in the 6 left crosscut at or above anchorage that impaired ventilation or impeded travel. (Tr. I 371-72).

active workings, where people actually were working. Ellison testified that the purpose of the reporting requirement is to inform MSHA of the accident so that MSHA can issue orders and approve rehabilitations plans to insure the safety of miners. (Tr. 116-17, citing section 103(k)). Ellison also considered the length of time that the violation existed. He testified that the failure to report lasted four days, from the afternoon of August 13 until the afternoon of August 17, and no one from management made any effort to inform Ellison of the roof fall when he arrived on August 17 to continue his quarterly inspection in other areas of the mine. (Tr. I 117). Ellison also considered the fact that Pine Ridge was knowledgeable about its reporting obligations and had a history of unplanned roof falls at the mine. (Tr. I 118; G. Ex. 12). Ellison further determined that the failure to report the roof fall could cause a high degree of danger, even though the area had been "breakered off," because miners were expected to return to the area during rehabilitation or cleanup, and the rock fall itself posed a high degree of danger to any miners working in the area. (Tr. I 118-19). Finally, Ellison considered Respondent's "very, very poor efforts" to abate the violation. (Tr. I 119). He concluded that the condition was obvious and should have been reported immediately. (Tr. I 121, 219).

Ellison credibly testified that when he initially observed the condition underground on August 17, he told safety specialist Ray that the fall was reportable and explained why. (Tr. I 19; G. Ex. 5, p. 7) Thereafter, at 1:15 p.m., Ellison told shift foreman Martin and section foremen Pauley that the fall needed to be reported. Once on the surface at about 2 p.m., Ellison told Belcher and Ashby about the 15-minute reporting rule and why Respondent was required to report the fall to the MSHA hotline. (Tr. 119; G. Ex. 5, pp. 7-8). Ashby told Ellison that he would make the call. Nearly an hour later at 2:55 p.m., when Ellison asked if Ashby had reported the fall, Ashby replied, "Not yet. I'm getting ready - - getting ready to." (Tr. I 120; G. Ex. 5, p. 8). At that time, Ellison called supervisor Price to discuss the situation and began writing up the instant 104(d)(1) Order.

Ellison considered mitigating circumstances, including Respondent's only argument that the fall did not occur in "active workings," and concluded that Respondent's continued refusal to report the roof fall despite his multiple requests, exhibited reckless disregard for the reporting requirement. (Tr. I 121-23, 219-220). As Ellison explained on probing for the bench:

> To me, the condition was obvious, at first, that they should've reported it
>
> . . . .
>
> I was borderline on the unwarrantable failure at that point; but after talking to them and telling them, "Hey, you know, you need to report this" -- I mean, I had two multiple discussions, and I have the times documented, and they still failed to report it. I felt that that just increased their negligence to high and reckless disregard.
>
> And they didn't actually call it in until after I wrote the order. I mean, I'd typed it up and everything. I mean, it was blatant that they didn't – it wasn't going to get called in.

(Tr. I 219-20).

Belcher testified that after the 104(d)(1) Order was written, he told Ellison, "We can

agree to disagree, but there's no way that's a roof fall, Brandon. That's everyday activity.... It happens every time you get a cut of coal, if you're in adverse roof conditions . . . . Even the state went up and looked at it and agreed with what we had to say about it. We didn't feel like it was a reportable fall." (Tr. II 374).

While the 103(k) and 104(d)(1) Orders were being issued, the on-shift report for August 17 indicated "section idle" and that "unsupported top" created a hazardous condition in the "dangered off" No. 6 entry and crosscut left, with "ventilation down." (Tr. II 142; R. Exh. 8, p.26). Similarly, the pre-shift report for the August 17 hoot owl indicated "unsupported top" and "ventilation down," i.e., hazardous conditions in the "dangered off" No. 6 entry and left crosscut. (R. Exh. 8, p.27).

Respondent eventually reported the roof fall at 3:11 p.m. on August 17. (G. Ex. 1).

D. The August 18 Inspection by WVOMHST and MSHA

On August 18, Collins was called to visit the mine by Ashby because both state and federal inspectors were examining adverse roof conditions throughout the East Section that day. (Tr. II 426-27). Collins credibly testified that the state inspectors (apparently Griffith, Herron, and Hiebe) arrived at the mine before MSHA inspectors Ellison, Price, Barker and Winston arrived, and that part of management traveled the section with the state, and Collins traveled with MSHA. (Tr. II 438-39; Tr. III 24)). When MSHA arrived, Collins testified that he asked MSHA inspector Ellison where the roof fall was, and Ellison replied, "6 break left that impeded ventilation." (Tr. II 430; Tr. III 22).

The August 18 inspection parties visited the fall. (G. Ex. 8, p. 2-4; Tr. II 426-27). Collins testified that the area was breakered off because the chunk of sandstone had fallen out between two parallel cracks, which started in the bolted area of the main roof and widened out into the adjacent crosscut, rendering continued mining in the No. 6 entry unviable. (Tr. 433-34).[26] MSHA inspector Lee Barker took measurements of the rock with a handheld Hilti laser. The laser, however, could not measure the height of the rock from where Barker and Ellison were standing, about three feet away. (Tr. II 432).

WVOMHST inspector Griffith issued a control order (R. Ex. 14) during the roof control inspection for the East Section from the feeder inby the faces. He also issued a notice of violation (R. Ex. 15) in which all workable headings and crosscuts in the East Section would cease normal operations until a plan of action for adverse roof conditions was approved by the state. In addition, no further work was permitted in the No. 6 headings from 25 feet outby the No. 6 left crosscut to the unbolted face area, due to deteriorating roof conditions. (R. Ex. 15).

Collins testified that he had a conversation with Herron and Griffith about the unreported roof fall violation in the No. 6 left crosscut written by Ellison the previous day. Collins testified that both Herron and Griffith told him that they had investigated and did not think there was a reportable roof fall under West Virginia law, which is identical to federal law.

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[26]Notes from MSHA roof specialist, Don Winston, state that the "sandstone fell in the unbolted area and pulled a couple rows of bolts in the #6 entry," although he corrected his notes through testimony establishing that only two bolts were pulled. (G. Ex. 8, p. 5; Tr. II 83-84).

THE COURT: And did they say what specifications under state law it didn't meet?

THE WITNESS: It didn't meet because it was just a face area, and it was normal mining. That happens every day. You know, we're subject to have a piece of rock fall out of unsupported top and damage or dislodge one or two roof bolts at any time.

THE COURT: That's what they said?

THE WITNESS: Yes, sir.

THE COURT: Thank you, sir.

(Tr. II 426-28).

Based on demeanor and the substance of Collins' testimony, I do not credit Collins' uncorroborated account of this hearsay. Neither Herron nor Griffith testified. Furthermore, I find it inherently implausible that experienced state inspectors would express an opinion in such general terms on the technical and precise requirements of a complex definition of a reportable roof fall accident, which had raised much recent controversy at Big Mountain No. 16 mine.

Section 104(d)(1) Order No. 8093139 was terminated on August 18 at 3:30 p.m., after Respondent provided documentation that it had reported the roof fall at 3:11 p.m. on August 17. (G. Ex. 1). As noted above, said Order was modified by inspector Ellison on August 20, based on the results of MSHA's additional investigation on August 18. (G. Ex. 1).[27] On or about August 24, Ellison completed an Accident Report(G. Ex. 4), describing the accident as follows:

> A roof fall at or above the anchorage zone in the #6 left face that pulled out 2 permanent roof supports (roof bolts), ventilation to the #6 face has been impaired due to the roof fall and the severe adverse roof conditions in the area. The ventilation control in the form of a line curtain is approximately 47' from the last row of roof bolts and approximately 75' from the unsupported face when measured with a digital range finder. Passage of persons has also been impeded to the last row of roof bolts in the No. 6 entry.

III. Legal Analysis and Conclusions of Law

A. Order Denying Respondent's Motion for Partial Summary Decision

As noted at the outset, Pine Ridge filed a Motion for Partial Summary Decision under Commission Rule 67, arguing that Order No. 8093139 was not properly issued pursuant to

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[27]Ellison's modification should have accounted for Barker's new measurements of the rock, as Ellison was with Barker on August 18, in close proximity to the fall. Ellison inexplicably failed to modify his approximation, and Respondent understandably faults him for failing to do so.

section 104(d)(1) of the Act because it did not allege a violation of a mandatory safety standard.[28] Pine Ridge contends that an order issued pursuant to section 104(d)(1) of the Act must allege a violation of a mandatory health or safety standard, and that the regulations at Part 50, including § 50.10, are not mandatory standards. The Petitioner concedes that the Part 50 regulations were not mandatory standards as originally promulgated. Petitioner argues, however, that § 50.10 was re-published or promulgated as a mandatory standard in 2006 rule making proceedings, and that the violation in 104(d)(1) Order No. 8093139 is charged properly as an unwarrantable failure. Pine Ridge counters that § 50.10 was simply revised, and not promulgated as a mandatory standard.

The identical issue was presented in *Wolf Run Mining Company,* July 2, 2010, Docket No. WEVA 2008-1417, in which Senior Administrative Law Judge Michael E. Zielinski issued an unpublished Order Denying Respondent's Motion for Partial Summary Decision (hereinafter cited as *Wolf Run,* unpublished Order).[29] While Senior Judge Zielinski's Order is non-precedential, I find it well written and persuasive. Accordingly, I adopt the crux of Judge Zielinski's analysis here and find that Pine Ridge's motion must be denied. I further find that after the 2006 final rule making proceedings described below, the 2009 violation of 30 C.F.R. § 50.10 at issue was charged properly as an unwarrantable failure.

1. Legal Framework

a. Statutory Provisions

Section 3(1) of the Mine Act defines "mandatory health or safety standard" as "the interim mandatory health or safety standards established by Titles II and III of this Act, and the standards promulgated pursuant to Title I of the Act." 30 U.S.C. §802(l). In *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999), the D.C. Circuit made clear that violations of regulations or other provisions that are not mandatory standards cannot be designated as significant and substantial or unwarrantable failures under section 104(d).

The Secretary's authority to issue mandatory health and safety standards is contained in section 101 of Title I of the Act. 30 U.S.C. § 811. Section 101(a) of the Act directs that the Secretary shall by rule in accordance with the notice and comment rule making procedures set forth in section 101 and section 553 of the Administrative Procedure Act (APA) (5 U.S.C. §553), "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. § 811(a). Section 101(a)(2) of the Act directs that "[t]he Secretary shall publish a proposed rule promulgating, modifying or revoking a mandatory health or safety standard in the Federal Register."

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[28]Commission Procedural Rule 67 provides that a motion for summary decision shall be granted if there is "no genuine issue as to any material fact" and "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

[29]Wolf Run was represented by the same law firm as Pine Ridge.

Section 101(b)(1) of the Act states that the Secretary shall provide, without regard to the requirements of the APA, for an "emergency temporary health or safety standard to take immediate effect upon publication in the Federal Register if [she] determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, *or to other hazards*, and (B) that such emergency standard is necessary to protect miners from such danger." 30 U.S.C. § 811(b)(1)(italics added). Once the Secretary publishes an emergency temporary standard ("ETS"), she must initiate a formal rule making proceeding pursuant to section 101(a). The temporary standard serves as a proposed rule for that proceeding, and remains effective until superseded by the mandatory standard. 30 U.S.C. § 811(b)(2) and (b)(3).

Under section 508 of the Act, the Secretary also has general authority to promulgate rules and regulations that are not mandatory standards. 30 U.S.C. § 957. The regulations in Part 50, which address "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines," were originally promulgated pursuant to the Secretary's general rule making authority. They were not promulgated pursuant to section 101. Accordingly, after *Cyprus Emerald*, they could not be enforced pursuant to section 104(d) as mandatory standards, unless developed, re-promulgated or revised as mandatory standards.

b. The Emergency Temporary Standard (ETS)

The legal landscape for § 50.10 changed on March 9, 2006. On that date, the Secretary issued an ETS pursuant to section 101(b) of the Act in response to the grave danger to which underground miners are exposed during underground coal mine accidents and subsequent evacuations. 71 Fed. Reg. 12252 (Mar. 9, 2006). In response to tragic accidents at the Sago Mine on January 2, 2006 and the Aracoma Alma No. 1 Mine on January 19, 2006, MSHA determined that "new" accident notification, safety, and training standards were necessary to further protect miners when a mine accident takes place. 71 Fed. Reg. 12253. Thus, the ETS added several new training requirements, re-published § 50.10 with the addition of a specific definition of the word "immediately," and added numerous new provisions to mandatory standards for underground coal mines, which were designed to enhance miners' chances for survival in the event of an accident.

In revising § 50.10 to require that mine operators immediately notify MSHA within 15 minutes after determining that an accident has occurred, the ETS defined "immediately" to mean at once without delay, and within 15 minutes. 71 Fed. Reg. 12256. The Secretary determined that miners are exposed to grave danger when a mine accident occurs and the mine operator does not immediately, that is, within 15 minutes, notify MSHA about the accident. Delay in notification may slow down the arrival of mine rescue assistance and the arrival of MSHA personnel, who can provide assistance at the mine site. 71 Fed. Reg. 12256; *see also* 71 Fed Reg. 12253-12254. Consequently, the ETS incorporated a definitive standard into § 50.10 of what is meant by "immediately contact, " i.e., "at once without delay," and "within 15 minutes," which sets a maximum time within which the contact must be made. The ETS was intended to impress upon mine operators that notification is urgent and must be made a priority. 71 Fed. Reg. 12260.

The ETS did not, however, change the basic interpretation of § 50.10 that the 15-minute time period begins when mine operator determines that an "accident" within the meaning of paragraph 50.2(h) has occurred, thereby affording operators a reasonable opportunity to

investigate an event prior to notifying MSHA. Accordingly, an operator is responsible for immediately notifying MSHA about those accidents that the operator knows or should know about. 71 Fed. Reg. 12260. Thus, § 50.10 notification "[s]hould be carried out in good faith and without delay, and in light of the regulation's command of prompt, vigorous action." *Id.*, *citing Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989).

The ETS served as a proposed rule and was effective immediately upon publication. After comments were submitted, the Secretary further revised § 50.10 and published a Final Rule on December 8, 2006. 71 Fed. Reg. 71430.

c. The MINER Act and the Final Rule

As published in the Final Rule, section 50.10 now reads as follows:

50.10 Immediate Notification

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that and accident has occurred.

71 Fed. Reg. 71452.

Prior to publication of the Final Rule, Congress responded to the Sago and Aracoma Alma mine tragedies by enacting the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). The MINER Act was signed into law by President George W. Bush on June 15, 2006. The MINER Act included requirements for Self-Contained Self-Rescuer (SCSR) storage, training, lifelines, and accident notification. In the Final Rule, MSHA reconciled the ETS with applicable provisions of the MINER Act. 71 Fed. Reg. 71431.

With respect to accident notification, MSHA noted the following in its general discussion of the Final Rule:

> In emergencies, where delay in responding can mean the difference between life and death, immediate notification leads to the mobilization of an effective mine emergency response. Immediate notification activates MSHA emergency response efforts, which can be critical in saving lives, stabilizing the situation, and preserving the accident scene. Immediate notification also promotes Agency assistance of the mine's first responder efforts. In other situations, it allows for a range of appropriate Agency responses depending on the circumstances. It alerts MSHA to trends or warning signals that can trigger a special inspection, an investigation, or targeted enforcement. This communication also encourages operators and miners to work with MSHA to develop procedures that prevent incidents from resulting in more hazardous situations, ultimately leading to disasters.

71 Fed. Reg. 71431.

The Final Rule added new requirements to 30 C.F.R. parts 48, 50, and 75. *Id.* With respect to Part 50, MSHA noted that notifying MSHA of accidents must be a priority of the mine operator. Any unnecessary delay can result in loss of life or other harmful consequences. 71 Fed. Reg. 71433. Accordingly, the Final Rule retained the requirement in the ETS that mine

operators notify MSHA of all accidents immediately and within 15 minutes. *Id.* The Final Rule, like the MINER Act, did not include any exception to the 15-minute notification provision, and eliminated the exception for lost communications that had existed under the ETS. 71 Fed. Reg 71434-71435.

In its analysis of the immediate notification requirement, MSHA summarized the divergence of views from commenters. 71 Fed. Reg 71434. MSHA then concluded that the 15-minute requirement for reporting all accidents was working. 71 Fed. Reg 71435. MSHA emphasized that the requirement was not only vital for saving lives, but instrumental in having expert Agency personnel at the scene with authority to assure that the accident site remains undisturbed and preserved for investigation into causes. *MSHA further noted that although many reported accidents do not involve an injury or are non-emergencies, they may be near misses or signify a trend or problem that left uncorrected can be extremely hazardous. For example, the reporting of roof falls may necessitate critical, pro-active corrective actions and the need for emergency response assistance.* MSHA also noted that even when MSHA does not activate an emergency response, the Agency conducts an investigation. Thus, prompt notification enables MSHA to secure an accident site, preserve vital evidence that can otherwise be lost, and examine data to accurately determine trends and means of prevention. *Id.* (italics added).

MSHA also considered what triggers the 15-minute reporting requirement. The final rule provides that "once the mine operator knows or should know," that a reportable accident has occurred based on the judgment of a reasonable person, it has an obligation to report such accident. 71 Fed. Reg. 71435. Thus, an operator, like any reasonable person under the circumstances, is held to know or realize that an accident has occurred. 71 Fed. Reg. 71436.

Finally, MSHA improved the method of notification. MSHA acquired a nationwide call system and eliminated the requirement in the ETS and prior standard that mine operators first notify the appropriate District Office. The Final Rule provides a person to answer calls 24 hours per day, 7 days per week. Accordingly, once the mine operator calls the toll-free service, notification to MSHA is achieved. 71 Fed. Reg. 71436.

2. Positions of the Parties

Pine Ridge contends that § 50.10 was not "promulgated" in the Final Rule, but merely "revised," and since it was not a mandatory standard prior to the 2006 rule making, it was not converted into one. Pine Ridge argues that there was no clear indication in either the ETS or the Final Rule, to convert § 50.10 from a regulatory provision into a mandatory standard. In essence, Pine Ridge further maintains that the Secretary did not provide actual notice that she intended to apply § 50.10 as a mandatory standard subject to an unwarrantable failure penalty under section 104(d)(1). Pine Ridge further argues that the ETS's revised statement of authority for the Part 50 regulations cites only the Secretary's general rule making authority, and the primary change to § 50.10 was described as a modification that did "not change the basic interpretation of §50.10." 71 Fed. Reg. 12256, 12260. Although acknowledging that the citation to section 101 was added to the statement of authority for the Part 50 regulations in the Final Rule, Pine Ridge argues that such change was not explained. Thus, Pine Ridge argues that the rule making was insufficient to convert the regulatory provision into a mandatory standard.

The Secretary rejoins that the ETS and Final Rule were published pursuant to section 101, the Secretary's statutory authority for the issuance of mandatory standards. The ETS included findings that delays in notification of accidents subjected miners to grave danger, a prerequisite to issuance of a temporary mandatory health or safety standard. The Secretary further argues that the December 8, 2006, Final Rule was the culmination of the rule making proceeding initiated pursuant to section 101. In fact, a reference to section 101 as authority for the Part 50 regulations was included in the Final Rule. Consequently, because §50.10 was promulgated pursuant to Title I of the Act, the Secretary contends that it is a mandatory standard that can be enforced as an unwarrantable failure pursuant to section 104(d).

With regard to the fair notice issue, the Secretary contends that she already provided adequate notice to the regulated community of the substance of the changes to § 50.10 by promulgating the ETS and Notice of Final Rule Making in the Federal Register. *See Satellite Broadcasting Co., Inc. v. Federal Communications Commission*, 824 F. 2d 1, 3 (D.C. Cir. 1987), citing *Gates & Fox Co., Inc. v. OSHRC* , 790 F. 2d 154, 156 (D.C. Cir. 1986).[30] The Secretary contends that Pine Ridge could and should have read the new § 50.10 in the Federal Register at 71 Fed. Reg. 71430 *et. seq.* (Dec. 8, 2006). Therefore, the Secretary argues that Pine Ridge did not need to be placed on actual notice that 30 C.F.R. § 50.10 was now a mandatory standard.[31]

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[30]The Secretary also argues that Pine Ridge had notice of and could have, but did not, attend public meetings that MSHA Coal District 4 held to educate the public and regulated community about the substantive changes to § 50.10. (Tr. II 162). While true, I give this argument little weight absent evidence that MSHA informed those present at said meetings that it intended to apply § 50.10 as a mandatory standard subject to an unwarrantable failure penalty.

[31]Even assuming Pine Ridge was entitled to actual notice that the Secretary intended to apply § 50.10 as a mandatory standard, the Secretary argues that the issue is irrelevant because there is no evidence that Pine Ridge placed any reliance of whether 30 C.F.R. § 50.10 was a mandatory standard at the time of the roof fall. In any event, the Secretary notes that the notice issue only implicates what type of enforcement action can be undertaken, not whether Pine Ridge is subject to sanction in the first instance. *See Satellite Broadcasting, supra,* 824 F. 2d at 3 (due process triggered when agency will begin to penalize private party). The Secretary argues that Pine Ridge certainly had notice that MSHA was enforcing violations of 30 C.F.R. § 50.10, and Pine Ridge presented no evidence that its considered whether its failure to report the instant roof fall subjected it only to a 104(a) citation. Rather, the Secretary argues that Pine Ridge deliberately chose to refrain from reporting the fall. Therefore, the Secretary argues that because 30 C.F.R. § 50.10 was properly promulgated as a mandatory standard, and the notice issue lacks merit, Pine Ridge committed an unwarrantable failure by failing to report the August 13 roof fall.

3. Analysis Denying Respondent's Motion for Partial Summary Decision on the Unwarrantable Failure Issue

Having duly considered the matter, I reject Respondent's arguments and find that the Secretary made § 50.10 a mandatory standard by promulgating it pursuant to section 101. Carried to its logical extreme, Respondent's argument would mean that the Secretary could never promulgate any new requirement as a "standard" if the Secretary carried over any existing requirements from the regulation. As Senior Judge Zielinski observed, both the ETS and the Final Rule set forth a complete revised text of § 50.10, not piecemeal amendments to the wording of the earlier regulatory provision. *Wolf Run,* unpublished Order at 5. The ETS and Final Rule incorporated a definitive standard into § 50.10 of what is meant by "immediately contact, " i.e., "at once without delay," and "within 15 minutes," which sets a maximum time within which notification to MSHA of a reportable accident must be made. 71 Fed. Reg. 12260.

In addition, MSHA acted to protect miners from grave dangers associated with mine emergencies and evacuations, including certain roof fall accidents. The reporting requirement change was intended to impress upon operators that notification is urgent and must be made a priority, without exception, so that MSHA can bring its varied expertise to bear once the operator knows or should know that a reportable accident has occurred based on the judgment of a reasonable person. Clearly, therefore, the ETS enhanced the protection for miners from grave dangers associated with failure to report ceratin roof falls, and certainly did not reduce such protection. 71 Fed. Reg. 12260. Moreover, the Final Rule eliminated the extant requirement that mine operators first notify the appropriate District Office. Under the Final Rule, MSHA acquired a nationwide call system, which provides a person to answer calls 24 hours per day, 7 days per week, thereby assuring that prompt and facile notification to MSHA is achieved.

As in *Wolf Run*, Respondent argues that the Final Rule's addition of a "passing reference" to section 101 in the citation to authority is insufficient to transform § 50.10 into a mandatory standard. As Senior Judge Zielinski cogently deduced, however, it is not the addition of the reference to section 101 in the Final Rule that rendered the new reporting requirements in § 50.10 a mandatory standard. Rather, the fact that the current text of § 50.10 was promulgated pursuant to a section 101 rule making proceeding brings it within the Act's definition of a mandatory standard. *Wolf Run,* unpublished Order at 5.

Respondent further argues that changing settled expectations concerning the consequences of violations of § 50.10 cannot be sustained absent a clear expression of intent by the Secretary. I agree with Judge Zielinski that there is little question that a clear statement of an intention by MSHA to make § 50.10 a mandatory standard would have been helpful to the regulated community, given the more serious consequences attendant certain violations of mandatory standards. *Wolf Run,* unpublished Order at 5. As Judge Zielinski explained, a mine that remains subject to withdrawal orders is commonly referred to as being on a "d-chain," and some very large operators can remain in that status for several years. *Wolf Run,* unpublished Order at 5, n. 8. Accordingly, I informed the parties during pre-hearing conferences, and again at the outset of the hearing, that I was concerned about this "fair notice" issue in light of the

possibility of conflicting statements from MSHA in the public domain.[32] Accordingly, I asked the parties to further brief this issue. (Tr. I 13-14).

In *Wolf Run*, Judge Zielinski found that respondent cited no authority for its "clear statement of intention" requirement. *Wolf Run*, unpublished Order at 5-6. The Final Rule was the end product of what a section 101 rule making proceeding and should have provided notice that the revised § 50.10 was a mandatory standard, he observed. *Wolf Run*, unpublished Order at 6. Judge Zielinski further emphasized the following salient points: that the version of § 50.10 that Wolf Run was charged with violating was published on December 8, 2006 in the Final Rule; that the Final Rule was published pursuant to section 101, part of Title I of the Act; and that the Final Rule fit squarely within the Act's definition of a mandatory standard, which is clear on its face. *Id.* Moreover, Judge Zieilinski found no ambiguity in either the Act's definition of mandatory standards or in § 50.10, and therefore found that the Secretary's interpretation of § 50.10 as a mandatory standard was reasonable and entitled to deference. *Wolf Run*, unpublished Order at 6, n. 10, citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3rd 1 (D.C. Cir. 2003). Finally, Judge Zieilinski discounted the argument that the Secretary has referred to the standard as a regulation, noting that the Secretary, the Commission, and the courts have often interchanged such terminology when discussing mandatory standards. *Id.*, citing *Cyprus Emerald*, 195 F.3d at 44 n.3.

I concur with Judge Zieilinski's analysis. It cannot be gainsaid that the Secretary must provide fair notice of the requirements of her safety and health standards. The Commission summarized this requirement in *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998), as follows:

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313,1317-18 (Aug. 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission [does not require] that the operator receive actual notice of the

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[32]In the *Wolf Run* matter, Wolf Run pointed out that MSHA's "Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines" (2005) continued to instruct MSHA inspectors that Part 50 regulations were not mandatory standards and could not be enforced pursuant to section 104. The Secretary did not refute that assertion, but countered that the Handbook was obsolete to the extent it conflicted with the current version of § 50.10. In this case, the MSHA Handbook on Citation and Order Writing for Coal Mines and Metal and Non-Metal Mines (3/08) is not in evidence, and the Secretary correctly points out that neither Pine Ridge's Motion for Partial Summary Decision nor its Reply in Support cite to the MSHA Handbook, although Respondent raised this issue in argument.

> Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In essence, the critical issue that I must decide is whether the Secretary must provide actual notice in notice and comment rule making that § 50.10 will no longer be enforced as a regulation, but as a mandatory standard subject to an unwarrantable failure finding and a statutory minimum penalty of $2,000.00. Although actual notice of such intent would have been prudent, I find that the Secretary need not provide such notice of its interpretation through rule making, but may and has done so through her litigation and enforcement efforts. That is, the Secretary is not required to promulgate interpretations through rule making or the issuance of policy guidance, but may do so through litigation. *See National Wildlife Fed'n. v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997)). Deference to an interpretation offered in the course of litigation is proper as long as it reflects the "agency's fair and considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, (1977); accord, *Tax Analysts v. IRS,* 117 F.3d 607, 613 (D.C. Cir. 1997).

Despite additional briefing and a full hearing, Respondent offered no evidence that MSHA's interpretation represents anything less than the agency's considered opinion after final rule making. Further, Respondent offered no evidence that MSHA has taken an inconsistent enforcement position in litigating cases before the Commission.[33] The Secretary's enforcement history provides notice of her consistent interpretation of the standard. In fact, the *Wolf Run* case and this case show that MSHA has acted consistently and interpreted § 50.10 as a mandatory standard consistent with the Act's definition of mandatory standard after appropriate rule making under Section 101 of the Act.

In these circumstances, I find that the Secretary has provided fair notice of her interpretation of § 50.10 as a mandatory standard and that such interpretation is reasonable and entitled to deference. *See Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1 (D.C. Cir. 2003). Accordingly, Respondent's Motion for Partial Summary Decision on the unwarrantable failure issue is denied.

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[33]As noted above, the MSHA Handbook on Citation and Order Writing is not in evidence. Furthermore, as the Secretary points out in her post-hearing brief at 52, the Handbook represents internal agency guidance and policy directives that are not binding on the Secretary in her enforcement actions. See, e.g., *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (1977), aff'd *Mingo Logan Coal Co. v. Sec'y of Labor*, 133 F. 3d 916 (4th Cir. 1988). Consequently, the Secretary need not give notice by publication in the Federal Register where she does not follow internal guidelines. *Id.*

B. Order No. 8093139

1. The Violation

30 C.F.R. § 50.10 required Pine Ridge to contact MSHA within 15 minutes once Pine Ridge knew or should have known that a reportable "accident" occurred. 30 C.F.R. § 50.2(h)(8) defines "accident" to mean "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage." Under this disjunctive test, Pine Ridge was required to report the roof fall if either of three conditions were met: 1) an unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; 2) an unplanned roof fall in active workings that impairs ventilation; or 3) an unplanned roof fall in active workings that impedes passage.

The parties disagree on the definition of anchorage zone and whether the roof fall was at or above the anchorage zone.[34] I find it unnecessary to resolve the parties disagreement, however, because both of the other prongs of the disjunctive test were met here. Thus, the Secretary established by a preponderance of the evidence that there was an unplanned roof fall in active workings that impairs ventilation. In addition, the Secretary established by a preponderance of the evidence that there was an unplanned roof fall in active workings that impedes passage. Moreover, testimony from Respondent's own witnesses establish that Respondent knew or should have known that toward the end of the day shift on August 13, there was an unplanned roof fall in active workings that impaired ventilation and impeded passage. Accordingly, I do not pass on whether there was an unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use.

a. Unplanned Roof Fall

There is no dispute based on testimony from foreman Pauley that toward the end of the day shift on August 13, a large piece of sandstone fell from the mine roof between surface subsistence cracks onto the drum of the continuous miner as it was turning the No. 6 left crosscut. (Tr. II 186-87, 286-89, 353, 416; G. Ex. 8, p. 5). Pauley heard the fall from 60-70 feet away, and miner operator Kinder and helper Daniels hollered. (Tr. II 211, 290). The rock came close to hitting Daniels. (Tr. I 107-08). When Pauley immediately approached the rock fall location, he noticed that the two miners were visibly shaken up. (Tr. II 288, 290).

Based on the foregoing, I find that the roof fall was unplanned. Respondent makes no argument to the contrary.

b. Active Workings

"Active workings" is defined in section 75.2(g)(4) of the regulations, consistent with Section 318(g)(4) of the Act, 30 U.S.C. § 878 (a)(4), as "any place in a coal mine where miners are normally required to work or travel." I find that the Secretary established by a preponderance of the evidence that the instant roof fall occurred in "active workings."

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[34]As noted, MSHA nowhere defines anchorage zone in its regulations!

First of all, Commission Rule 2700.58(b), 29 C.F.R. §2700.50(b), addresses requests for admissions, and provides in relevant part that ". . . [a]ny matter admitted under this rule is conclusively established for the purpose of the pending proceeding unless the Judge, on motion, permits withdrawal or amendment of the admission." In its discovery responses, Pine Ridge admitted that the August 13 roof fall occurred in "active workings." (Tr. III 137; G. Ex. 15). Pine Ridge made no motion or request for withdrawal of the admission. Accordingly, I find that Ridge admitted as a matter of law that the roof fall was in active workings.

At trial, despite such prior admission, Pine Ridge witnesses Pauley, Collins and Ashby attempted to deny that the roof fall occurred in "active workings" because it occurred in the "red zone" where miner are not supposed to work or travel. (Tr. II 82, 198; Tr. III 66, 133-35). Belcher, by contrast, directly admitted that a "[a] red zone is an active working place." (Tr. II 364, 367). Similarly, MSHA inspectors Ellison, Barker, Price and Winston all testified that Pine Ridge was actively mining coal in an active working face when the roof fall occurred. (Tr. I 86, 126, 205, 265, 300, 354; Tr. II 10, 37 and 79). I credit the MSHA inspectors and Belcher over Respondent's other witnesses, who contradict Respondent's own discovery admissions.

I further find that the roof fall indeed occurred in active workings where miners normally work or travel.[35] The roof fall occurred during active mining while turning the left cross cut. The miner pulled or dragged the rock into the supported area of the No. 6 entry (Tr. II 203-04, 274-76), and the rock fell to the ground in both supported and unsupported top after being dragged by the miner. (Tr. II 274-76, R. Ex. 10). The fall extended several feet into the bolted No. 6 entry from unbolted 6 left, about half way to the second row of roof bolts. (G. Ex. 5, p. 4; G. Ex. 6, p. 6; R. Ex. 10). Miners regularly work or travel there. In fact, the roof fall nearly missed Daniels. (Tr. I 107-08). Moreover, Ashby testified that the continuous miner would take a cut and back out so the roof bolting crew could come in and support the top. Additionally, if the machine broke, miners would travel into the "red zone" to fix it. (Tr. III 133). In short, the Secretary established that the August 13 roof fall occurred in "active workings."

c. Impairs Ventilation

The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). The dictionary defines the verb "impair" as "diminish in quantity, value, excellence or strength: do harm to: damage: lessen: deteriorate." *Webster's Third New International Dictionary* 1131 (1993). Applying this definition, I find that the Secretary established by a preponderance of evidence that the roof fall impairs ventilation, even though no air readings were taken by MSHA.

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[35]I agree with the Secretary that although the red zone may have kept miners from direct contact with the continuous miner, that area was still "active workings" because men were working and traveling in the immediate and adjacent area. *Cf. Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 27, 2000).

During the roof fall process, the continuous miner tore out a couple of roof bolts that were at the edge of the cut (Tr. II 189, 193, 201), and the boom of the miner caught the line curtain and pulled it down. Thereafter, the credible evidence establishes that the line curtain was never moved back up to comply with the 50-foot waiver that MSHA had granted Respondent. (Tr. II 228 and n. 10, *supra*). Rather, as a result of the roof fall, there were no ventilation controls in the face area and the line curtain was greater than 50 feet outby the face of the No. 6 entry, about 67-70 feet back. (Tr. I 97, 254, 355, 359; Tr. II 15, 159, 369; R. Exh 10).

Inspector Ellison testified that Respondent was still obligated to examine the No. 6 face as part of its pre-shift and on-shift examinations to ensure actual air movement to eliminate dust, gas and other hazardous conditions, even though actual mining had ceased after the fall. I credit Ellison's testimony that Respondent could not meet such obligations without conducting examinations at the No. 6 face, and the "[t]he conditions were too bad for anyone to travel up to that area." (Tr. I 87-90). As Ellison explained, no one could travel to the face under fully-supported roof across the entry, because the fall had pulled out two bolts and broke off two of the plates. (Tr. 96). In addition, the line curtain extended about three rows of bolts past the breaker posts and was much more than 50 feet from the No. 6 face, thereby exceeding Respondent's ventilation waiver from MSHA. Since the line curtain was not providing the ventilation the way it should have been, Ellison concluded "there's no way [Respondent] could've really had the No. 6 face ventilated with the location of the curtain." (Tr. I 96-97, 111-12: G. Ex. 3). Ellison's contemporaneous notes confirm that there was "no way to ventilate face." (Tr. I 111; G. Ex. 5, p. 3).

Inspector Ellison testified that he did not take an air reading because the line curtain was down and the roof fall made it too dangerous to proceed to the face to take a reading. (Tr. I 141, 145). Ellison explained, "There was no place to take an air reading. The curtain was torn down. They didn't have ventilation established. You have to have a curtain to provide ventilation." (Tr. I 141).

Respondent argues that an MSHA air reading could have been taken at the breakers and emphasizes record evidence that there was sufficient air at the last open break as the air swept left to right. (Tr. I 144). I am persuaded, however, by inspector Ellison's testimony that "just because you have enough [air] in the last open break does not mean you have enough in the working faces" (Tr. I 173), particularly the No. 6 face where the roof fall precluded proper placement of the line curtain, which was necessary for the ventilation system to work properly. I note that Ellison refused to concede on cross examination that air swept across the No. 6 face because his passage to the face was hindered by the rock fall, so he could not determine the air at the face. (Tr. I 145, 186). He testified with confidence, however, that ventilation was "impaired" because the curtain was too far from the face. (Tr. I 171).

MSHA Supervisor Price confirmed that there were no other ventilation controls besides the line curtain in the No. 6 entry, and that placement of the line curtain 67 feet outby the No.6 face automatically impaired ventilation to that face. (Tr. I 359-361.) I credit Price's testimony, particularly since it was consistent with Ellison's testimony and corroborated by Respondent's own witnesses and documents.

Respondent's own witnesses and pre- and on-shift reports establish that ventilation was impaired after the rock fall. Foreman Pauley admitted that when a curtain is down, ventilation is automatically compromised. (Tr. II 279). Pauley volunteered that a downed curtain impedes ventilation (Tr. II 280), and then testified that it always impairs the volume of air in the area. (Tr. 280). In addition, Pauley testified that after the roof fall, no one went inby the timbers to the No. 6 face to ensure compliance with the ventilation plan, or to replace the piece of curtain that the continuous miner had torn down. The No. 6 entry was not sealed off, and remained in the primary air intake with an incomplete crosscut to the No. 5 entry. (Tr. II 251-52, 256-57). In order to abate the 103(k) Order and eventually abandon the section, Respondent needed to implement a rehabilitation plan that would complete the cross cut between the No. 6 and No. 5 entries. (G. Ex. 3 at 4). Collins conceded that additional ventilation was needed subsequent to the roof fail to ventilate the No. 6 crosscut because any inspector would have shut the mine down if the crosscut was left undone. (Tr. III 51-52).

Although Respondent attempted to establish through the testimony of Belcher, Collins, and Ashby that the ventilation to the No. 6 face was not impaired by the rock fall because there was a sufficient amount of air traveling up the primary intake, and because pre-shift exams were taken at the breaker line (Tr. II 345-47, 436-437; Tr. III 87), I am unpersuaded by this testimony. Belcher acknowledged that the line curtain takes noxious gas, coal dust, and bad air down the return and back out, and that all ventilation curtains or controls should be in place, even when the section is idle. (Tr. II 346-47). In fact, on cross examination, Belcher reluctantly conceded that the ventilation curtain should have been in compliance. (Tr. 369-70). Similarly, Collins and Ashby testified that the ventilation curtain should have been within 50 feet of the face. (Tr. III 44, 86).

Moreover, Respondent's pre-shift and on-shift reports on the day of the inspection, establish impaired ventilation. The August 17, 2009 pre-shift exam had the words "H2O to face," crossed out and initialed. (Tr. II 246, 262-64; R. Ex. 8, p. 23). While the 103(k) and 104(d)(1) Orders were being issued, the on-shift report for August 17 indicated "section idle" and "unsupported top," creating a hazardous condition in the "dangered off" No. 6 entry and crosscut left, with "ventilation down." (Tr. II 142; R. Exh. 8, p.26). Similarly, the pre-shift for the August 17 hoot owl indicated that "unsupported top" and "ventilation down" were hazardous conditions in the "dangered off" No. 6 entry and left crosscut. (R. Exh. 8, p.27).

In sum, I conclude that the preponderance of record evidence establishes that the August 13 roof fall "impairs" ventilation in the No. 6 entry.

d. Impedes Passage

As set forth above, the credible evidence establishes that the roof fall impedes passage to the No. 6 face. The dictionary defines the verb "impede" as "to interfere with or get in the way of the progress of: hold up: block. *Webster's Third New International Dictionary* 1132 (1993). Webster's uses the synonym "hinder." Applying this definition, I find that the Secretary established by a preponderance of evidence that the August 13 roof fall impedes passage to the No. 6 face under fully supported top.

Without prior waiver from MSHA, Respondent's examiners were required to travel to the No. 6 face several times per day to conduct required pre-shift and on-shift examinations. (Tr. I

87-88, 253, 355; Tr. II 167, 183).[36] Pauley conceded that Respondent was still obligated to examine and ventilate the No. 6 face even though it was breakered off after the fall, but no one went inby the breaker line to do so. (Tr. II 267-68). Ellison explained that Respondent was still required to inspect that area. "That's an active working face that was unbolted at both locations. They're still required to check it for methane and hazardous conditions." (Tr. I 126).

I credit Ellison's testimony that there was no way to assess proper air movement at the No. 6 face without examining the air there, however, the roof conditions after the fall were too precarious for anyone to travel up to the face to examine the air. (Tr. I 89-90). As Ellison and Supervisor Price explained, no one could travel to the No. 6 face under fully supported roof, and there was no safe way for anyone to travel to that face to take an examination. (Tr. I 96, 207, 356). MSHA Roof Control Specialist Barker and Supervisor Price confirmed that Respondent was obligated to pre-shift and on-shift all faces on every working section, and there was no way for Respondent to conduct the required examinations at the No. 6 face because the roof fall compromised the support in the entry and precluded travel to the face under fully supported roof as required by 30 C.F.R. §75.202.[37] (Tr. I 253, 317, 355-57; Tr. II). In fact, MSHA inspectors Ellison and Barker concluded that it was too dangerous to inspect the No. 6 face because the conditions created by the roof fall impeded their passage. (Tr. I 145, 242). As Price put it, only if one traveled inby "some obvious extremely dangerous and unsupported top" could one have ventured to the No. 6 face. (Tr. II 27).

I agree with the Secretary's argument that Pine Ridge's decision to danger off the No. 6 entry and conduct examinations at the breaker posts after the roof fall is persuasive evidence that the roof fall impedes passage. Sec'y Br. at 40-41. The roof fall dislodged roof supports creating an area of unsupported top, which caused Respondent to breaker off the area the next shift, and begin conducting examinations at the breaker posts. (Tr. I 206-07, 356; Tr. II 245; Tr. III 34). Respondent's witnesses Pauley and Collins acknowledged that once the area was dangered off, safe travel to the face was impeded. (Tr. II 245, 256; Tr. III 29-30). In fact, Belcher explained that once he set the breaker lines after the fall, they "prohibited anyone" from traveling to the No. 6 face because it was "[u]nsafe," and Respondent did not need that entry, with two parallel surface cracks on the outcrop, to punch outside. (Tr. II 348-49). In short, I agree with the Secretary that Respondent's decision to breaker off the No. 6 entry to travel shortly after the roof fall demonstrates that the roof fall impedes passage. See Sec'y Br. at 41.

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[36]MSHA had no opportunity to grant a waiver because Respondent did not report the roof fall.

[37]C.F.R. §75.202 provides:

> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.
> (b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

e. Conclusion as to Violation

Based on the foregoing, I conclude that Respondent's failure to immediately report the roof fall on August 13, was a violation of 30 C.F.R. § 50.10 because there was an unplanned roof fall in active workings that impairs ventilation *and* impedes passage, although either is sufficient.

C. Unwarrantable Failure Principles

I have denied Respondent's motion for partial summary decision on the unwarrantable failure issue. Accordingly, Respondent's failure to report the roof fall in the No. 6 entry and left crosscut of the 020-0 MMU (East Section) within 15 minutes of its occurrence on August 13, may constitute an unwarrantable failure to comply with a mandatory safety standard.

The Secretary bears the burden of proving all elements of the 104(d)(1) Order by a preponderance of the evidence. The Secretary must prove that the Respondent's failure to report the "accident" was "aggravated conduct" after considering all the relevant facts and circumstances as set forth in Commission precedent. Having duly considered such factors, I find that the Secretary established by a preponderance of the evidence that Respondent, at a minimum, exhibited "serious lack of reasonable care," if not "intentional misconduct" or "reckless disregard," in failing to immediately notify MSHA within 15 minutes of the roof fall accident.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). It refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). A judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). I discuss below, the applicability, *vel non*, of all of the relevant factors.

1. The Extent of the Violative Condition

The Commission has viewed the extent of a violative condition as an important element in the unwarrantable failure analysis. *IO Coal* Co., 31 FMSHRC 1346, 1351-52 (Dec. 2009). This factor considers the scope or magnitude of the violation. *See Eastern Associated Coal,* 32 FMSHRC at 1195, citing *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Here, the violation is the failure to report the roof fall to MSHA within 15 minutes; it is not a roof control violation.[38]

As Ellison testified, the purpose of the reporting requirement is to inform MSHA of the accident so that it can issue orders and approve rehabilitations plans to insure the safety of miners. (Tr. 116-17, citing § 103(k)). Respondent's failure to report the accident immediately resulted in a § 103(k) control order four days later that prohibited all activity on the East Section from spad #13331 inby until MSHA determined that it was safe to resume normal operations in this area. Only those persons selected from company officials, state officials, miner's representative(s) and others deemed by MSHA to have information relevant to the investigation were permitted to enter the affected area. G. Exh. 2. Thus, the whole East Section and miners working throughout the section were affected by the failure to report the violation, not just the No. 6 entry and miners working in such entry. *Cf. Eastern Associated Coal,* 32 FMSHRC at 1195 (rejecting analysis that extensiveness of a roof control violation is limited to measuring area of inadequately supported roof and comparing it to relevant area examined by inspector, particularly since violative conditions could easily be considered much more extensive within a concentrated area).

Another relevant consideration in determining whether the violation is extensive is the abatement measures taken to terminate the relevant Order(s). *Eastern Associated Coal,* 32 FMSHRC at 1196; *Peabody Coal Co.*, 14 FMSHRC at 1263 (providing that extensiveness can be shown by condition that requires significant abatement efforts). In this case, Pine Ridge submitted a rehabilitation plan for the 020-0 MMU to terminate the 103(k) Order. G. Ex. 2. That mining plan encompassed extensive safety precautions across the entire East Section in all remaining entries and crosscuts and required, inter alia, the establishment of additional ventilation between the No. 5 and No. 6 entries and installation of a curtain in the No. 6 and No 2 entries. (G. Ex 3; Tr. III 52).

In addition, the failure to report the roof fall extended for four days, while abatement required a mere precautionary phone call to MSHA consistent with the rationale set forth in the Final Rule to assure that the accident site was secure, undisturbed and preserved for investigation into causes, trends, and means of prevention. Collins intimated that Respondent deliberately chose to engage in self-help and deemed it more expedient to ignore MSHA, but conceded that Respondent could have protected the safety of its miners by breakering off the No. 6 entry *and*

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[38]The Secretary argues that the size of the fall made it extensive, but the actual violation was the failure to report the accident. Accordingly, unlike inspector Ellison, I discount the extent of the hazardous condition, a large roof fall that occurred in active workings, where people actually were working, and I consider the extensiveness and ramifications of the actual failure to report.

complying with its legal obligations to immediately notify MSHA of the roof fall accident. (Tr. III 44-46). Thus, the failure to report the "near miss" accident (Tr. I 106-07) extensively inhibited the use of MSHA expertise to timely investigate and institute critical, pro-active corrective actions through the East Section that were eventually set forth in the rehabilitation plan.

Furthermore, such extensiveness must be weighed in the context of my findings that the hazard created by the failure to report was obvious, lengthy in duration (given the nature of the violation), and contributed to the potential for a high degree of danger to other miners working in other adverse roof areas throughout the section until MSHA controlled the scene. *Eastern Associated Coal,* 32 FMSHRC at 1198. Accordingly, on balance, I find that the extensiveness factor tips in favor of an unwarrantable failure finding.

2. The Duration of the Failure to Report the Roof Fall Accident

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See, e.g., Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence of cited conditions). Inspector Ellison considered the length of time that the violation existed. Consistent with his testimony, the record establishes that the failure to report lasted four days, from the afternoon of August 13 until the afternoon of August 17, and no one from management made any effort to inform Ellison of the roof fall when he arrived on August 17 to continue his quarterly inspection in other areas of the mine. (Tr. I 117).

The record further establishes that it took several months to inspect the whole mine and Ellison had already completed his inspection of the 020-0 MMU (East Section) (Tr. I 55, 73). It was only after the miner's representative asked Ellison to look at some specific conditions on the previously inspected 020-0 MMU (East Section) because of some very dangerous roof conditions and cracks across the section, that Ellison checked the pre-shift/on-shift reports and discovered that the No. 6 entry was dangered off without explanation of hazard. (Tr. I. 72-73, 75-77). Ellison began his inspection when Respondent's safety supervisor, Justin Ray, could not provide any rationale for the danger. (Tr. I 73-75, Tr. II 122).

In sum, the failure to report lasted four days and the accident triggering the reporting requirement might not have been discovered if not for the assiduity of the miner representative and Ellison. An unwarrantable failure finding has been found when the violative condition has lasted for several days, as here. *See, e.g. Watkins Engineers & Constructors*, 23 FMSHRC 81, 93 (Jan. 2001) (ALJ Manning). Accordingly, in the circumstances of this case, I find that the duration of the violation weighs heavily toward a finding of unwarrantable failure.

3. Whether Respondent Was Placed on Notice that Greater Compliance Efforts Were Necessary

The Commission has stated that repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); see also *Consolidation Coal Co.*, 23FMSHRC 588, 595 (June 2001). The purpose of evaluating the number of past violations is to

determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007), *citing Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *Id.*, *citing Consolidation Coal*, 23 FMSHRC at 595.

Inspector Ellison considered the fact that Pine Ridge was knowledgeable about its reporting obligations because it had a history of unplanned roof falls at the mine. (Tr. I 118; G. Ex. 12). The Secretary emphasizes that Respondent had about fifteen reportable roof falls in the year preceding the August 13 roof fall, including another one that same day. (G. Exh 12; Tr. I 62-68). The Secretary further asserts that Pine Ridge's known history of roof falls and poor roof conditions motivated it to refrain form reporting the instant roof fall because it might cause an increase in its incident rate in MSHA's statistics. I decline to engage in such speculation.

Although Pine Ridge knew how to report a roof fall accident based on its recent history as set forth in G. Ex. 12, there is no record evidence that MSHA had previously communicated to Pine Ridge that it needed to make additional efforts to comply with 30 C.F.R. § 50.10. (Tr. I 204). In fact, inspector Ellison was not aware of any other failure to report roof fall accidents by Respondent. (Tr. I 204-05) In these circumstances, I find that the Secretary has failed to establish that Respondent was placed on notice that greater compliance efforts with 30 C.F.R. § 50.10 were necessary. Accordingly, this factor mitigates against a finding of unwarrantable failure.

4. Whether the Violation Posed a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, e.g., BethEnergy Mines,* Inc., 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

The relevant inquiry here is whether the failure to report the roof fall accident posed a high degree of danger to miners or heightened their exposure to such danger. Hence, even though the failure to report is the actual violation, I must examine whether the failure to report the roof fall aggravated the danger posed by the extant roof conditions after the fall, and whether Respondent took any actions that mitigated its failure to report.

Respondent's own witnesses established that the roof conditions in the No. 6 entry following the fall were was so dangerous that the entry was breakered off with timbers by the following shift. The unsupported top created by the dislodged roof bolts between parallel surface cracks made travel in the area hazardous, as Respondent admitted in August 17 and 18 pre- and on-shift reports (R. Ex 8, pp. 26-27), and through the testimony of Belcher that travel in the No. 6 entry was unsafe after the fall. (Tr. II 348-49). Moreover, by the time of the inspection four days later, Ellison observed that the rock had fallen under cracked roof that dropped three or four inches. (Tr. I 78-80, 91-93). Additionally, Collins testified that the area was breakered off because the chunk of sandstone had fallen out between two parallel cracks, which started in the bolted area of the main roof and widened out into the adjacent crosscut,

rendering continued mining in the No. 6 entry unviable. (Tr. 433-34). I credit Ellison's testimony that the failure to report the roof fall could cause a high degree of danger, even though the area had been "breakered off," because miners were expected to return to the area during rehabilitation or cleanup, and the roof fall itself posed a high degree of danger to any miners working in the area. (Tr. I 118-19).

Concededly, the present danger that miners faced under continued normal operations *in the No. 6 entry* was ameliorated by Respondent's prompt decision to breaker off that entry. Indeed, inspector Ellison marked the gravity in Order No. 8093139 as "no likelihood," "no lost workdays," and not "significant and substantial" (S&S). *But the failure to report had danger ramifications that extended beyond the No. 6 entry where the instant roof fall occurred.* The record clearly establishes that the whole East Section had adverse roof conditions in every entry as Respondent drove on the outcrop with low cover. (Tr. II 243).[39] There were very bad roof conditions and cracks across the section, which were very dangerous. (Tr. I 72-73, 76-77; Tr. III 433-34). Even after the No. 6 entry was dangered off, mining continued for four days in other entries until the 103(k) order issued on August 17. That Order was issued to ensure the safety of all persons by prohibiting all activity on the East Section 020-0 MMU from spad #13331 inby because the whole section, and not just the No. 6 entry, had several adverse conditions present in the form of cracks, slips, and mud streaks. G. Ex. 2. Miners were working and traveling in this section from August 13 through August 17.

Thus, contrary to the rationale set forth in the Final Rule at 71 Fed. Reg. 71435, the failure to immediately report the August 13 "near miss" roof fall accident, hampered the timely mobilization of MSHA's expert personnel to the scene. Such immediate notification would have permitted MSHA to more quickly address a problem with adverse roof conditions throughout the East Section, which required a detailed rehabilitation plan, and left uncorrected, could have been extremely hazardous to miners continuing to work there.

Consequently, despite Respondent's laudable and prudent decision to breaker off the No. 6 entry, Respondent could have and should have immediately notified MSHA so that it could bring its expertise to bear to rehabilitate the entire section. (Cf. Tr. III 46). Respondent's failure to do so exposed miners to additional roof fall hazards throughout the section. Accordingly, I find that the violation heightened the exposure of miners working throughout the East Section to

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[39]As the record evidence established before Judge Paez recently in *Stillhouse Mining LLC*, Docket No. KENT 2007-309, Slip op. at 7 (Mar. 28, 2011), http://www.fmshrc.gov/decisions/alj/Kt2007-309.htm, underground areas near where the coal is exposed to the surface, called the outcrop, are known to have weaker roofs than other areas of the mine. In addition, the deaths of most underground miners are caused by roof falls. Slip op. at 7. *See also Big Ridge, Inc.*, Docket No. 2009-532, Slip op. at 19 (Mar. 1, 2011)(Judge Miller), http://www.fmshrc.gov/decisions/alj/Lk2009-490.htm, reaffirming Commission precedent in *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n. 4 (Jan. 1984) that roof falls continue to be recognized by Congress, the Secretary of Labor, the Commission, and the mining industry as one of the most serious hazards in mining and remain the leading cause of death in underground coal mines).

potential grave danger for four days, and this factor, on balance, tips in favor of an unwarrantable failure finding. (Tr. III 44-46).

5. The Operator's Knowledge of the Existence of the Violation, Whether the Violation was Obvious, and the Reasonableness of the Operator's Purported Good-Faith Disagreement with MSHA as to What Constitutes a Reportable Roof Fall

I agree with the Secretary that the record evidence establishes that the violation was obvious and that Pine Ridge knew or should have known that the roof fall was reportable. As explained above, irrespective of the anchorage zone issue,[40] there was an unplanned roof fall in active workings that impaired ventilation and impeded passage. The record evidence establishes that these conditions were obvious and triggered a reporting obligation by foreman Pauley and mine manager Belcher. Accordingly, I find that Pine Ridge did not have any reasonable, good-faith belief that the unplanned roof fall did not occur in active workings, did not impair ventilation, and did not impede passage.

As found above, foreman Pauley was in close proximity to the roof fall when it fell on the continuous miner during active mining while turning the left cross cut. The fall was obviously unplanned. When Pauley approached the rock fall location, he noticed that Kinder and Daniels were visibly shaken up. (Tr. II 288, 290). The roof fall nearly missed Daniels, where he was working. (Tr. I 107-08). In discovery, Respondent conclusively admitted "active workings." Reliance on hearsay to the contrary from WVOMHST inspectors has been specifically discredited.

Foreman Pauley further noticed that during the roof fall process, the continuous miner tore out a couple of roof bolts that were at the edge of the cut (Tr. II 189, 193, 201), and the boom of the miner caught the line curtain and pulled it down. As a result of the roof fall, there were no ventilation controls in the face area and the line curtain was greater than 50 feet outby the face of the No. 6 entry, about 67-70 feet back. (Tr. I 97, 254, 355, 359; Tr. II 15, 159, 369; R. Exh 10). The fall extended several feet into the bolted No. 6 entry from unbolted 6 left, about half way to the second row of roof bolts. (G. Ex. 5, p. 4; G. Ex. 6, p. 6; R. Ex. 10).

A "confrontation" ensued when the UMWA representative challenged Pauley concerning whether the fall was a reportable accident. (Tr. II 190-91). Despite the confrontation; the fact that mere reporting was not a violation; the fact that there were parallel surface cracks in the roof

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[40]Respondent raised substantial arguments concerning good-faith disagreement with MSHA over whether the unplanned roof fall was at or above the anchorage zone. Based on decades of collective mining experience, Respondent's witnesses testified that reportability was triggered at or above the length of the bolt, and that MSHA had never informed them differently. (Tr. II 344, 440-41; Tr. III 12). Since I have found it unnecessary to pass on prong one of the disjunctive definition of "accident," which is the only prong that addresses "anchorage zone," I find it unnecessary to decide whether Respondent held an objectively reasonable belief that the roof fall was below the anchorage zone.

even before the fall; the fact that the fall extended into the bolted entry and roof bolts had been pulled out, thereby compromising safe passage to the face under fully supported top; and the fact that the only ventilation control in the entry had been torn down and remained non-compliant with MSHA requirements, Pauley decided that the roof fall was not reportable.

At trial, Pauley admitted that when a curtain is down, ventilation is automatically compromised (Tr. II 279), and he testified that a downed curtain impedes ventilation (Tr. II 280), and always impairs the volume of air in the area. (Tr. 280). Belcher conceded that line curtain takes noxious gas, coal dust, and bad air down the return and back out, and that all ventilation curtains or controls should be in place, even when the section is idle. (Tr. II 346-47). On cross examination, Belcher conceded that the ventilation curtain should have been within 50 feet of the face. (Tr. 369-70). Respondent's shift reports further establish that ventilation was impaired after the rock fall.

The credible evidence also establishes that as a result of the roof fall, it was obvious that passage to the No. 6 face under fully supported top was impeded. Pauley knew that the roof fall dislodged roof supports creating an area of unsupported top. Thus, Pauley knew or should have known that there was no way for Respondent to conduct the required examinations at the No. 6 face because the roof fall compromised the support in the entry and precluded travel to the face under fully supported roof as required by 30 C.F.R. §75.202. (Tr. I 253, 317, 355-57; Tr. II). The danger impeding passage caused Belcher to breaker off and begin conducting examinations at the breaker posts. (Tr. I 206-07, 356; Tr. II 245; Tr. III 34).

Pauley's report to Belcher is telling as Pauley failed to give Belcher a full and accurate account of the situation so that Belcher could make an accurate judgment call on reportability.[41] In fact, based on discussions with his crew, Pauley had already made up his mind that the fall was not reportable, and I find that his report to Belcher was tailored to arrive at this conclusion. Based on Pauley's explanation, Belcher agreed that the roof fall was not reportable. (Tr. II 194, 299-300). As Belcher put it, "I had to trust his judgment, what he told me on the mine phone that day," to meet the 15-minute reporting requirement. (Tr. II 404). "If I'm wrong, I'm wrong: if I'm right, I'm right." (Tr. II 406).

Belcher was wrong and failed to make reasonable inquiry. Pauley was not forthcoming. The fall did pull out roof bolts and resulted in unsupported top and a downed ventilation control. Pauley knew this, but did not tell Belcher, at least not according to Belcher. Pauley never explained why he called out a fall that purportedly was just part of normal mining and not reportable. Further, Belcher performed a perfunctory investigation and inquiry. His testimony indicated an initial cavalier attitude toward the roof fall, describing it as not even a close call based on Pauley's account, but one wonders why Belcher would need to clear his conscience when purportedly talking to Herron on August 14, if this was the case. Belcher never asked Pauley why the rock had a bolt in it, if the fall did not pull out roof bolts. Belcher did not talk to Kinder or Daniels, who were directly involved in the roof fall. Belcher did not ask anyone underground to immediately confirm Pauley's assessment, as Martin did not examine the fall until shortly after commencement of the next shift.

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[41]See page 6, *infra*, citing Tr. II 314-17.

Based on the totality of record evidence, I reject any argument that Pine Ridge did not know or should not have known that there was unplanned roof fall in active workings that impaired ventilation and impeded passage, or that such conditions were not obvious. The Commission has held that an operator's supervisors are held to a high standard of care, and that a foreman's involvement by failing to recognize the violation and take reasonable precautionary measures may be a factor supporting an unwarrantable failure finding. *See e.g., Lafarge Construction Materials*, 20 FMSHRC 1140, 1145-1148 (Oct. 1988), citing *Midwest Material Co.*, 19 FMSHRC 30, 34-35 (Jan. 1997).

Based on the foregoing, I find that foreman Pauley and mine manager Belcher failed to exercise the heightened standard of care required of them, respectively, in reporting and investigating the rock fall to assess reportability. Accordingly, I find that Respondent knew or should have known that the roof fall was reportable based on facts that made it obvious that there was an unplanned roof fall in active workings that impaired ventilation and impeded passage.

6. The Operator's Efforts in Abating the Violation

An operator's efforts to abate the violative condition is a factor relevant to determining whether a violation is unwarrantable. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356, citing *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

In this case, I place great weight on inspector Ellison's detailed testimony, as corroborated by his contemporaneous notes, that Pine Ridge engaged in "very, very poor efforts" to abate the violation. (Tr. I 119). As noted, the condition was obvious and should have been reported immediately. (Tr. I 121, 219). Ellison credibly testified that when he initially observed the condition underground on August 17, he told safety specialist Ray that the fall was reportable and explained why. (Tr. I 19; G. Ex. 5, p. 7) Thereafter, at 1:15 p.m., Ellison told shift foreman Martin and section foremen Pauley that the fall needed to be reported. No call was made. Once on the surface at about 2 p.m., Ellison told Belcher and Ashby about the 15-minute reporting rule and why Respondent was required to report the fall to the MSHA hotline. (Tr. 119; G. Ex. 5, pp. 7-8). Ashby told Ellison that he would make the call. No call was made. Nearly an hour later at 2:55 p.m., when Ellison asked if Ashby had reported the fall, Ashby replied, "Not yet. I'm getting ready - - getting ready to." (Tr. I 120; G. Ex. 5, p. 8). After consulting supervisor Price, Ellison began drafting the instant 104(d)(1) Order.

As noted, Respondent was required to report the fall immediately on August 13, i.e., within 15 minutes of its occurrence when Pauley had the requisite knowledge of its reportability. By the time Ellison inspected, it was four days later, and Respondent continued its failure to report the roof fall accident despite Ellison's repeated requests that it do so. In these circumstances, I agree with inspector Ellison's conclusion that Respondent's unjustifiable

intransigence exhibited "reckless disregard"[42] for the reporting requirement. (Tr. I 121-23, 219-220). Respondent's inaction exhibited a gross and continuing lack of care for the reporting requirement that it deemed unworthy of its attention. In fact, Respondent did not even report the accident to MSHA until after inspector Ellison wrote the Order.

In these circumstances, I agree with inspector Ellison that the abatement efforts of Respondent exhibited reckless disregard for the reporting requirement and MSHA's statutory authority. Accordingly, this factor supports the unwarrantable failure determination.

D. Conclusion on Unwarrantable Failure Issue

In sum, after considering the relevant Commission factors, I find that the violative condition was extensive, obvious, and lengthy. Further, the failure to report the roof fall accident heightened miners' continuing exposure to potential grave danger from other roof falls as miners continued to work under dangerous, adverse roof conditions throughout the section. Pine Ridge's supervisors knew or should have known through reasonable inquiry that the roof fall was reportable. Pine Ridge did not harbor any reasonable, good-faith belief that the unplanned roof fall did not occur in active workings, did not impair ventilation, and did not impede passage. Pine Ridge's abatement efforts manifested "reckless disregard" for the reporting requirement.

Given the fact that the violation was obvious, dangerous, and extensive; the fact that inspector Ellison had completed his inspection of the section and Respondent did not bring the fall to his attention; the fact that Respondent planned on cleaning up the fall and punching to the surface through another entry; and the fact that Respondent engaged in self-help without simple notification to MSHA, I conclude that the totality of record evidence supports the inference that Respondent, acting through Pauley, Belcher, or both, made a conscious decision to refrain from reporting what should have been known as a reportable roof fall. I infer that Respondent acted intentionally and at least with a "serious lack of reasonable care" in failing to report the fall immediately to MSHA. In my view, the entire record supports the inference that Pine Ridge consciously and deliberated failed to report the fall based on a calculated risk that it would not get caught. As the Secretary points out near the outset of her brief, Respondent "was caught, and the Secretary's 104(d)(1) order must be affirmed and an appropriate penalty imposed."

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[42]As Judge Paez recently noted in *Stillhouse Mining*, supra, Slip op. at 7, the term "reckless" is commonly understood as "without thinking or caring about the consequences of an action [or inaction]," *citing The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). As a legal term, "reckless" conduct is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard or indifference to that risk; heedless; rash . . . . more than mere negligence: it is a gross deviation from what a reasonable person would do." *Black's Law Dictionary* 1298 (8th ed. 2004). The term "disregard" is commonly understood as "to treat without fitting respect or attention: to treat as unworthy of regard or notice: to give no thought to: pay no attention to. *Webster's Third New International Dictionary (Unabridged)* 665 (1993). I note that for civil penalty purposes, 30 C.F.R. §100.3, Table X, defines "reckless disregard" as "conduct which exhibits the absence of the slightest degree of care."

E. Civil Penalty Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority 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 "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 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 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
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> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600, citing 30 U.S.C. § 820(I) (italics added).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has recently reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293.

F. Explanation for Civil Penalty Assessed

As noted, Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. In addition, since Order No. 8093139 was issued under § 104(d)(1), § 110(a)(3)(A) of the Act requires that the minimum penalty shall be $2,000.00. Here, the Secretary's Petition has proposed assessment of the statutory minimum penalty of

$2,000.00 for the § 104(d)(1) violation.[43] Addressing the appropriate penalty criteria in light of the facts in the record and the rationale in the Final Rule, I find that the statutory minimum penalty of $2,000.00 is insufficient to have the requisite deterrent effect for the unwarrantable failure at issue.

The parties stipulated to the authenticity of the Violator Data Sheet attached to the Secretary's Petition for Assessment of Civil Penalty. (Tr. I, 15-16; see G. Ex. 1). Respondent introduced no evidence to the contrary. Pine Ridge's history of previous violations is based on both the total number of violations and the number of repeat violations of the same provision of a standard in the preceding-15 month period prior to August 17, 2009. 30 C.F.R § 103.3(c). The un-rebutted record establishes that Pine Ridge has approximately 1.43 violations per inspection day and a repeat history of violating 30 C.F.R. § 50.10 three times in the 15 months preceding the instant 104(d)(1) Order.

As noted, Pine Ridge was more than negligent with respect to the actual violation, i.e, the failure to report the roof fall accident immediately.[44] Rather, as explained above, Respondent's unjustifiable intransigence in failing to report the accident exhibited "reckless disregard," defined in Part 100.3(d) table X for penalty purposes as ". . . display[ing] conduct which exhibits the absence of the slightest degree of care." As found herein, Respondent's inaction exhibited a gross and continuing lack of care for the reporting requirement that it deemed unworthy of its attention.

I have found that Pine Ridge did not have any reasonable, good-faith belief that the unplanned roof fall did not occur in active workings, did not impair ventilation, and did not impede passage. Similarly, Pine Ridge did not demonstrate good-faith by attempting to achieve rapid compliance after notification of the violation. Only after multiple discussions and the 104(d)(1) order was drafted did Respondent belatedly notify MSHA four days after the "near miss" accident. Although the gravity of the violation as set forth in inspector Ellison's Order was no likelihood of injury, no lost work days, and non-S&S, I have found that the failure to immediately report the roof fall, hampered the timely mobilization of MSHA's expert personnel and heightened the exposure of miners to potential grave danger from adverse roof conditions throughout the East Section for several days before a detailed rehabilitation plan was in place.

Finally, the appropriateness of the penalty to the size of Pine Ridge's business is calculated by using the size of the mine cited and the size of the mine's controlling entity. Pine Ridge's Big Mountain No. 16 is a very large underground coal mine, which takes several months to fully inspect (Tr. I 55), has annual tonnage of over 1,000,000 to 2,000,000, and has a controlling entity, Patriot Coal Corporation, with annual tonnage of over 10,000,000. (G. Exh. 1 and 30 C.F.R § 103.3(b) Tables I and II). Pine Ridge declined to stipulate that payment of civil penalties would not affect its ability to remain in business, but it failed to offer any argument or

---

[43] I note that § 110(a)(3)(B) of the Act requires a minimum penalty of $4,000.00 for any order issued under section 104(d)(2).

[44]Respondent's prudent action in breakering off the No. 6 entry where the roof fall occurred is not a mitigating factor with respect to the actual violation, i.e., the failure to report.

evidence that its ability to continue in business would be impaired. *Sellersburg*, 5 FMSHRC at 294, *citing Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973). Moreover, Pine Ridge failed to introduce any financial information or other specific information on the issue of whether the proposed penalty, which merely adopted the statutory minimum of $2,000.00, was inappropriate to the size of Respondent's business or adversely affected its ability to remain in business. Absent proof that the imposition of authorized penalties would adversely affect Pine Ridge's ability to stay in business, it is presumed that no such adverse affect will occur. *See Broken Hill Mining Co.*, 19 FSSHRC 673, 677 (Apr. 1997) (*citing Sellersburg*, 5 FMSHRC at 294, which cited *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). *See also Steele Branch Mining*, 18 FMSHRC 6, 15 (Jan. 1996).

Given the large size of Respondent's business and the other penalty criteria discussed above, I find that an increased penalty of $6,000.00 against Pine Ridge is based on a proper consideration of the statutory criteria, the deterrent purpose of the Act, and the rationale in the Final Rule. *Cf. Sellersburg*, 5 FMSHRC at 294-95. This results in an increase from the required statutory minimum penalty of $2,000.00 by the amount of $1,000.00 for each day the failure to report the roof fall accident continued while miners were exposed to adverse roof conditions throughout the East Section.

IV. ORDER

For the reasons set forth above, Order No. 8093139 is **AFFIRMED**, as written, thus establishing an unwarrantable failure to report a roof fall accident within 15 minutes under 30 C.F.R. § 50.10. Within 40 days of the date of this decision, Respondent, Pine Ridge Coal Company is **ORDERED TO PAY** a civil penalty of $6,000.00 for its unwarrantable failure to report the roof fall accident. Upon payment of the penalty, this proceeding is **DISMISSED**.

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 11, 2011

MAPLE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2011-1318-R
	:	Citation No. 8123869;02/25/2011
	:	
	:	Docket No. WEVA 2011-1319-R
	:	Order No. 8123871;02/28/2011
v.	:	
	:	Docket No. WEVA 2011-1320-R
	:	Order No. 8123873;02/28/2011
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2011-1321-R Citation No. 8123876;03/01/2011 Maple Eagle No. 1 Mine Mine ID 46-04236
MAPLE COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2011-1403-R
	:	Citation No. 8123841;02/01/2011
	:	
	:	Docket No. WEVA 2011-1404-R
	:	Citation No. 8123842;02/01/2011
v.	:	
	:	Docket No. WEVA 2011-1405-R
	:	Citation No. 8123844;02/01/2011
	:	
	:	Docket No. WEVA 2011-1406-R
	:	Citation No. 8123856;02/08/2011
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2011-1407-R Citation No. 8123859;02/14/2011 Docket No. WEVA 2011-1408-R Citation No. 8123864;02/16/2011
	:	
	:	Docket No. WEVA 2011-1409-R
	:	Citation No. 8123866;02/16/2011
	:	
	:	Docket No. WEVA 2011-1410-R
	:	Order No. 8123846;02/01/2011

:	Docket No. WEVA 2011-1411-R
:	Order No. 8123853;02/08/2011
:	
:	Docket No. WEVA 2011-1412-R
:	Order No. 8123855;02/08/2011
:	
:	Maple Eagle No. 1 Mine
:	Mine ID 46-04236

DER PERMITTING LATE FILING OF CONTESTS AND ORDER OF CONSOLIDATION

Before: Judge Barbour

On April 13, 2011 counsel for Maple Coal Company ("Maple") moved to late file contests of seven citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and three orders issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). Three of the citations and one of the orders were issued to Maple on February 1, 2011, one of the citations and two of the orders were issued to Maple on February 8, 2011, one of the citations was issued on February 14, 2011, and two of the citations were issued to Maple on February 16, 2011. Section 105(d) of the Act, 30 U.S.C. § 815(d), requires contests of such citations and orders to be filed within 30 days of their issuance.

As grounds for its motion, the Company points out that penalties have not yet been assessed for the violations alleged in the citations and orders. Mtn. 2. Maple also states that prior to the issuance of the subject citations and orders, the Company was advised on December 17, 2010 that its mine was subject to a Potential Pattern of Violations designation. In response, Maple adopted an improvement program designed to reduce the number of S&S violations at its mine. *Id.* It also monitored those citations and orders with S&S findings. As a result, on February 22, 2011 the company's representative, Senior Manager Ronald Wooten, by letter requested a conference with MSHA District 4 personnel to administratively present the company's defenses to the S&S findings contained in the 10 subject citations and orders. Wooten wanted to persuade MSHA to modify the findings. Mtn 2.

Between March 2, 2011 and March 18, 2011 Wooten met with MSHA CLR Dana Hosch to discuss the citations, orders and the S&S findings. Maple contends that Hosch told Wooten that the District Manager would make the final decision regarding any modifications, and that he, Hosch, would write a report to the District Manager presenting Maple's arguments. Mtn. 3. Maple asserts that because it believed its positions with regard to the citations and orders would be considered, it did not file contests of the subject enforcement actions. Mtn. 3.

Maple states that on March 20, 2011 the District Manager informed Wooten that he would need a few days to consider Maple's arguments. However, on April 8, 2011 the District Manager sent a letter to Maple advising the company that its rate of S&S violations for the first quarter of the year exceeded the target goal established by MSHA, and stated that the mine was currently being evaluated by MSHA for Pattern of Violations ("POV") status. Mtn. 3. Maple then sought expedited late review of the citations and orders because they form part of the basis for Maple's potential POV status designation. *Id.* 4. (Four additional citations for which the company had filed timely contests are included in its request for expedited review.)

As grounds for acceptance of its contests Maple asserts it relied to its detriment on MSHA's conferencing process. Motion 5. It also maintains that a balancing of the equities weigh in its favor. Because the facts of violation and the findings of the inspectors, including the S&S findings, will be subject to trial in any event when the forthcoming penalties are contested by the company, the only question is when the merits will be tried, not if they will be tried. *Id.* Further, if late filing is denied Maple will be prejudiced because its mine may be placed in a POV status subjecting it to "one of MSHA's most severe forms of enforcement." *Id.* Thus, if the contests are not allowed, until the penalty proceeding is completed the Company may find itself "erroneously and unjustly" subject to MSHA's POV enforcement, upon which it should not have been placed in the first place." Motion 6.

The Secretary opposes the motion. She notes that there is nothing mutually exclusive about its conference procedures and the right of an operator to contest citations and orders. She asserts Maple could and should have filed timely contests while at the same time pursued the agency's conferencing procedures. Op. Mtn. 2. Rather than file contests, Maple took its chance that a sufficient number of S&S findings would be modified or vacated as a result of its conferences with MSHA. Maple chose how to proceed and now should live with the consequences of its choice. *Id.* 4-5.

The Secretary also argues that the Company is overstating the potential consequences of a POV designation. It is, she suggests, no more onerous than the mine being under a section 104(d) order sequence. 30 U.S.C. §814(d). Op Mtn. 6.

RULING

I am not persuaded by the Company's detrimental reliance argument. I agree with MSHA that the most plausible read of the Company's motion is that it did in fact choose to conference the subject citations and orders and that the Maple only decided to bring the contests after it became clear the result of conferencing the citations and orders would be unsatisfactory to the Company

While its choice was unfortunate, I do not agree with the Secretary that it prevents acceptance of Maple's late filed contests. In my opinion, the equities favor the Company. While it

is true the company can contest the S&S findings in a forthcoming civil penalty case, that case is months down the road, and the Company faces the possibility that in the meantime it mine will have to operate under a POV designation, one that may be invalidated when the civil penalty proceeding is decided. The Secretary's assertion that a POV designation is no more burdensome than being placed on a "d" chain is not convincing. Under section 104(e) of the Act, 30 U.S.C. ' 814(e), a violation issued with an S&S finding requires closure of the affected area and the withdrawal of miners until the violation is abated. Unlike an order issued under section 104(d), an attendant high level of negligence is not required for the closure to take effect. S&S findings are commonly made by the Secretary's inspectors. Under a POV designation an operator faces a sanction that carries a highly disruptive potential. The sooner a mine's POV status is clarified the better.

For these reasons, the motion to permit late filing **IS GRANTED.** In addition, and in order to permit the most expeditious resolution of the POV issue, the motion to consolidate the 10 subject contest proceedings with the previously filed four contest proceedings also **IS GRANTED.** A hearing in these matters will be scheduled subsequently.

David Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2010-315 A.C. No. 11-02752-206211-01
v.	:	
AMERICAN COAL COMPANY, Respondent	: :	Mine: Galatia Mine

ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge McCarthy

This case is before me upon a petition for assessment of a civil penalty filed under section 105(d) of the Federal Mine Safety and Health Act of 1977. It involves a single, section 104(a) citation designated as significant and substantial (S&S). The citation was issued on August 20, 2009 after an accident occurred at the Respondent's underground bituminous coal mine, the Galatia Mine, in Galatia, Illinois.

Citation No. 6683272 alleges the following condition or practice:

> The D9 dozer operator at the New Future raw coal stockpile was positioned in a hazardous location over the bridge/void condition created by coal reclaiming operations beneath the storage pile. The operator trammed the dozer across the stockpile above the #2 feeder. An unseen void was present above the feeder due to the #2 feeder being started by the mine control attendant without informing the dozer operator. The lights that indicate which feeders are operating could not been (sic) seen from all areas on the stockpile due to excessive height of the coal stockpile. The coal above the void collapsed as the dozer was being trammed across it and the right side of the dozer dropped into the void. An ignition, possibly caused when methane was released from the void, occurred shortly after the dozer dropped into the void. The heat from the ignition caused severe burns to the operator.

The inspector evaluated gravity as an injury occurred, which could reasonably be expected to be permanently disabling and was S&S. Negligence was characterized as moderate.

On August 24, 2009, additional time was granted to terminate the citation after an electrical contractor installed additional lights to indicate which feeders were running. The citation was eventually terminated on September 8, 2009 when additional lights were installed in an effort to inform dozer operators which feeders were running so they would refrain from positioning the dozer in hazardous locations above the operating feeders.

The Solicitor has filed a motion to approve settlement. A reduction in the penalty from $7,578.00 to $3,405.00 is proposed. The Solicitor also requests that the Citation be modified to reduce the level of negligence from "moderate" to "low." For the reasons set forth below, the motion to approve settlement is denied.

In the Motion to Approve Settlement and Dismiss Proceedings, the Secretary relies on the fact that "[t]he dozer operator exited the vehicle and he sustained severe burns from the heat of the ignition." The Secretary then accepts Respondent's argument "that it could not have foreseen that the dozer operator would exit the dozer onto the raw coal pile and, therefore, the negligence should be less than was cited" and the civil penalty reduced.

The authority of Commission judges to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

In *Knox County*, the Commission further explained the role of its judges in reviewing settlements:

> The judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion. While the scope of this discretion may elude detailed description, it is not unlimited and at least some of its outer boundaries are clear. . . . [We] reject the notion . . . that Commission judges are bound to endorse all proposed settlements of contested penalties. However, settlements are not in disfavor under the Mine Act, and a judge is not free to reject them arbitrarily.... Rejections, as well as approvals, should be based on principled reasons. Therefore, we [have] held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria, and is not otherwise improper, it will not be disturbed. In reviewing such cases, abuses of discretion or plain errors are not immune from reversal.

Id. at 2479-80.

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission stated:

> 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. (italics added). Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
>
> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Accordingly, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once such findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has emphasized that a judge is not bound by the amount of the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission has also emphasized, however, that when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Id.* Without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg, supra,* 5 FMSHRC1 at 293.

Applying these legal principles to the facts before me, I find no rational explanation justifying the modification of the citation from moderate to low negligence and the concomitant reduction in penalty by 55%. MSHA regulations define the terms "moderate negligence" and "low negligence" for assessment of penalty purposes. *See* 30 C.F.R. § 100.3(d). Moderate negligence is defined as where, "[t]he operator knew or should have known of the violative

condition or practice, but there are mitigating circumstances." Low negligence is defined as where, "[t]he operator knew or should have known of the violative condition or practice, but there are *considerable* mitigating circumstances." 30 C.F.R. § 100.3(d)(emphasis added). Therefore, in order to justify the reduction of negligence from moderate to low, the Secretary must set forth facts to show not only that there were mitigating circumstances, but that those mitigating circumstances were "considerable."

The Secretary accepts Respondent's argument that it could not have foreseen that the operator would attempt to exit the dozer, which had dropped into the void and ignited a potentially flammable and explosive coal pile. Such reasoning is fallacious. One need not engage in any extended philosophical or rhetorical debate about whether the captain of a sinking ship must go down with it. Unlike the captain of a sinking ship, there were no considerations of overall responsibility for crew, passengers, or cargo here. Suffice it to say that the operator's action would appear to be exactly the sort of action that any reasonably prudent person would take when trapped in the same or similar life-threatening circumstances. Absent a deliberate attempt at suicide, it would be hard to imagine that one would not attempt to exit the sunk dozer in the burning coal pile. Contrary to the proffered settlement, that event is quite foreseeable. Furthermore, the Secretary does not set forth any "considerable" mitigating circumstances that would justify the modification to low negligence or the 55% reduction in penalty, and instead relies entirely on the erroneous claim that the act of self-preservation was unforeseeable.

The injury here was serious. The severe burns could have turned fatal. Penalties must be strong enough to adequately effectuate the deterrent purpose underlying the Mine Act's penalty assessment scheme. *Sellersburg, supra,* 5 FMSHRC at 294. I have considered the representations and documentation submitted and I conclude that the proposed settlement is unreasonable and inappropriate under the criteria set forth in section 110(i) of the Act and would not effectuate the deterrent purpose underlying the Act's penalty assessment scheme. The motion to approve settlement is **DENIED**.

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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April 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2008-423-M
Petitioner	:	A.C. No. 20-02461-145408
v.	:	
	:	
ESSROC CEMENT CORPORATION,	:	ESSROC Cement Corp.
Respondent	:	

ORDER DENYING MOTION TO DISMISS
ORDER RESCHEDULING HEARING

Before: Judge Barbour

On April 05, 2011 Respondent, Essroc Cement Corporation ("Essroc"), filed a motion to dismiss for lack of jurisdiction. The Respondent claims the Essroc Cement Corporation facility is not a "coal or other mine" within the meaning of the Mine Safety and Health Act ("Mine Act"). Resp't Am. Mot. to Dismiss 1. The Respondent contends the Facility is a "cement grinding facility and shipping terminal". *Id.* The Respondent states cement is produced at the Facility by taking finished products mined and milled elsewhere and "combin[ing] these finished products, typically via mixing and grinding processes". *Id.* 2.

In response, the Petitioner argues the Facility is a mine because it engages in milling and grinding and affects commerce by shipping cement. *See* Sec'y Am. Response to Resp't Mot. to Dismiss 2-3, 5. In support of its argument the Secretary submits a letter from L. Harvey Kirk III, CSP, an MSHA Senior Mine Safety and Health Specialist with over 30 years of experience in Portland cement manufacturing and over 15 years of experience as a cement plant production engineer. In the letter, Kirk asserts Essroc is a Portland cement plant that performs finish grinding and shipping. *See* App. to Sec'y Am. Response to Resp't Mot. to Dismiss 7. Further, he states that grinding is a milling process. *Id.* 7-8.

After reviewing the parties' arguments and submissions, I can conclude that MSHA has jurisdiction over the Facility, and I deny the motion. My conclusion is based on the fact that the Facility is a cement plant at which milling and/or grinding is conducted thus making the facility a "mine" within the meaning of the Act. Moreover, the facility engages in interstate commerce and therefore is subject to the Mine Act.

According to Section Four of the Mine Act "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803(2006). The definition of coal or other mines includes facilities used in the milling of materials extracted from their natural deposits. *See* 30 U.S.C. § 802(h)(1)(2006). Milling is not defined in the Mine Act, but it is defined in the Interagency Agreement between the Mine Safety and Health Administration ("MSHA") and the Occupational Safety and Health Administration ("OSHA") ("Interagency Agreement") published in 1979. The Interagency Agreement defines milling as "the separation of one or more valuable desired constituents of the crude from the undesirable contaminants with which it is associated." Mine Safety and Health Administration and the Occupational Safety and Health Administration Interagency Agreement, 44 Fed. Reg. 22,827, 22,829 (April 17, 1979). The appendix of the Interagency Agreement also provides a list of milling processes under MSHA's jurisdiction, which includes grinding. *Id.* The Interagency Agreement provides guidance regarding the jurisdictional boundaries between MSHA and OSHA. *Sec'y of Labor v. Watkins Eng'rs and Constructors*, 24 FMSHRC 669, 674 (July 2002). In addition, in *Secretary of Labor v. Watkins* the Commission determined that the Interagency Agreement as a whole supports MSHA's view that the term "milling" can apply to cement plants even if the facility does not separate waste from valuable material. *Watkins,* 24 FMSHRC at 674. In its Motion to Dismiss Respondent admits that it conducts grinding at the Facility. Resp't Am. Motion to Dismiss 2. The definition of milling includes grinding, therefore the Facility is a mine within the meaning of the Act. In addition, the Interagency Agreement states MSHA has jurisdiction over mining operations that conduct grinding. Interagency Agreement, 44 Fed. Reg. at 22,829.

The Commission has stated that "Congress intended to exercise its authority to regulate interstate commerce to the 'maximum extent feasible' when it enacted section four of the Mine Act." *Jerry Ike Harless Towing, Inc. and Harless, Inc.*, 16 FMSHRC 683, 686-687 (Apr. 1994)(citing *Marshall v. Kraynak*, 604 F.2d 231, 231 (3d Cir. 1979); *United States v. Lake*, 985 F.2d 265, 267-269 (6th Cir. 1993)). Respondent states that the clinker it uses comes from Canada. Resp't. Am. Mot. to Dismiss 2. I find that the Facility's operations affect commerce because products are purchased from Canada for use at the facility in Essexville, Michigan. Such a finding is consistent with Congress' intent to exercise its power to regulate commerce to its 'maximum extent feasible' through the Mine Act. For the reasons stated above, the Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

The hearing scheduled to begin April 26, 2011 is **CANCELED**. It is **RESCHEDULED** to be heard beginning at **8:30 a.m.** on **Tuesday, July 12, 2011** in Bay City, Michigan. The prehearing requirements set out in the February 23, 2011 Notice of Hearing remain in effect except that discovery must be completed by **June 14, 2011** and the parties must exchange prehearing statements no later than **June 28, 2011**.

David Barbour
Administrative Law Judge

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