APRIL 2012

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

April 25, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. VA 2008-215
ERNEST MATNEY, employed by KNOX CREEK COAL CORPORATION	: :	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman concluded that Ernest Matney ("Matney") was not personally liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c),[1] for failing to conduct an adequate preshift

[1] Section 110(c) of the Mine Act provides:

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

30 U.S.C. § 820(c).

examination in violation of 30 C.F.R. § 75.360(a)(1)[2] and failing to protect personnel from roof and/or rib falls in violation of 30 C.F.R. § 75.202(a).[3] 31 FMSHRC 1422, 1424, 1438 (Dec. 2009) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's decision. For the reasons that follow, we vacate the judge's decision, reverse his conclusion that Matney is not liable under section 110(c) of the Mine Act, and remand for assessment of a penalty.

I.

Factual and Procedural Background

Knox Creek Coal Corporation ("Knox Creek") operates the Tiller No. 1 Mine, an underground coal mine in Tazewell County, Virginia. 31 FMSHRC at 1425. At the time of the hearing, the mine operated two production shifts and one maintenance shift in three sections. K.C. Post-Hearing Br. at 3; Tr. 260-61. The area at issue in this proceeding is the 005 MMU, also referred to as the No. 3 section. 31 FMSHRC at 1425. The area consists of the No. 3 and the No. 4 entries, and the crosscut between these entries in the general vicinity of the area located inby survey stations 8050 to 8045. *Id.*; G. Ex. 7 (attached to the judge's decision and attached to this decision as Appendix 1 ("App. 1")). In this area, Knox Creek utilized the room and pillar method of mining. 31 FMSHRC at 1425. The relevant provisions of the roof control plan limited the entry widths to 20 feet. *Id.* Roof bolts were required: four across between the ribs, on four-foot centers. *Id.* Each roof bolt is driven into the roof through a six-inch, washer-like bearing plate that compresses a larger 10 to 12 inch "pizza pan" plate that supports the draw rock in the surrounding area of the bolt. *Id.*

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[2] 30 C.F.R. § 75.360(a)(1) provides in pertinent part:

> [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. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval.

[3] 30 C.F.R. § 75.202(a) states:

> 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.

Knox Creek originally mined the area in the vicinity of survey stations 8045 and 8050 approximately three to four months prior to the November 7, 2006, inspection at issue. *Id.* When this area was initially mined, there was a rock fall in the No. 3 entry just outby survey station 8045 that required the area to be dangered-off with two rows of cribs. *Id.*; *see* App. 1. After this area was mined and rock dusted, it remained idle for several months until November 2006, when battery chargers for scoops were moved into the area in preparation for further development inby. *Id.*

On Sunday evening, November 5, and/or Monday morning, November 6, 2006, two scoop battery chargers were placed in the section, one in the No. 3 entry and the other in the crosscut outby the 8050 survey station. *Id.* at 1426. The scoops operating from these battery chargers are approximately 10 feet wide and 25 feet long. *Id.* The scoop and charging station in the No. 3 entry were designated as No. 1, and the scoop and charging station in the crosscut were designated as No. 2. *Id.*; *see* App. 1.

After the battery chargers were placed in the No. 3 entry and crosscut, at least four preshift and onshift examinations of the section were conducted during the relevant time period. 31 FMSHRC at 1426. Ernest Matney, the maintenance shift section foreman, conducted an onshift and preshift examination beginning at 4:13 a.m. on Monday, November 6. *Id.* Christopher Stiltner, the day shift section foreman, conducted an onshift and preshift examination during the November 6 day shift following Matney's maintenance shift. *Id.*; Tr. 277. Charles Riordan, the evening or second production shift section foreman, conducted an onshift and preshift examination on the evening of November 6. *Id.*; Tr. 221. Finally, in the early morning hours of November 7, Matney conducted his November 7 combined onshift and preshift examination that began at 4:15 a.m., which he completed 36 minutes later at 4:51 a.m. *Id.* at 1426-27. None of the preshift or onshift examinations noted any hazardous roof conditions. *Id.* at 1427.

During his November 7 preshift examination, Matney checked eight headers. *Id.* After returning to his crew at the continuous miner, Matney traveled down to the power center, then to the belt drive (located in a parallel crosscut, two crosscuts over from the crosscut at issue), and ultimately to the No. 1 charger in the No. 3 entry, where he initialed the date board at 4:39 a.m. *Id.*; Tr. 464-65. Matney stated that he observed the intersection in the vicinity of survey station 8045 from the back of the No. 1 scoop that was parked next to the No. 1 charger. 31 FMSHRC at 1427. However, he did not walk through the intersection in the vicinity of survey station 8045, or to the rock fall area. *Id.*

The date board at the No. 1 charger was approximately 45 feet away from the survey station at 8045. *Id.* Matney did not note sloughage and compacted material in the intersection of the crosscut and No. 3 entry observed by Mine Safety and Health Administration ("MSHA") Inspector Donald Phillips during his inspection several hours later. *Id.*; *see* App. 1, Area "C." Day shift foreman Stiltner testified that his crew did not take scoop No. 1 off the charger in the No. 3 entry before Phillips inspected the area during the morning of November 7. 31 FMSHRC at 1427. Consequently, the judge found that the compacted material on the mine floor

immediately underneath the corner of the right rib likely existed prior to Matney's November 7 preshift examination, as it had likely been caused by contact with the No. 1 scoop. *Id.*

After signing the date board in the No. 3 entry, Matney traveled down a crosscut parallel to the crosscut where the No. 2 scoop was located. *Id.* Matney traveled to the belt drive, walked the track entry located in the No. 4 entry, and used a mantrip to travel down to the crosscut to the vicinity of the No. 2 battery charger. *Id.*; Tr. 467-68. Matney signed the date board located in the crosscut inby survey station 8050 at 4:40 a.m., reflecting that the date board was signed just one minute after the date board in the No. 3 entry was signed.[4] 31 FMSHRC at 1427; *see* App. 1, Area "E." Matney testified that he observed the intersection at survey station 8045 from the date board at the No. 2 battery charger. *Id.* at 1427-28. The No. 2 scoop was not parked next to the charger during Matney's preshift examination. *Id.* at 1428. Rather, it was located near the disabled continuous miner in the intersection at survey station 8630. *Id.*

Similar to his inspection of the roof conditions with his cap light from the first date board in the No. 3 entry, Matney testified that he relied on his cap light to view the 8045 intersection from the second date board located in the crosscut. *Id.* The only reference to roof conditions in Matney's written November 7 preshift examination report was the remark "top shaggy." *Id.*; G. Ex. 10-10. Matney testified that he did not observe any of the adverse roof conditions that were subsequently observed by Inspector Phillips five hours later at 10:00 a.m. 31 FMSHRC at 1428.

On November 7, Inspector Phillips conducted a quarterly inspection of the mine and found numerous hazardous roof conditions in the No. 3 section, including: (1) two sheared roof bolts, one in the crosscut inby the intersection of the crosscut and the No. 3 entry and the second above the No. 2 scoop battery charger in the crosscut inby survey station 8050; (2) roof cracks containing rock dust and loose roof material near survey stations 8045 and 8050; (3) three areas of rib sloughage, extending the distance from the ribs to the first row of bolts beyond the plan's permissible limit of 48 inches; and (4) dislodged timbers in one of the cribs used to danger off the area where a rock fall had occurred in the No. 3 entry outby the intersection of the crosscut. *Id.* at 1428-31. Phillips found that none of the hazardous conditions was recorded in any of the four preshift examination reports immediately preceding the inspection. *Id.* at 1426-28.

Inspector Phillips issued Citation No. 7317341 for failure to conduct an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1). 31 FMSHRC at 1423; G. Ex. 3. Inspector Phillips also issued an order for failure to protect personnel from roof and/or rib falls in violation of 30 C.F.R. § 75.202(a). 31 FMSHRC at 1423; G. Ex. 4. Pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), Phillips designated both violations as "significant and

[4] The judge found that the accuracy of the times recorded by Matney were suspect, but that Matney's exam, in its entirety, took 36 minutes to complete, from 4:15 until 4:51 a.m. 31 FMSHRC at 1427 n.7; G. Ex. 10-10.

substantial" ("S&S")[5] and attributable to Knox Creek's "unwarrantable failure."[6] 31 FMSHRC at 1431. After a special investigation, MSHA found Maintenance-Shift Foreman Ernest Matney to be personally liable under section 110(c) of the Act for both violations, and proposed a total civil penalty of $2,700 against him. *Id.* at 1423.

Knox Creek conceded that both violations occurred and that both were S&S. *Id.* However, it contested the unwarrantable failure designations. *Id.* at 1424. Matney contested his personal liability under section 110(c).

In his decision, the judge affirmed the unwarrantable failure designations for both violations. *Id.* at 1432-34. The judge found that "[i]t is clear that virtually all of the elements of an unwarrantable failure are manifest in this case." *Id.* at 1432. Regarding duration, the judge concluded that, due to the fact that the severed shaft of the roof bolt was covered with rock dust, the sheared roof bolts occurred when the area was initially mined during the summer of 2006, and thus had existed for approximately four months. *Id.* at 1433. As to the sloughed material located along the corner of the right rib inby the intersection of the crosscut in the No. 3 entry, the judge found that it had existed for more than one shift because the No. 1 scoop remained on the battery charger during the shift preceding Matney's maintenance shift. *Id.*

The judge also determined that the roof conditions were "readily apparent" in a "heavily traveled area." *Id.* In considering the degree of danger posed by the roof conditions, the judge relied in particular on the high degree of danger created by one of the sheared roof bolts located at the intersection of entry No. 3 with the crosscut, adjacent to an area that was dangered-off by two rows of cribs because of a prior rock fall. *Id.* The judge reasoned that the location of this sheared bolt alone justified an unwarrantable failure finding. *Id.* The judge also found that Knox Creek had been put on notice that greater compliance efforts were necessary given that the operator was cited only one week before Phillips' inspection for inadequate preshift examinations.[7] *Id.* The judge concluded that "[t]he long standing nature of these readily

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[5] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[6] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[7] The parties stipulated that a citation had been issued to Knox Creek on October 31, 2006, for an allegedly inadequate preshift examination at the 002 MMU. *Id.* at 1426. To terminate this citation, all of Knox Creek's examiners, including Ernest Matney, Christopher Stiltner, and Charles Riordan, the three 005 MMU section foremen, were retrained on preshift examinations. *Id.* The retraining occurred shortly after October 31, 2006, less than one week

(continued...)

apparent hazardous roof conditions, that were repeatedly overlooked during the numerous onshift and preshift examinations preceding Phillips' inspection provide an adequate basis for concluding that the roof condition and preshift examination violations . . . are attributable to Knox Creek's unwarrantable failure." *Id.* at 1434.

The judge additionally concluded that Matney was not personally liable under section 110(c). *Id.* at 1424. The judge again noted that the collective failures of all of the preshift examiners to perform adequate exams provided a sufficient basis for an unwarrantable failure determination. *Id.* at 1436. He found that while Matney's conduct individually evidenced a "high degree of negligence," it did not amount to a "'knowing' violation," and thus Matney was not personally liable under section 110(c). *Id.* at 1437. He also rejected the Secretary's argument that Matney engaged in intentional misconduct by "deliberately fail[ing] to note a hazardous roof condition that was known to him, or, that should have been known to him, during his preshift examination." 31 FMSHRC at 1424. The judge declined to draw an inference from the evidence that the area of the sheared roof bolt at the No. 3 entry had previously been cribbed, but then intentionally dismantled or accidentally knocked down and not replaced in order to allow access by the scoops to the chargers placed in that area the day before Phillips' inspection. *Id.* at 1424, 1436-38.

The Secretary sought and the Commission granted review of the judge's finding that Matney is not personally liable under section 110(c). The operator did not seek review of the judge's conclusion that there had been an unwarrantable failure to comply with relevant standards.

II.

Disposition

The Secretary argues that the judge erred in disposing of the case against Matney based on his finding that no intentional misconduct had occurred, thereby failing to give adequate consideration to whether Matney's undisputed, repeated failures to note or remedy numerous hazardous roof conditions otherwise established section 110(c) liability. She argues that the judge applied the wrong legal standard by requiring the Secretary to prove that Matney willfully violated the cited standard. She also maintains that the judge failed to provide an adequate explanation for his conclusion that Matney was not liable under section 110(c). She also contends that the judge mischaracterized Matney's testimony regarding the placement of the loose cribs, which undermined his finding of no intentional misconduct. The Secretary urges the Commission to vacate the judge's section 110(c) determination and to remand the case to him for further consideration.

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[7](...continued)
prior to the issuance of the November 7, 2006, citations at issue. *Id.*

Matney responds that the judge did not rely solely on an "intentional misconduct" test nor find it a prerequisite for section 110(c) liability. In particular, Matney argues that while the judge noted that Matney's preshift examination was inadequate and highly negligent, the judge concluded that the foreman's actions did not rise to the level of aggravated conduct. Matney also argues that the judge did not err by failing to explicitly account for his two preshift examinations because the record does not establish that all of the violative conditions cited by the inspector were present at the time of the first examination on November 6. Matney also contends that whether or not the judge mischaracterized his testimony regarding the placement of the loose cribs, the judge's conclusion that Matney was not liable under section 110(c) must be affirmed.

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

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)).

A knowing violation thus occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. The Commission has explained that "'[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.'" *Id.* (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

In this case, the judge properly set forth the test for determining whether an individual is liable under section 110(c). 31 FMSHRC at 1424, 1435-36. However, in applying that test, the judge ignored his own factual findings regarding the obvious nature of the violations involved and the overwhelming evidence in the record showing that Matney, as the preshift examiner, knew or should have known of the cited roof conditions and knew or should have known that his preshifts were inadequate. As a result, the judge's conclusion that Matney was not liable under section 110(c) is unsupportable.

The judge focused his section 110(c) analysis on the Secretary's theory that Matney had engaged in intentional misconduct because Matney allegedly knew that Knox Creek had

installed, and then intentionally removed, a crib that was supporting the sheared bolt in the intersection of the crosscut and the No. 3 entry. 31 FMSHRC at 1424, 1436-38.[8] The judge's focus on whether or not the Secretary had successfully proved that the crib had been installed and removed was far too narrow and led him to overlook the most relevant evidence regarding whether a "knowing" violation occurred.

Although the judge found that a crib had *not* been installed and removed, as claimed by the Secretary,[9] that finding is not at all dispositive of whether Matney knew or should have known of other violative conditions relating to the roof. The Commission has made clear that section 110(c) liability does not hinge on whether an agent engaged in "willful" conduct. *Kenny Richardson*, 3 FMSHRC at 15. Instead, the question is whether Matney knew or should have known about the violative roof conditions. *Id.* at 16.

The judge's unwarrantable failure findings with regard to the violative conditions are directly relevant to the inquiry of whether Matney knew or should have known of the roof conditions. In *Freeman United*, 108 F.3d at 363, the D.C. Circuit stated that "knowing" in the context of section 110(c) includes "deliberate ignorance" and "reckless disregard," as well as "actual knowledge." The judge erred by failing to reconcile his unwarrantable failure findings with his section 110(c) analysis. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (holding that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision).

For purposes of the section 110(c) analysis, the most significant unwarrantable failure finding made by the judge in this regard is his finding that the extensive violative roof conditions were "readily apparent" and that these hazardous roof conditions existed during Matney's November 7 preshift examination. 31 FMSHRC at 1432-33. He also found that "the hazardous roof conditions went unattended for a considerable period of time, and they were repeatedly overlooked during the course of numerous preshift and onshift examinations." *Id.* at 1433. The judge had previously noted that a few days before the preshift and onshift examinations of

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[8] If a crib had been installed, it could have provided evidence that Matney knew that additional support of the sheared roof bolt was required, and thus knew of the violative condition (that is, the bad roof).

[9] Ultimately, the judge credited Knox Creek's witnesses in declining to draw an inference that a crib had been built and dismantled in the area. *See Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984), *aff'd*, 766 F.2d 469 (11th Cir. 1985) (stating that when the judge's finding rests upon a credibility determination, the Commission will not substitute its judgment for that of the judge absent clear indication of error). Accordingly, there is no basis to overturn the judge's finding that the crib had not been built and then dismantled under the sheared roof bolt. *See, e.g.*, *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1862 (Nov. 1995) (concluding that judge was within his discretion in refusing to draw inference after considering record evidence).

November 7, 2006, Matney, along with the day shift and night shift foremen, had inspected the area around the intersection at the 8045 survey station in preparation for advancement inby. *Id.* at 1426. The three foremen traveled the area several times to determine the best location for placement of the two scoop battery chargers. *Id.* In this regard, the judge stated: " . . . the hazardous roof conditions, which were repeatedly overlooked by preshift and onshift examiners, included: two sheared roof bolts, one of which was located in an intersection near a dangered-off area; several areas of rib sloughage that resulted in exceeding the maximum 48 inch distance allowed between ribs and roof bolts; and a dislodged crib located near an intersection in an area of bad roof." *Id.* at 1432.

Substantial evidence supports the judge's findings. The judge determined that the sheared bolts and the roof cracks at survey station 8045 had existed since the area was initially mined four months earlier. *Id.* at 1433. The judge also found a high degree of danger and emphasized that the sheared bolt in the intersection of the No. 3 entry near the dangered-off area *alone* constituted an unwarrantable failure. *Id.* at 1433-34.

Matney failed to address these conditions in two separate preshift examinations, despite needing to enter the area to access the scoop chargers. In short, the judge's findings that the violative conditions were "readily apparent" and had existed for a considerable period of time lead inescapably to the conclusion that Matney, the shift foreman conducting preshift examinations, knew or should have known that the violative roof conditions existed.

Also significant for the section 110(c) analysis in this case is the evidence regarding the nature and extent of Matney's preshift examinations. The judge found that the timing of Matney's November 7 preshift examination noted on the date boards was "suspect." *Id.* at 1427 n.7.[10] The judge noted that Matney completed his entire preshift examination of this significant area of the mine in only 36 minutes,[11] that Matney merely used his cap light to view and inspect the area, and that Matney did not walk through the area of survey station 8045 during the examination. 31 FMSHRC at 1427 & n.7, 1428.

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[10] Matney initialed the date board at the No. 1 charger in the No. 3 entry at 4:39 a.m. 31 FMSHRC at 1427. According to his testimony, he traveled two crosscuts in the No. 3 entry over to where the belt drive was located in a parallel crosscut, then traveled down that crosscut to the No. 4 entry, where the track was located, took a mantrip outby back to the crosscut at survey station 8050, and went to charger No. 2. Tr. 383-84, 463-64, 467-68; R. Ex. 1. Matney inspected that area from the date board behind the No. 2 charger located in the crosscut and initialed the date board at 4:40 a.m., one minute after initialing the first date board in the No. 3 entry. 31 FMSHRC at 1427; Tr. 467-68.

[11] As noted by the judge, Matney's preshift report stated that he began his examination at 4:15 a.m. and concluded it at 4:51 a.m. *Id.* at 1427 n.7; G. Ex. 10-10.

Matney acknowledged that he observed the 8045 area from 65 feet away in the No. 2 entry and from behind the scoop at Date Board No. 1 approximately 45 feet away. Tr. 386, 390. Inspector Phillips, though, testified that he could not see the conditions of the roof and ribs in the intersections from the location of the date boards because it was too far away and too dark. Tr. 163. He testified that an examiner would have to walk through the area to adequately examine it, which Matney failed to do. Tr. 163.

Finally, Matney had been recently retrained on how to perform an adequate preshift examination as abatement of a prior citation issued on October 31, 2006, less than one week prior to the issuance of the citations in this case. 31 FMSHRC at 1426. His actions constitute aggravated conduct, rather than ordinary negligence, supporting a finding of liability under section 110(c). *BethEnergy Mines*, 14 FMSHRC at 1245.

In defining the scope of liability under section 110(c), the Commission has stated:

> If a person 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, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

Kenny Richardson, 3 FMSHRC at 16. In *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984), the Commission reaffirmed its holding in *Kenny Richardson* that "a supervisor's blind acquiescence in unsafe working conditions would not be tolerated." The Commission warned that onsite supervisors "could not close their eyes to violations, and then assert a lack of responsibility for those violations because of self-induced ignorance." *Id.*

This "closed eyes" approach highlighted in *Roy Glenn* is precisely the type of conduct involved here. Matney himself had the responsibility to conduct combined onshift and preshift examinations of the area of the mine at issue to ascertain whether any hazardous conditions existed, to note those conditions, and to take the necessary steps to address the dangerous conditions and protect miners. Clearly, Matney was in a position to protect miners' safety and health, but failed to do so. The evidence indicates that Matney conducted an abbreviated exam, in which he visually examined the mine's conditions from a distance and in the dark, using only his cap light, which he admitted provided limited visibility. 31 FMSHRC at 1427-28; Tr. 382-83, 387. Had Matney conducted a more careful and thorough examination, he would have noted the obvious and highly dangerous roof conditions.

The evidence compels the conclusion that a preshift examiner, exercising reasonable care, would have identified the hazardous roof conditions and taken action to remedy the hazards. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (where evidence supports only one conclusion, remand on that issue unnecessary). Under the standard in *Kenny Richardson*, an agent who knows or has reason to know of a violative condition, and fails to address those conditions, is liable under section 110(c). 3 FMSHRC at 16.

In sum, because the judge focused almost exclusively on the evidence pertaining to the missing crib, he failed to address key pertinent evidence pertaining to Matney's conduct in performing the preshift examinations. By failing to consider this relevant evidence, the judge erred. Given the judge's findings on the extensiveness and obviousness of the violative roof conditions, the level of danger involved, the prior notice provided to Matney himself on how to perform an adequate preshift examination, and the circumstances of Matney's limited examination of the area of the mine in question, we conclude that the record compels the conclusion that Matney should have known of the readily apparent roof violations and that his failure to do so and to note and remedy those violations amounted to a knowing violation under section 110(c). *See Harold Moody*, 19 FMSHRC 688, 693 (Apr. 1997) (reversing judge's determination that agent is not liable under section 110(c)).

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Matney is not liable under section 110(c) for knowingly authorizing Knox Creek's violations and remand for the assessment of a civil penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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April 2, 2012

HOPKINS COUNTY COAL, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. KENT 2009-820-R
	:	Citation No. 6694904; 03/23/2009
	:	
v.	:	Docket No. KENT 2009-821-R
	:	Order No. 6694905; 03/23/2009
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Respondent,	:	
	:	Mine ID 15-18826
	:	Elk Creek Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1441
Petitioner,	:	A.C. No. 15-18826-192978
	:	
	:	
v.	:	
	:	
HOPKINS COUNTY COAL, LLC,	:	
Respondent.	:	Mine: Elk Creek Mine

DECISION

Appearances: Matthew Shepherd, Esq., U.S. Department of Labor, Nashville, Tennessee on behalf of the Secretary;

Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PPLC, and Gary McCollum, Esq., Lexington, Kentucky on behalf of Hopkins County Coal, LLC.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) ("Mine Act" or "Act"). In the contest proceedings Hopkins County Coal, LLC ("HCC") contests the validity of two

citations and one withdrawal order issued to the company at its Elk Creek Mine in Hopkins County, Kentucky on March 23, 2009, by Mine Safety and Health Administration ("MSHA") Special Investigator Kirby Grant Smith. The citations and order were issued because HCC failed to produce records requested by the Secretary during her investigation of a discrimination complaint made by former HCC miner, Robert Gatlin. In the civil penalty proceeding the Secretary seeks civil penalties for the company's alleged violation of the Mine Act's record production requirements.

EVENTS LEADING TO THE CONTESTS

Robert Gatlin, a belt examiner at the mine, filed a discrimination complaint with MSHA on January 20, 2009. Gov. Ex. 1. In the complaint, Gatlin, who was fired by HCC on January 8, 2009, alleged he was discharged in violation of section 105(c) of the Mine Act.[1] 30 U.S.C. § 815(c). Gatlin also requested temporary reinstatement. Tr. 44. MSHA notified the company of the complaint by letter that same day. Secy's Mot. for Sum. Dec. 2. Special Investigator Kirby Smith interviewed Gatlin. Tr. 47- 48. Based on the interview and Gatlin's complaint, Smith believed Gatlin may have engaged in protected activity and may have suffered adverse action. Tr. 48. On January 26, the MSHA district manager, Carl E. Boone II, advised HCC by letter that MSHA wanted to interview five named miners "as part of . . . [its] investigation of . . . [Gatlin's] [d]iscrimination [c]omplaint . . . during the fact-finding segment of this investigation." Gov. Ex. 2. Boone requested HCC contact MSHA special investigators Kirby Smith or Rodney Adamson by February 6 "with a convenient date and time to conduct these interviews." *Id.* By letter dated February 6, counsel for HCC refused to arrange the requested interviews unless MSHA identified the protected activity alleged in the complainant's discrimination complaint. Gov. Ex. 3.

[1] In his complaint Gatlin summarized the alleged discrimination he suffered by stating:

> I feel that I was unfairly terminated due to being directed to do more than my regular job duties on a daily basis, which I would do on weekends for extra pay. I also feel that the comment about the union played a part in my being discharged. I would like my job back, any negative comments deleted from my personnel file and backpay for the time I've been off. I feel that my name has been black balled in the mining industry around here and they will not hire me.
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> Gov. Ex. 1 at 1-1.

* RYOn February 23, Boone sent HCC's counsel a letter in which MSHA requested:

1. Robert Gatlin's personnel file[;]
2. Any documents showing disciplinary action that was taken against Robert Gatlin by [HCC;]
3. Documents showing any hazards or potentially hazardous conditions, including but not limited to pre-shift, on-shift and conveyor belt examination books at the Elk Creek Mine for the period of July 1, 2008 - January 31, 2009[;]
4. Any employee handbook or employee manual that was used by [HCC] from January 1, 2004 - January 20, 2009[;]
5. The personnel files of all employees at the Elk Creek Mine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 - January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin.
6. All documents relied upon by [HCC] in its decision to terminate Robert Gatlin[.]

Gov. Ex. 4.

MSHA requested that the documents be provided to Smith by the close of business on March 2, 2009. *Id*.

In a letter to Boone dated March 2, counsel for HCC again asserted the complaint did not state a protected activity and renewed his request that MSHA clarify "how . . . [the complaint] states a claim under the Mine Act." Gov. Ex. 5. Counsel noted the record books requested in the February 26 letter were available for review at MSHA's convenience, and counsel stated he would respond to the request for the other items once he discussed the request with HCC officials. Gov. Ex. 5.

On March 17, the district manager again wrote to counsel, advising him that MSHA's special investigators would be at the mine on March 23 and that they intended to review and copy the specified examination books. Gov. Ex. 6. The district manager asked counsel to "remind [his] client of its obligation to cooperate in [the] investigation and produce the records that have been requested." Gov. Ex. 6. The letter also requested HCC have "all documents listed in the February 23 . . . letter . . . available for inspection . . . on March 23, 2009." Gov. Ex. 6.

In a March 18 letter to Boone, counsel for HCC again requested "clarification regarding how [Gatlin's complaint] states a claim under the Mine Act." Gov. Ex. 7. Counsel asserted one of HCC's rights under the Act "is to know what it is the agency is investigating." Gov. Ex. 7. Counsel for HCC then attached documents or made available all the information requested except the personnel files of Gatlin and other employees disciplined, reprimanded or terminated "for engaging in conduct which led to the termination of . . . Gatlin." Gov. Ex. 7. The impasse over the personnel files led Boone to again write to the company's counsel. In a letter dated March 20, Boone stated that he expected the personnel files to be provided to the special investigators on March 23. *Id.* Counsel for HCC reiterated its objections to release of the requested personnel files in a letter dated March 23. Gov. Ex. 9.

On March 23, Supervisory Special Investigators Smith and Adamson arrived at the mine at 8:00 a.m. Tr. 65-66. The inspectors went to the mine office. Tr. 66. Smith asked William Adelman, the mine general manager, for the previously requested examination books. Tr. 66. Adamson reviewed the conveyor belt examination book, apparently the only book in which the special investigators were interested. Tr. 67. They also asked for the personnel files requested in the February 23, 2009 letter, of which Adelman had received a copy. Tr. 67, 118. Smith testified that Gatlin's personnel file was requested in order to determine his work history, including any disciplinary action taken against him, to find any information corroborating Gatlin's allegations and to determine his general credibility. Tr. 56, 68. The personnel files of other similarly situated employees were requested in order to determine whether there was evidence of disparate treatment. Tr. 56.

Adelman refused to produce the personnel files. Tr. 67. Adelman believed that the requests in the February 23, 2009 letter for the personnel files of employees disciplined, reprimanded or terminated for engaging in the same conduct as Gatlin and for the documents relied upon by HCC in its decision to terminate Gatlin were vague. Tr. 119. However, he did not request clarification because he believed those files were "off limits to MSHA." Tr. 119-120. Adelman told Smith that privacy concerns prevented him from turning over the requested files. Tr. 67. Since he believed the files to be off limits, Adelman did not ask Inspector Smith to narrow the scope of his request nor did Adelman ask to withhold certain private non-relevant documents contained within the personnel files.[2] Tr. 126. In response to Adelman's privacy concerns Smith explained that MSHA investigators were exempt from Health Insurance Portability and Accountability Act ("HIPAA") regulations. Tr. 67. Adelman still refused to provide the records. *Id.* Smith then issued Citation No. 6694904 (Docket No. KENT 2009-820-R) alleging HCC violated section 103(a) of the Act, when it:

> failed to produce/provide records requested by MSHA special investigators during the performance of investigative duties under section 105(d) of the Act.[3] On February 23, 2009[,] written requests for specific documents were given to the operator's legal counsel . . . as directed by the mine operator. Sections 103(a) and

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[2] The personnel files included a variety of personal information, including medical information, insurance information and employee benefits and unemployment benefits information, some of which was unrelated to Gatlin's discrimination complaint. Tr. 94, 123-124.

[3] Section 105(c)(2) of the Act (30 U.S.C. § 815(c)(2)) requires the Secretary "[u]pon receipt" of a miner's discrimination complaint to "forward a copy of the complaint to the [operator] and . . . cause such investigation to be made as [the Secretary] deems appropriate." Section 105(c)(2) further states, "If upon such investigation, the Secretary determines that . . . [the operator has discriminated against the complainant, the Secretary] shall immediately file a complaint with the Commission[.]" Under section 105(c)(3) the Secretary must determine whether discrimination occurred within 90 days of the receipt of the miner's complaint. 30 U.S.C. § 815(c)(3). Smith testified that investigators have 60 days to complete an investigation and that they strictly adhere to the deadline, with some limited exceptions. Tr. 82.

> [103](h) of the Act [require] the operator to furnish information requested by the Secretary that she has determined necessary in carrying out the provisions of the Act.[4]
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> Citation No. 6694904, Gov. Ex. 10.

In issuing the citation, Smith gave HCC 45 minutes, or until 9:00 a.m., to comply. *See* Citation No. 6694904. Smith advised Adelman to contact his counsel during the abatement period. Tr. 67. At 8:50 a.m. Adelman informed Smith that he had spoken to counsel and did not intend to produce the requested personnel files. Tr. 72. Smith did not extend the abatement period because he believed he had set a reasonable time for abatement and an extension was not justified. Tr. 74. Smith waited until the abatement period expired, then at 9:00 a.m. he issued Order No. 6694905 (KENT 2009-821-R) to the company pursuant to section 104(b) of the Act (30 U.S.C. § 814(b)).[5]

In issuing the order, Smith stated:

> The operator[']s] agent . . . refused to comply with the [sic] Citation No. 6694904 requiring the operator to produce/provide records requested by MSHA Special Investigators during the performance of their official duties in the [sic] investigation activities under [section] 105(c) of the Mine Act.
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> Order No. 6694905, Gov. Ex. 11.

After five minutes passed and the requested documents still were not produced, at 9:05 a.m. Smith issued another section 104(a) citation to HCC for continuing to work in the face of a 104(b) withdrawal order.[6] Citation No. 6694906 (KENT 2009-822-R) states:

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[4] Section 103(a) authorizes the Secretary to "make frequent inspections and investigations . . . for the purpose of determining whether there is compliance with . . . mandatory health or safety standards or with any citation, order, or decision . . . or other requirements of this Act." 30 U.S.C. § 813(a). Section 103(h) in pertinent part requires an operator to "provide such information, as the Secretary . . . may reasonably require from time to time to enable [her] to perform [her] functions under this Act." 30 U.S.C. § 813(h).

[5] Section 104(b) of the Act provides for the issuance of an order when an inspector or other authorized representative of the Secretary finds that a violation described in a citation issued under section 104(a) of the Act has not been totally abated within the time originally fixed and that the time should not be further extended. 30 U.S.C. § 814(b).

[6] Smith testified he was trained at the MSHA Academy to issue a 104(a) citation, a 104(b) withdrawal order and then a 104(a) citation for continuing to operate in the face of a withdrawal order when an operator fails to comply. Tr. 75.

> The operator[']s agent continued to deny to [sic] produce/provide the records requested by [the] MSHA Special Investigator after the reasonable time for abatement had expired on . . . 104(a) [C]itation No. 66904904. The Operator[']s agent continued to refuse to provide the requested records after . . . 104(b) withdrawal [O]rder No. 66904905 was issued.
>
> This citation is issued for continuing to operate in [the] face of a withdrawal order.
>
> Citation No. 6694906, Gov. Ex. 12.

Smith indicated Citation No. 6694906 should be abated by 10:00 a.m. Gov. Ex. 12. When the citation was not abated, HCC became subject to the provisions of section 110(b)(1) of the Act, which provides that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues." 30 U.S.C. § 820(b)(1). On the same day the citations and order were issued, HCC filed notices of contest with the Commission.[7] Shortly thereafter, HCC filed a motion requesting an expedited hearing, which the Secretary opposed.

PROCEDURAL BACKGROUND

The contest dockets, Docket Nos. KENT 2009-820-R, KENT 2009-821-R and KENT 2009-822-R, were initially assigned to Commission Administrative Law Judge Jacqueline Bulluck. On March 24, Judge Bulluck initiated a conference call with the parties. Subsequently, the dockets were reassigned from Judge Bulluck to me. In a conference call on March 27, 2009, the parties stated that they agreed how to abate the citations and order and that abatement occurred on March 26, 2009, ending HCC's continuing liability under section 110(b)(1) of the Act for daily penalty assessments (30 U.S.C. § 820(b)(1)) and obviating the need for an expedited hearing.[8] Accordingly, on April 02, 2009, I issued an order denying HCC's

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[7] Although only one contest was filed, it pertained to all three enforcement actions, and the single contest was docketed as three separate cases.

[8] According to counsel for HCC's letter of March 26, 2009, abatement included submission to MSHA of the requested personnel files. HCC's decision to produce the files was based on "oral clarifications as to the scope of the request made by counsel for the Secretary in the March 24 [conference call]." Gov. Ex. 13. The documents submitted by HCC included Gatlin's personnel file (released with the caveat HCC be held blameless should the personal information contained in the file enter the public domain) and the personnel files (with personal information redacted) of four employees. Counsel for HCC also stated it was not until the conference call of March 24

(continued...)

motion to expedite. Counsels then filed cross-motions for summary decision. In an April 21, 2009 order I deferred ruling on the motions until the issuance of proposed civil penalties for the alleged violations of the Act.

On September 30, 2009, the Commission received the Secretary's civil penalty petitions for the citations and order. Docket Nos. KENT 2009-1441 and KENT 2009-1442 were initially assigned to Commission Administrative Law Judge Alan Paez. They were reassigned to me to facilitate resolution of both the contest and civil penalty dockets. In the civil penalty petition for Docket No. KENT 2009-1441 the Secretary proposed a penalty of $112.00 for the violation of section 103(a) of the Act charged in Citation No. 6694904. The Secretary also proposed a penalty of $436.00 for Citation No. 6694906 which alleged HCC continued to operate in the face of a withdrawal order and continued to violate section 103(a) by refusing to produce the requested records. Daily penalties totaling $1,500.00 were assessed and were associated with the 104(b) withdrawal order, Order No. 6694905, in Docket No. KENT 2009-1442. On May 24, 2011 the Commission received the Secretary's unopposed motion to amend the civil penalty petition for Docket No. KENT 2009-1441. Secy's Mot. to Amend 2. The Secretary stated the $1,500.00 in daily penalties assessed for continuing to operate in the face of a withdrawal order should have been assessed for Citation No. 6694906 rather than for Order No. 6694905. Tr. 13, Secy's Mot. to Amend 2. She stated that if the motion to amend was granted the Secretary would not seek a penalty for Order No. 6694905. *Id.* Following the filing of the civil penalty petitions a hearing was held in Evansville, Indiana on June 07, 2011. The Secretary's unopposed motion to amend the civil penalty petition was approved on the record. Tr. 14. This disposed of Docket No. KENT 2009-1442, which was subsequently dismissed on the record.[9] The Secretary's motion for summary decision and HCC's cross-motion for summary decision were denied due to the parties' inability to resolve their differences regarding the validity of the citations and order and the importance of the issues involved.

STIPULATIONS

The parties entered the following stipulations on the record:

1. At all times relevant to this proceeding, Hopkins County Coal, LLC, was the operator of the Elk Creek Mine, Mine ID No. 15-18826.
2. The Elk Creek Mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all times relevant to this proceeding, products of Elk Creek Mine entered

[8] (...continued)
that counsels for MSHA made HCC aware that MSHA was seeking the "files of employees who were disciplined for engaging in conduct which *HCC claims* lead to the termination of Gatlin." *Id.* at 2 (emphasis in original).

[9] The parties agreed at hearing that since I granted the Secretary's unopposed motion to amend, dismissal of the docket was appropriate. Tr. 14.

commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

4. Employees at the Elk Creek Mine produced more than 3,000,000 tons of coal in 2009. Hopkins County Coal, LLC is a large operator.
5. Copies of the violations at issue in this proceeding were served on Hopkins County Coal, LLC by an authorized representative of the Secretary.
6. Hopkins County Coal, LLC timely contested the violations.
7. Hopkins County Coal, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.
8. The proposed penalties will not affect Hopkins County Coal, LLC's ability to remain in business.

Jt. Ex. 1.

THE PARTIES' ARGUMENTS

HCC argues the contested citations and order must be vacated because MSHA is not entitled to the personnel files it requested without a warrant. HCC's Resp. to Secy's Mot. for Sum. Dec. and Cross-mot. for Sum. Dec. 6 ("HCC's Resp."). HCC notes the files are not documents required to be maintained by the operator pursuant to the Mine Act. *Id.* HCC argues that while records required to be kept under the Mine Act must be available to MSHA, and while an operator has no realistic expectation of privacy in such records, the same is not true if sought-after files also contain data not required to be maintained under the Mine Act. *Id.* The company insists the government does not have a right to "rummage in any wholesale way or to initiate a general search" for records and documents not required to be kept under the Mine Act. *Id.* at 6 (*quoting Youghiogheny and Ohio Coal Co. v. Morton,* 364 F.Supp. 48, 51, n.5 (S.D. Ohio 1973)). HCC also points to Administrative Law Judge James Broderick's decision in *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) in which, according to HCC, Judge Broderick recognized constitutional difficulties prevented MSHA from validly issuing a citation and order when Sewell refused to allow MSHA to inspect personnel files in order to determine Sewell's compliance with Part 50 reporting requirements. HCC's Resp. 6-7.

The Secretary contends section 103(a) (30 USC § 813(a)) (authorizing the Secretary to make "frequent . . . investigations . . . for the purpose of . . . determining whether there is compliance with . . . [the] requirements of this Act"); section 103(h) (30 USC § 813(h)) (requiring operators to "provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act); and section 108 (30 U.S.C. § 818) (allowing the Secretary to seek civil relief when an operator does not, "permit access to, and copying of, such records as the Secretary . . . determines necessary to carry out the provisions of [the] Act") require HCC to produce the requested personnel files and information. Secy's Mot. for Sum. Dec. 6. She asserts when HCC failed to produce the information the Secretary had the discretion to proceed against the company either by issuing the subject citations and order, or by seeking relief in federal district court under section 108 of the

Act, or by proceeding on both tracks. Secy's Mot. for Sum. Dec. 6-7.

HCC counters that release of employees' personnel files would violate the privacy rights of its employees.[10] HCC's Resp. 6. HCC argues the files are protected by the Fourth Amendment of the Constitution. HCC contends that turning the files over without releases from its employees would violate HIPAA and could expose HCC to litigation. Tr. 23. Counsel for HCC, citing *Wheeler v. Sorenson*, 415 S.W.2d 582 (Ky. Ct. App. 1967), contends that employees in Kentucky have sued their employers for releasing their personnel files. Tr. 176.

The Secretary responds that HCC cannot refuse to provide the information because the Secretary lacks a waiver and release from Gatlin and/or the other employees. Secy's Mot. for Sum. Dec. 7. According to the Secretary, HCC bears the burden of showing the Secretary's investigative authority under section 103(a) and section 103(h) of the Act is subject to any statutory exception requiring the Secretary to obtain waivers and releases, and HCC has not done so. *Id.*

HCC also argues that "[t]he request [was] unduly burdensome and . . . tantamount to harassment in the overly broad, sweeping request for *all files* covering a *five-year period.*" The Secretary counters that she has only requested "[Gatlin's] files and the files of those employees and former employees whom [HCC] has 'disciplined, reprimanded or terminated . . . for engaging in the conduct which led to the termination of . . . Gatlin." Secy's Mot. for Sum. Dec. 9 (quoting *MSHA Letter of February 23, 2009, Carl E. Boone II, District 10 Manager to Marco M. Rajkovich, Jr., Counsel to HCC*). She describes her requests as "clear, narrowly drawn and relevant." *Id.* In summarizing her position, the Secretary states she must determine whether Gatlin was treated differently than other similarly situated employees, and that HCC cannot avoid production of lawfully demanded records by making "unsupported and baseless demands for waivers and releases designed for the purpose of impeding the Secretary's investigation." Secy's Mot. for Sum. Dec. 10. The Secretary argues that HCC's contests are "without merit and there are no constitutional matters at issue." Secy's Resp. to Contestant's Mot. for Sum. Dec. 1.

The company also takes issue with the wording of the February 23 request for "[t]he personnel files of all employees at the Elk Creek Mine who were disciplined, reprimanded, or terminated during the period of January 1, 2004 – January 20, 2009 for engaging in the conduct which led to the termination of Robert Gatlin." HCC Resp. 3. According to HCC, MSHA actually sought "files evidencing that other employees have been disciplined for similar reasons as the reason that HCC claims it disciplined Gatlin." HCC Resp. 10. HCC contends such evidence, if it existed, would support HCC's affirmative defense. *Id.* It would not support the existence of a valid claim. *Id.* HCC states MSHA should have requested "personnel files of

[10] HCC states that the sought-after files contain social security numbers, bank names, account numbers, and health information of its employees and their dependents, all of it information to which MSHA is not entitled without a warrant. HCC's Resp. 9-10. HCC also notes it ultimately released all requested information relating to Gatlin, but only after the Secretary assured HCC that Gatlin would not object to his file being produced in its entirety since he filed the discrimination complaint which prompted the investigation. *Id.* at 10.

individuals who engaged in the same conduct as Gatlin, but were not disciplined." *Id.* HCC contends that MSHA and Gatlin have no information any employees have been treated disparately, and it asserts Gatlin and the Secretary engaged in a "fishing expedition" to see if they could uncover a case without any reasonable cause to believe that discrimination actually had occurred. *Id.* at 10-11. HCC claims that any delays in producing the files were due to MSHA's failure to timely respond to several requests made for clarification of MSHA's requests for information. HCC asserts it was not until the March 24 conference call with Judge Bulluck that it understood that the documents MSHA was requesting were "presumably . . . [those] related to HCC's *reason* for termination of Gatlin, as may be applicable to other similarly disciplined employees, and *apparently not* documents related to *Gatlin's reason* for why he thinks he was terminated."[11] HCC's Resp. 4 (emphasis in original).

With this understanding, HCC produced the requested files.[12] Finally, HCC argues that it did not have fair notice the Secretary interpreted sections 103(a) and 103(h) of the Mine Act to give her the authority to request personnel files. HCC Supp. Resp. Sum. Dec. 8-9.

RESOLUTION OF THE ISSUES

Whether a Search Warrant Was Required

As noted, HCC contends that though it has no reasonable expectation of privacy in files maintained pursuant to the Act, it has a reasonable expectation of privacy in its other files, including personnel files, and the Secretary must obtain a warrant in order to access them. I disagree. Warrants are not required for administrative searches made pursuant to the Mine Act. *Donovan v. Dewey*, 452 U.S. 594, 604 (1981). A warrant is not constitutionally required where, "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner . . . cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Dewey*, 452 U.S. at 600. Congress reasonably determined warrantless searches were necessary under the Mine Act. *Id*. at 600. The certainty

[11] I interpret this to mean HCC did not respond concerning the personnel files other than Gatlin's because it thought MSHA wanted the files of those employees who were terminated for the same reason Gatlin believed he was fired, that HCC was unable to tell from Gatlin's complaint why Gatlin thought he was let go, and that this was one of the reasons why the company made repeated (and unanswered) requests for clarification of Gatlin's complaint.

[12] The Secretary accuses HCC of dilatory tactics in its failure to produce the requested files, and HCC responds that any delays were due to MSHA's failure to timely answer several requests it made for clarification of MSHA's requests for information. However, as I noted in my April 21, 2009 order, both parties engaged in behavior that delayed the investigation, and the accusations of dilatory behavior will not be a factor in my resolution of the issues. *Order Staying Proceedings, Order Requesting Secretary's Counsel to Report and Order Directing Counsels to Submit Stipulations if Necessary (April 21, 2009),* 11-12.

and regularity of the Act's scheme provides an adequate substitute for a warrant because the Mine Act's regulation of the mining industry is "sufficiently pervasive" that the property owner "cannot help but be aware" that he will be subject to inspection. *Id.* at 600, 603-604. In *Dewey*, the Supreme Court reviewed the Secretary's exercise of her powers under Section 103(a), which provides the Secretary with a right of entry for the purposes of inspections and investigations, including those made pursuant to Section 105(c), and approved the scheme of warrantless searches under the Mine Act. The Mine Act grants the Secretary an absolute right of entry when she exercises her investigative powers and a warrant is not required, even if the Secretary is seeking files other than those required to be maintained under the Act. *See BHP Copper*, 21 FMSHRC 758, 765 (July 1999). I find that the Secretary did not need to first obtain a warrant to access the requested personnel files.

Whether Privacy Concerns Prevented Disclosure of the Files

Employer Privacy Rights

Mine operators have a general expectation of privacy in their offices on mining property. *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45, 51, n.5 (S.D. Ohio 1973). However, the expectation of privacy that operators enjoy "differs significantly from the sanctity accorded an individual's home" and is adequately protected by the Mine Act's statutory scheme authorizing warrantless inspections. *Dewey,* 452 U.S. at 598-599. Federal inspectors do not "intrude into any zone of privacy which the mine owners reasonably expect to remain inviolate." *Youghiogheny*, 364 F. Supp. at 51. Further, the government's interest in promoting mine safety arguably greatly outweighs any general interest a mine operator may have in privacy. *Id.* Any special privacy interests an operator may have are protected under the Mine Act's scheme through the injunction provisions of the Act and the opportunity to contest a citation or order before the Commission prior to the imposition of sanctions. *See BHP Copper*, 21 FMSHRC at 767 (1999).

The company argues that it has a particular interest in safeguarding its employees' private information because of its legal obligations under HIPAA and Kentucky law. As noted, HCC, citing *Wheeler v. Sorenson*, 415 S.W.2d 582 (May 1967), contends that employers in Kentucky have been sued by their employees for releasing employee personnel files. The Respondent's argument is unpersuasive. Consent is not required under HIPAA for disclosures to public health authorities. 45 C.F.R. § 164.512(b)(i). MSHA is identified as a public health authority in the Department of Health and Human Service's response to the comments to the HIPAA regulations published in the Federal Register. 65 Fed. Reg. 82,462, 82,624 (Dec. 28, 2000). Further, *Wheeler* is not applicable because it involved disclosure of employee information to other employees, not to a government agency. I conclude that while HCC has a general interest in the privacy of its personnel files and other records not required to be kept under the Mine Act, the Secretary's interest in promoting miner safety through the rigorous enforcement of the provisions of section 105(c) outweighs that interest. I further find that HIPAA does not bar the disclosure of the records nor has HCC presented convincing evidence that it would be subject to suit for disclosing personnel files to MSHA.

Employee Privacy Rights

Whether HCC has Standing to Assert Employee Privacy Rights

HCC states that because disclosure of employee records would violate employee privacy rights it would not release records without its employees' consent. However, I conclude that neither HCC's privacy rights nor the rights of its employees are violated by the disclosure of information contained in personnel files to MSHA.

I find that HCC lacked standing to assert Gatlin's privacy rights and I find that it is doubtful HCC had standing to assert the privacy rights of its other employees. I also find that consent was not required from Gatlin or from the other miners whose records the Secretary sought. Third party standing is determined based on the relationship of the litigant to the person whose rights the litigant seeks to assert and the ability of the third party to assert his own rights. *Singleton v. Wulff*, 428 U.S. 106, 113-114 (1976). First, HCC did not have standing to assert Gatlin's privacy rights. During the discrimination investigation at issue, the relationship between HCC and Gatlin, who initiated the investigation by alleging HCC discriminated against him, was adversarial. Gatlin was capable of asserting his own privacy rights, but did not. HCC refused to grant Gatlin's representative access to Gatlin's file without his consent in an investigation that Gatlin himself initiated. The company's actions were overly protective. HCC could not assert an employee's privacy rights in a situation where the employee himself did not assert them.

Second, it is doubtful that HCC had standing to assert the privacy rights of its other employees. "Courts must hesitate before resolving a controversy . . . on the basis of rights of third persons not parties to the litigation" because the holder of the right might not want to assert it or might enjoy the right regardless of the outcome of the litigation and the third party himself is usually the best proponent of his own rights. *Singleton*, 428 U.S. at 114. The relationship between an operator and non-complainant miner employees in the context of a 105(c) discrimination case is ambiguous at best and their interests may conflict or align according to the facts of the case. HCC has presented no evidence its employees would have wanted their rights to be asserted. Granting an operator standing to assert the privacy rights of its employees could unreasonably delay the Secretary's discrimination investigation. Inspector Smith credibly testified the 60 day investigation deadline is strictly adhered to by MSHA with limited exceptions. Delays caused by the assertion of employee privacy claims by employers could reduce the efficacy of 105(c) investigations and result in fewer 105(c)(2) cases. Moreover, the delays in the investigation of discrimination complaints would be contrary to Congress' intent to swiftly investigate such complaints. The Mine Act's Senate Report states that discrimination complaints are to receive "high priority" and that in order to "further expedite the handling of these cases" the Secretary must immediately petition the Commission for appropriate relief.[13] S.

[13] Even if HCC had standing to assert the privacy rights of employees other than Gatlin, the disclosure of private information contained in a personnel file to MSHA, an agency charged with public health and welfare, would not violate constitutionally protected employee privacy rights. *See United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1241 (D.C. Cir. 1980).

Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Whether Employee Consent is Required for Disclosure of the Personnel Files

I find that consent is not legally required prior to the disclosure of relevant information contained in personnel files to MSHA. Neither the Mine Act nor HIPAA require it. Further, permitting operators to condition disclosure upon consent where it is not legally required would burden the Secretary's swift and efficient investigation of discrimination claims without resulting in any greater privacy protection for the employee. Redaction of files to remove non-relevant personal information provides employees with comparable protection without imposing any of the potential costs. Indeed, this is what is commonly done and what the Respondent in fact did prior to producing the requested personnel files.[14]

Whether the Secretary's Investigative Powers Enable Her to Request Personnel Files

HCC argues that not only did the Secretary violate the constitutionally protected privacy rights of HCC and its employees, she also exceeded her investigative powers under the Mine Act. In response, the Secretary contends Section 103(a) when read in conjunction with Section 103(h) grants her the authority to request personnel files pursuant to a discrimination investigation. Under section 103(a)(30 U.S.C. § 813(a)) the Secretary has the power to conduct investigations for, *inter alia*, the purpose of determining compliance with the requirements of the Mine Act. She argues that under section 103(h) she is entitled to files that are 'reasonably required' to enable her to perform her functions under the Act. 30 U.S.C. § 813(a). The Commission has stated that when the Secretary exercises her investigative powers under Section 103(a) she is not limited to receiving just that information the operator is required by regulation to maintain. *BHP Copper*, 21 FMSHRC at 766. In order to determine to what additional information the Secretary is entitled a *Chevron* analysis is useful. In *BHP Copper* the Commission outlined how to proceed:

> [The first inquiry in statutory construction is] "whether Congress has directly spoken to the precise question at issue." *Chevron*, 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

[14] Although HCC contends that Section 103(h) of the Mine Act mandates that all records collected by the Secretary be open for public inspection, potentially subjecting the private information contained therein to public disclosure (Resp. Post-Trial Supp. Sub. 3) and that the information might be released pursuant to a Freedom of Information ("FOIA") request, noting that social security numbers given to MSHA investigators during the Sago investigation became public (HCC Resp. 10), this argument is speculative and will not be considered. HCC has offered no evidence beyond its assertions that the private information is likely to be disclosed. Smith credibly testified personnel files are not released to the public or made available for public examination. Tr. 98. He stated the information may become subject to disclosure during a judicial proceeding. *Id.* However, should disclosure prove necessary during a judicial proceeding, steps, such as redaction, can and usually are taken to protect the information.

> be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local 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; *Keystone Coal Mining Corp*., 16 FMSHRC 6,13 (Jan. 1994). 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. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), cert. denied, 520 U.S. 1209 (1997), citing *Chevron*, 467 U.S. at 843; *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).
>
> *BHP Copper*, 21 FMSHRC at 764.

The Mine Act is silent on whether the Secretary's investigative power gives her access to employee personnel files. As a result, under *Chevron II* analysis, the next inquiry is whether the Secretary's interpretation of sections 103(a) and 103(h) is reasonable. Section 103(a) states in pertinent part:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.
>
> 30 U.S.C. § 813(a).

Section 103(h) states in pertinent part:

> *In addition to such records as are specifically required by this Act*, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary . . . may reasonably require from time to time to enable [her] to perform [her] functions under this Act. (emphasis added).
>
> 30 U.S.C. § 813(h).

Section 103(h) provides the Secretary access to records, "In addition to such records as are specifically required by this Act." It is clear from the text of the section Congress specifically intended for the Secretary to have access to more than just those files required to be kept under the Mine Act. Also, section 103(h) requires the operator to "provide such information as the Secretary . . . may *reasonably require* from time to time to enable [her] to perform [her] *functions* under this Act." (emphasis added). One such function is the investigation of discrimination claims made by miners to determine whether there has been a violation of the Act.

The requirements for establishing a prima facie case of discrimination under section 105(c) of the Mine Act are well-established. The complainant must demonstrate "(1) that [he] engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). Circumstantial evidence of discriminatory intent includes: (1) knowledge of protected activities, (2) hostility or animus towards the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *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). Typically, disparate treatment occurs when other employees guilty of the same or more serious offenses as the miner alleging discrimination escape his disciplinary fate. *Chacon*, 3 FMSHRC at 2512. The Mine Act should be construed liberally to effectuate the purposes of the Act and promote miner safety. *Hanna Mining Company*, 3 FMSHRC 2045, 2048 (1981), *MSHA v. Westmoreland Coal Company*, 606 F. 2d 417, 420 (4th Cir. 1979).

Where the Secretary's function is the evaluation of a discrimination claim, information that is relevant to assessing the merits of that claim, including evidence of protected activity, adverse action or discriminatory intent may be "reasonably required." Such information commonly includes information related to company practices and procedures, information about the complainant's disciplinary and work history, and information about similarly situated employees, all of which is often contained in personnel files. I find that the Secretary's interpretation of sections 103(a) and 103(h) is reasonable and entitled to deference under *Chevron II* analysis. Accordingly, I find that the Secretary was entitled to the requested personnel files and that HCC violated section 103(a) of the Mine Act when it refused to provide the files.[15]

[15] In the context of a 105(c) discrimination claim, the requirement in 103(h) that the information sought be "reasonably required" obligates the Secretary to have a reasonable understanding of the complainant's claim prior to making any requests to the operator for documents, interviews or other information. Smith's credible testimony demonstrates he had such an understanding and did not, as HCC claims, embark on a "fishing expedition." Rather, based on the allegations made by Gatlin in his complaint and his subsequent interview, Smith investigated the merits of his discrimination claim.

Whether the 104(b) Withdrawal Order was Valid

Relying solely on its reading of the Mine Act, HCC contends that 104(b) orders cannot be issued for violations where there is no "area affected." I disagree. The Commission has not recognized this principle and a careful reading of the Mine Act does not support HCC's interpretation of the Act.

Section 104(a) states in pertinent part:

> "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 other 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."
>
> 30 U.S.C. § 814(a).

Section 104(b) states:

> "If, upon a follow-up inspection of a coal or other mine, [the] . . . representative of the Secretary finds (1) that a violation described in a citation issued pursuant to *subsection (a)* has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited form entering, such area until [the] . . . representative . . . determines that such violation has been abated." (emphasis added).
>
> 30 U.S.C. § 814(b).

It is clear from the language of section 104(a) that Congress intended to permit the issuance of citations under the section for not just violations of health and safety standards but also of any provision of the Act, including violations of section 103(a). Prior to the issuance of a 104(b) order the Secretary must find (1) that the violation cited under section 104(a) was not totally abated within the abatement period and (2) that the abatement period should not be extended. HCC incorrectly treats the following clause as an additional requirement, "[the representative] shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine . . . to immediately cause all persons . . . to be withdrawn from . . . such area until [the] . . . representative . . . determines that such violation has been abated." This clause is separated from the clauses detailing the requisite findings by a

comma, and in contrast, describes action to be taken. The precise meaning of the clause is unclear. The Secretary has interpreted the clause to mean that if the representative determines no area is affected she need not withdraw any miners and can issue a "no persons affected" 104(b) order. Section 104(b) applies to 104(a) citations issued for violations of the Act other than violations of health and safety standards. As a result, it may apply in situations where there is no area affected and there are no miners to withdraw. For these reasons I find the Secretary's interpretation of the Mine Act to be reasonable and entitled to deference under *Chevron II* analysis.

While the Secretary may choose to obtain the requested personnel files via an injunction (30 U.S.C. § 818(a)(1)), the Commission has stated that an injunction is not the exclusive remedy available to the Secretary when an operator refuses to produce documents requested pursuant to an investigation. *BHP Copper*, 21 FMSHRC at 766. The Secretary may choose to instead impose a citation and penalty. *Id.* I find that by imposing citations, an order and civil penalties for HCC's failure to produce the requested documents the Secretary utilized enforcement mechanisms provided her by the Act, and I conclude that her choice to exercise these mechanisms was not improper.

Whether the Secretary's Request was Unduly Burdensome

HCC also argues that "[t]he request [was] unduly burdensome and tantamount to harassment in the overly broad, sweeping request for *all files* covering a *five-year period.*" HCC's Mot. for Exped. of Proceedings 2 (emphasis in original). While such a request could potentially be burdensome there is no persuasive evidence in the record that HCC actually found the request to be so. Rather, Adelman testified that he did not believe MSHA was entitled to the documents and would not have provided them even if the Secretary's request was modified. Although the Respondent claimed in its filings that providing the Secretary with the requested documents could implicate the files of over 500 employees, the search for the requested documents in fact took approximately five hours, and in addition to Gatlin's file, four redacted files were ultimately produced. Tr.158.

Whether HCC had Fair Notice of the Secretary's Interpretation of the Mine Act

HCC contends it lacked fair notice the Secretary interpreted the Mine Act to give her access to personnel files when she exercises her investigative powers. I find HCC's argument unpersuasive. The company was provided with notice of the Secretary's interpretation when Carl E. Boone II, District Manager, sent its counsel, Marco M. Rajkovich, Jr., a letter dated February 23, 2009 requesting the personnel file of Gatlin and the personnel files of other similarly situated employees as part of MSHA's investigation of Robert Gatlin's discrimination claim. Notice was also provided through subsequent letters from MSHA reiterating its request. *See* Gov. Ex. 6, Gov. Ex. 8. In a letter dated March 20, 2009 Boone state that HCC still refused to "produce Mr. Gatlin's personnel file and the personnel files of any other employees who were terminated for the reason that Mr. Gatlin was terminated" and he "note[d] the repeated refusals of the

company to provide documents and information to which *MSHA is clearly entitled under the Act.*"[16] Gov. Ex. 8 (emphasis added). I conclude HCC had adequate notice of the Secretary's interpretation.

SUMMARY OF FINDINGS AND ORDER

I have found that the Secretary was entitled to the personnel files requested by Smith during his investigation. In addition, I find that the Secretary rightfully exercised her discretion in issuing a 104(b) withdrawal order to HCC when it failed to abate the citation and that the initial citation, Citation No. 6694904, the 104(b) withdrawal order, Order No. 6694905, and the subsequent citation, Citation No. 6694906, are valid.

I have further found that the violations of section 103(a) alleged in Citation No. 6694904 and Citation No. 6694906 occurred. However, I conclude that Adelman honestly but mistakenly believed, in the face of the Secretary's repeated requests, that production of the records was not required. Accordingly, I modify Citation No. 6694906 by changing the inspector's negligence finding of "reckless disregard" to "moderate negligence." The inspector found that there was no likelihood the violations would result in an injury or illness, and I agree. The violations were not serious.

The parties stipulated at hearing that HCC is a large operator and the proposed penalties will not affect its ability to remain in business. The Secretary did not assess penalty points for a lack of good faith or decrease the assessed penalties for good faith abatement. I agree with the Secretary's determination. Due to its mistaken belief that production was not required, HCC did not timely abate the cited violation. Accordingly, I neither reduce nor increase the penalties based on this criterion. The Secretary proposed a civil penalty of $112.00 for the violation alleged in Citation No. 6694904, and I assess that amount. She proposed a civil penalty of $436.00 for the violation alleged in Citation No. 6694906. However, the parties agreed the proposed penalty should have been $1,500.00 ($500 per day in daily penalties) for operating in the face of a withdrawal order, and the Secretary's penalty petition was amended to reflect that fact. *See* Tr. 13 -14. Given that I have found HCC's negligence to be moderate rather than reckless, I assess a reduced civil penalty of $1,050.00 ($350.00 per day) for HCC's violation of section 103(a) and for its continuing operation in the face of a withdrawal order.

For the reasons above I find that the contested citations and order were validly issued. Accordingly, they are **AFFIRMED**.

[16] HCC is represented by an experienced attorney, familiar with the Mine Act, who should have been aware the Secretary had adopted this interpretation from the letters sent to him by Boone.

It is **ORDERED** that Citation No. 6694906 be **MODIFIED** to reduce the degree of negligence from "reckless disregard" to "moderate."

The Respondent is further **ORDERED** to pay a civil penalty of $1,162.00 within 30 days of this order.[17] This decision resolves all issues with respect to the above-captioned contest and civil penalty cases. Upon receipt of payment the above-captioned cases are **DISMISSED**.

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

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/ca

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 3, 2012

SECRETARY OF LABOR, obo, TRAVIS CAUDILL Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 2010-1580-D
	:	PIKE CD 2010-07
v.	:	
CAM MINING, Respondent	:	Mine No. 28 Mine ID 15-18911

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for the Complainant
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Respondent

Before: Judge Moran

Introduction

In this discrimination proceeding under section 105 (c)(1) of the Mine Act, the Court finds, for the reasons which follow, that the Complainant, Travis Caudill, engaged in the protected activity of making safety complaints, by informing his superiors that there was insufficient time for him to perform his job as a pre-shift examiner. Only after the Respondent was cited by MSHA for failing to do the preshift, did Cam Mining take the adverse action of discharging the Complainant, singling him out among many who failed to perform duties related to those preshifts. The Court further finds that Cam did not establish any affirmative defense to show that there were unprotected activities to justify its adverse action.

Findings of Fact

The Complainant, Travis Caudill, testified first.[1] He began working for Cam Mining ("Cam") in 2002 or 2003, starting as a roof bolter.[2] Tr. 17. Near the end of 2009, he became a certified foreman. Tr. 28. His work in that position included involvement with the creation of a new opening at the mine.[3]

After that opening, referred to as the "Marrowbone," was completed, Caudill was assigned as an examiner. It was in that position, as an examiner, that the events in controversy arose. Tr. 34. In that role Caudill was to examine the travelways, the head drives, the belts, and the refuse chambers. This work occurred on the "about half of the second shift and all of the third shift." Accordingly, he was doing two examinations each day he worked. Thus, he did the preshift for the oncoming third shift and then the preshift for the day shift. These exams were to be done between 8 to 11 and 3 to 6, respectively. Tr. 35.[4] The hoot owl shift started at 11 and

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[1]Mr. Caudill is is currently employed at another mine as a maintenance engineer, helping electricians.

[2] Some testimony, from both sides, addressed the assertion that Caudill made safety complaints at a time prior to the time in issue in this proceeding. As the Court expressed at the hearing, it considers those events to be unconnected to this proceeding. Further, whether the prior safety complaints occurred or not, both sides agree that, subsequent to those events, Caudill was promoted. Accordingly, those earlier events play no part in this decision.

[3] While not critical to understanding this case, some background may be helpful for context. Subsequent to becoming a certified foreman, Caudill was assigned to do a different job, putting him at the number five, where Cam was constructing a pass through. Tr. 29. Frank Smith, the mine superintendent, had Caudill involved in this task, under which he was to oversee the top and prepare the mine for the track that would be installed. Tr. 30. This was part of the mine's effort to create a new opening at the mine during 2009 or the early part of 2010. Thus, Caudill was part of the effort to create the new entry for miners, known as the "Marrowbone" site. Tr. 30. The mine then had two portals: the "Hellier side," also referred to as the "Marrowbone" and the "Rob Fork," on the other side. The Rob Fork was the original portal. Tr. 31. The result was that the mine then had two slope entrances. Caudill's job at that time was to help get everything ready to "flip-flop the air" so that they could be pulling air on the other side of the mountain. Thus, he agreed this project resulted in major ventilation changes at the mine with his tasks involving many aspects of this effort, not just ventilation. Tr. 32. During that effort Caudill was employed as a foreman, in charge of two to three other miners. Also then, he was working the day shift, reporting to Frank Smith and Reggie Bates. Tr. 33.

[4] The mine had another preshift examiner, "Mac Sweeney," who did the preshift exam for the second shift. Tr. 73.

the first shift at 6. Caudill would arrive for work around 7 to 7:30 p.m., reporting to Danny Conn, the second shift mine foreman. In the time between his two preshifts, that is, from 11 p.m. to 3 a.m., Caudill would repair things, such as belt splices. The preshift itself, however, is done alone. Tr. 38. Miners were not to enter the mine for their shift until Caudill had called out that his preshift was done. Tr. 39. A certified foreman would take down the information relayed by Caudill, recording it in the preshift book. Caudill would later "sign off on it, if everything was correct." Tr. 39. Caudill would call out his preshifts reports before 11 p.m. and 6 a.m. Tr. 40. There are two separate preshift books for the examiner, such as Caudill, to later review. Tr. 40. One was for the belts and outby and the other was for the section. The actual preshift work that needed to be done was performed by the section foremen. Tr. 41. Apparently the section foremen do some preshifting areas and Caudill would do others, with Caudill doing up to where the belt hits the feeder. In the outby area, Caudill's responsibility to examine encompassed all the belts, airways, branches, lifelines, C0s, power centers, refuge chambers, track and roof. Tr. 41.

When Caudill first started doing preshifts, Frank Smith and Reggie Bates told him the areas that needed to be examined and he traveled with Perry Norman, his predecessor on that job, who showed him what the job entailed. Caudill agreed that the job was the same each day, in terms of his examining duties. Tr. 43 However, importantly, what he might encounter on a given day however was not predictable. Caudill was unsure exactly when he started doing preshifts, but thought it was around February 2010. Tr. 44, 46. His last day at work was March 17, 2010, when he was discharged.

With his testimony augmented by the use of G 6, a map of the mine, Caudill identified the Rob Fork portal on that map, noting that it appears on the upper left side of it. Along with the aid of the map, Caudill's testified as to the areas he would preshift. His preshift duties took him all the way to the power center. Working with MSHA Inspector Nathan Mounts, Caudill provided his estimates of the time it would take to cover the areas of his preshift. Tr. 48. Caudill stated that he had to check various installations and that there were things to do at each heading. For example, at the power center, one has to check the refuge chambers and there were things to be checked at the head drives. Tr. 52. Caudill also noted that, for a good part of his preshift exam, he would have to be hunched over. If one were to walk the whole area, Caudill maintained that it would take all day, but no one simply walked the whole distance. Instead, a tracked diesel mantrip was used and Caudill's access was through that diesel mantrip. Tr. 54. Others were on the track at the same time Caudill was on it, using different vehicles. Although the mantrip helped, Caudill was not able to use it for the entirety of his preshift exam. Tr. 56. For example, one would need to leave the mantrip to inspect the head drives and around the power centers and the refuge chambers in order to adequately inspect those areas. Tr. 58. Also, going toward the two section, Caudill had to walk the belt because there are two separate entries and each area had specific things that needed to be checked. Tr. 57.

Further, in checking the power center, one has to make sure that all the required things are present; one also has to walk around and check the ribs as well as the fire extinguisher and rock dust. Tr. 60. Some installations were in areas that were difficult to access.[5]

Caudill was doing the preshift on the Rob Fork side when he first started doing that job and, even then, he was "stretching it" to get it done. Later, he would have to go "portal to portal" when the miners started entering the mine on the Marrowbone side. When that switch occurred and his position switched to the Hellier (aka, the "Marrowbone") side, all of Caudill's men were still over on the Rob Fork side. Tr. 65. This meant that Caudill then had to backtrack, something he did not have to do when he entered from the Rob Fork side. Tr. 65. In explaining how he would have to "backtrack," (i.e. retrace his route), Caudill stated that he would enter from the Marrowbone portal. When starting the second of the two preshifts he would do each day he worked, that second preshift, which was the 3 a.m. preshift, would start that from wherever he happened to be when that time arrived. Thus it was when he would start his second preshift exam that he would need to "backtrack." By contrast, for his first preshift of a given day, that would begin at the Hellier side. Tr. 71. Caudill would do repair work in the interim between the two preshifts he would perform each day. It is also noteworthy that when Caudill rode on the tracked vehicle, he would sit, but in a semi-reclined position, because the roof was too low to allow him sit up fully, the way one would if one were in an automobile. Tr. 74-75. Given that, to properly examine the area, Caudill could not travel too fast in the tracked vehicle. Tr. 75. He would also have to mark his date, time and initials at each place he would stop. Tr. 76. The boards to list that information were located along the belt line. Tr. 76.[6]

It was Caudill's testimony, and the Court specifically finds this to be credible, and the fact, that simply to run through the preshift, with no ride available, it took more than 3 hours' time. Further, that time would increase if one had to correct or fix anything in the course of the preshift. Tr. 62. Caudill stated that he did keep telling those above him that he didn't have sufficient time to do the preshift properly and the Court also finds this to be the fact. These statements constituted safety complaints. Among those he informed of this problem were Danny Conn, Seth Haynes (the chief electrician) and Reggie Bates. Tr. 63.

Mr. Caudill stated that there were times when he had help doing his preshift exams. Tr. 78. Danny Conn and Seth Haynes would help him. Tr. 78. In the course of his testimony,

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[5] As an example cited by Caudill, he stated that just outby six drive, one has to go over the belt to get to it. This requires first shutting off the belt, crossing it, then checking the refuge chamber, and then returning to the starting point. Tr. 61-62.

[6] Another factor, among many, that would eat into the time he expended in his preshift, would be if he ran into another miner using the same track. This would necessitate that he back up his vehicle to get out of that miner's way. Tr. 80. Walking the belt line, because it could not be examined from the tracked vehicle, and making necessary corrections, such as attending to draw rock, were also time consuming. Tr. 80.

Caudill reasserted, several times, that he did inform others that he did not have sufficient time to time to do the preshift exam "the way it needs to be done." Tr. 78. The Court finds this to be the fact as well.

Caudill identified on the map the location of the East Mains, an area of his preshift that was discussed by various witnesses.[7] Tr. 82. The reduced height in the East Main required that one "duck walk," that is, one could not stand fully erect in that area. Tr. 83. There is no track that goes to the East Mains. Instead that area of the mine had a "permissible ride," which ride is similar to small 4 wheeled vehicle, and very much like an electric golf cart. Tr. 91. It was the only such vehicle of that type at the number nine power center. Tr. 92. Caudill's testimony established that the performance of the preshift was not simply a matter of looking at things. This was because, during the course of the preshift exam, things would be discovered that needed attention. For example, Caudill might come upon rock which would need to be pryed down. Caudill's recollection was that there were nine initial boards in that area requiring his date, time and initials or "DTIs." Tr. 84. During the time in the week before the violation was issued by MSHA, Caudill did not examine the East Mains at all.[8] As previously noted by the Court, it was Mr. Caudill's credible testimony that he kept telling mine officials that they needed

[7] Respondent's Counsel challenged some of the information in the map referenced by Caudill, but this was apparently attributable to some changes, in that the map used at the deposition listed, inaccurately, some belts which did not exist at the time in issue; i.e. at the time of Caudill's discharge. Tr. 160. It is true that Caudill worked with MSHA inspector Fletcher, providing the inspector with information to add particulars associated with the map. At any rate, Caudill did make remarks during his deposition pertaining to the map which was then being used, and which remarks were in error. For example, Caudill agreed that he misstated information pertaining to a conveyor belt, when in fact that belt was not present at the time of his discharge. The Court viewed these inconsistencies, which the Complainant did not essentially disagree with, as tangential to the heart of the matter in this case. Tr. 165. Counsel for Respondent also attempted to show that the Complainant was inconsistent in his testimony as to the length of time it took to examine the preshift areas. Tr. 164-165. In his deposition, Caudill stated that it took about an hour and a half to walk the East Mains. Tr. 166. Respondent asked the Court to take notice of the decision made by the administrative law judge that ruled in the temporary reinstatement case in that, while Caudill stated it took an hour and a half to examine the area, company officials stated it took only 40 minutes. The Court noted that it could take notice of the prior judge's finding, *that is, that it was made*, but that it is in no way bound by that prior determination, in terms of accepting that it was correct. If that were the case, there would be no point to a subsequent hearing, as the temporary reinstatement proceeding would have resolved all issues. Tr. 167.

[8] Caudill slightly modified this statement, asserting later that this involved four or five days of not examining that area. Tr. 86. The outcome of this case certainly does not turn on such details.

to fix his ride. He told them there was not enough time to walk the area and still take care of all his other responsibilities. Tr. 85-86.

Caudill also stated, and again the Court finds this as a fact, that he told Danny Conn and Seth Hayes about the ride not working in the East Mains on the first day he discovered that it was not functioning. Tr. 89. Caudill stated that Mr. Conn told him that he would take care of it, and he interpreted that response to mean both that the ride would be repaired and that Conn would examine the East Mains.[9] Tr. 90. Seth Haynes was present during Caudill's exchange with Mr. Conn. Haynes, as the Chief Electrician, was the person most likely to do such a repair. Tr. 91. Caudill stated that he believed, or at least assumed, that someone else was examining the East Mains, when he did not have time to do that due to the ride being broken. Tr. 96.

It was Caudill's credible contention that one was not to list problems in the preshift book; that one would get in trouble if that was done. Thus, he stated that Reggie Bates told him not to put information regarding hazards in the books. Tr. 102. Instead, the practice was for one to tell others about problems and they would get them fixed. The thinking behind that was that recording such matters "looks bad on the books." Tr. 103. Caudill maintained that the company wanted the books "to be clean because the inspectors look at it." Tr. 105. The Court concludes this to be a plausible assertion and finds it to be the fact. As Caudill explained the practice further to the Court, he would enter a problem in the books *when he could fix it then and there*. If not, he would, in the example of an electrical problem, tell the electricians. Such a problem as that is written down, but in a separate book, not in the preshift book.[10] Tr. 104. Instead, his practice was not to sign off on the book, if a problem was found and not fixed immediately.

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[9] Caudill stated that he would record his exams for the East Mains in one section in the preshift book. This is a separate section book from where he would record the rest of his examination. However, he never looked at the book during the time he was not examining it, to see if someone else was recording that the area was being examined. Tr. 98. He further stated that he never wrote in the book that he was examining the area, when he was not actually doing that. Tr. 98. The Court accepts this and notes that the Respondent never presented record evidence contradicting that. Caudill only told people that the ride was broken; he never wrote that down and he never wrote down that he was unable to do the East Mains. Tr. 100-101.

[10] Caudill believed that while recording a hazard he found was an obligation during his preshift, he believed there was no duty to record things he was unable to do during that time. Thus, he expressed that not being able to complete his preshift because of insufficient time was not a "hazard" and therefore there was no obligation *to record* such an omission. Tr. 217. Thus he maintained that he did not have to record "stuff [he] didn't do." Tr. 217. No case law supporting the idea that this would be a recordable hazard was presented at the hearing nor in the post-hearing briefs. Tr. 218.

Caudill also informed that others were required to sign the preshift books, naming Frank Smith and Reggie Bates as specific examples of such others. Of course, Caudill agreed that only he would observe the conditions firsthand as he was the only one doing the actual preshift exam.[11]

On March 17th, Caudill did not know that MSHA inspector Nathan Mounts was underground. Tr. 120. On that day, Caudill stated that he called out his preshift, then came outside, then filled out his books. Tr. 121. Caudill told Reggie Bates that he did not have time to get up to the East Mains and that Bates responded that he took care of it. Tr. 122. Frank Smith spoke to him later that day and told him that the mine was going to have to suspend him for three days and that, following a meeting with others, he faced possible dismissal. Tr. 123. Smith told him that the basis was that he had not been making his preshift but had been signing off the books that he *had* been doing his preshifts. Tr. 124. Caudill responded that he had not been making his preshifts but that he had not signed anything that he wasn't supposed to be signing. Thus, he denied the aspect of falsely signing the books. Tr. 124. He told Smith that he hadn't been able to do the preshift because there was not enough time to do it. Smith countered that he believed there was sufficient time to do the preshift. Tr. 124. Caudill spoke to people on the telephone about the issue, but did not recall receiving any letter regarding termination of his employment. Tr. 126.

Caudill affirmed that the first day he was notified that he may be fired was March 17, 2010.[12] Tr. 137. On that day he had come from his home to the mine and then received the telephone call from Mr. Smith. Smith advised him then that he was on a three day suspension pending a meeting to see if termination would occur. Tr. 138. Caudill then returned to his home. The conversation with Mr. Smith was, in Caudill's estimation, about ten minutes. Tr. 139. Smith told him that the basis was that Caudill had signed off on the books, attesting that the preshift had been done, when in fact it had not been done. Tr. 140. Caudill, responding with

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[11] Shown R's Exhibit 7, Caudill identified it as a preshift for the 004 section, at Cam Mining Number 28 mine for the East Mains, covering March 14-17, 2010. Tr. 109. It was signed off by Joe Akers, who is the section boss for the three section, or the one section on the third shift. Tr. 110. Akers' job, as reflected on that exhibit, included examining the East Mains, at least on those dates. Tr. 111. Caudill's practice was to "sign off" on the preshift book by adding his initials to it when he would end his day. The same page with Akers' (initials or signature) was countersigned by Reggie Bates and it reflects a time of examination as 9 to 10 p.m.. Tr. 111-112. Caudill stated that he did not believe that he examined the East Mains from 8 to 11 p.m. on that date. Tr. 112. The Court noted, and Caudill agreed, that the first page of that exhibit listed three locations that were examined, including 1 through 9 East Mains but Caudill stated those did not reflect all the areas that he had the responsibility to inspect. Tr. 113-114.

[12] Caudill stated that, following his discharge, he has since obtained other employment. At the time of the hearing he was working 50 to 55 hours per week for another mine. Tr. 133 and see n.1.

some emotion, but no cussing, told Smith at that time that he had not done those things claimed by the mine. Tr. 140-141. He was told to come back in three days to meet with the supervisors over the issue, but that promised meeting never occurred.

After the three days passed, Caudill called Mr. Smith. He tried to reach others, including Jack Holbrook, the CEO of the company. Tr. 144. He did reach Smith but was given no answers about his status and was again told he would have to speak with Mr. Holbrook. Caudill again told Smith he did not do what he was accused of doing. Tr. 145. At the end of the call, Caudill did not know what his employment status was.[13] Tr. 145. Caudill next drove to the mine the following day, but no one was available to speak with him. He returned again the day after that and talked with Frank Smith and Joey Baldwin, but neither of them could tell him anything and he left again, with no information about his status. Finally, some five or six days later, he was able to reach Jack Holbrook, who told him that they were letting him go for falsifying records.[14] As Caudill stated, "Jack [Holbrook] told me he had seen my name somewhere in the book." Tr. 148. Caudill testified that he responded that he "didn't sign off on any book." Tr. 148. Caudill maintained that his initials only appeared where they were supposed to appear, that is, only where they legitimately belonged. Tr. 149. As noted, Caudill was never given the promised meeting. Tr. 148- 149. Further, he did not remember ever receiving a letter of termination. Tr. 153.

In the Court's inquiry of Mr. Caudill about the "ride," which refers to the permissible ride, which was not operating during the time in issue, Caudill stated that the ride was in its location for the very purpose of traveling to the East Mains Panel and that it was there solely for that purpose. Tr. 194, 201. The Court finds that to be the fact. Caudill also agreed that, although the ride was broken on the 10th, he was able to complete his inspection on that day, including inspecting the East Mains. Tr. 194. Caudill maintained that he was barely able to complete the exam on that day and that, to get it done, he was "pushing it." Tr. 195. The distinction was that, "[i]f you run into any problems along the way on the rest your exam, you wouldn't have time to complete any of it." Tr. 196. Caudill explained that, seeing he had insufficient time to complete the exam, if he had gone ahead and tried to do it anyway, he "wouldn't have been able to have the ride back in time at the bottom of the port[al] for the men to come in." Tr. 196.

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[13] The Court raised a question about the basis for Caudill's suspension, asking whether it was for a failure to examine the East Mains or for falsifying records, or at least *what Caudill understood* the basis to be. Tr. 187-188. Reaffirming that there wasn't time for him to get to that area, Caudill stated that his understanding for the mine's action against him was the allegation of falsifying records. Tr. 189. As just noted, the Respondent never established that claim as fact.

[14] It is important to recall that, while the Respondent's Counsel echoed this claim at the hearing, no proof was ever presented to support that allegation.

In testimony that the Court views as aiding the Complainant's case, Caudill agreed that, in his earlier testimony at deposition, prior to when he was going up to Rob Fork, he *was able* to do the exam in three hours with the ride. More particularly, Caudill agreed that, *with the ride* on the East Mains, he could "push and get it done." Tr. 168. As to when they later switched to the Marrowbone Creek site, Caudill could still do the 8 to 11 p.m. exam because he didn't have to "double up" (i.e. he did not have to backtrack, or retrace, his steps). Tr. 168. However, it was Complainant's contention that he could not complete the 3 a.m. to 6 a.m. preshift because, for that preshift, he would have to start in the middle of the mine, work his way to the portal, and then come back. Tr.168. Caudill also maintained that, for the earlier preshift, he was still having trouble completing it.[15] Tr. 168. Caudill did agree that no one told him that he was no longer assigned to inspect his areas of responsibility. Tr. 171. When he received help in examining an area, this occurred only when someone happened to be up that way, but he couldn't ask them to do his job. Tr. 172.

Tending to support that the job took too much time, Counsel for Respondent stated that, when Caudill did receive *some help* in doing his job, they would call him and report that they checked a section or perhaps two sections, informing him as to the areas they were able examine for him. Tr. 172. Caudill agreed this happened from time to time. Tr. 172. Thus, Respondent's Counsel's questions demonstrated, beyond Counsel's attempt to show that Caudill could get help, when he needed it, that *in fact help was needed.* If, as Respondent claims, the preshift could truly have been done in a timely manner, such help would not have been needed. However, on March 11th, Caudill agreed, no one called him to advise that they had examined an area for him.[16] Tr. 173. The same was true, that is, no one called Caudill to tell him that they had examined some portion of his exam area for the 12th through the 17th. Tr. 173. Caudill did state in his deposition that he received help in completing his exams "quite a bit" but at hearing he stated it was "from time to time" if a miner was going to be up that way. Tr. 173. Thus, at least at the hearing, Caudill stated that he did get help quite a bit, but that help was always contingent on another miner being up that way. Tr. 173. Those that did help out at times included Danny Conn and Seth Haynes and, at times, Joe Akers.[17] Tr. 174.

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[15] As far as why he didn't simply go over to the Rob Fork at the start of his second preshift, Caudill stated he could not do that because there were things that had to be done. Respondent's Counsel suggested there was ample time to do those things, during the time between 11 and 3. Therefore, Counsel asserted, Caudill could have finished those duties by 2:30 and made his way over to the Rob Fork side. Tr. 170. Again, Caudill maintained that was a possible scenario only if everything was done by that time. Tr. 170.

[16] Regarding the March 11th inspection by Caudill, all he could state with authority was that *he* did not examine the East Mains on that date. Accordingly, he could not state whether others, such as Reggie Bates or Danny Conn had done so. Tr. 220. The same situation existed for 12th through the 15th. Tr. 220.

[17] Caudill agreed that when he did his exams he could call out and advise that he needed

(continued...)

Caudill also stated that he did talk with Seth Haynes and Danny Conn on the 10th of March, advising them that the ride was broke down and he hadn't been able to make the East Mains. Tr. 179. He also told Reggie Bates about the ride being down. This occurred when he came outside the mine. This was either on March 10th or the following day. Tr. 180. Caudill stated that he talked to Reggie more than one time. One of those occasions was on March 17th when he told him he hadn't been able to get to the East Main panel because the ride was down and that he told him that before he came outside of the mine. Tr. 184. Although he believed he also told Frank Smith about this in his office, he could not be sure of the date of the conversation. Tr. 184.

Caudill acknowledged that the disciplinary form, which he had apparently not seen until just before the hearing, listed his failure to examine the East Mains as grounds for his suspension. Tr. 186. Caudill agreed that he admitted to Smith that he had not examined the East Mains from the 11th through the 17th but contended that he was told they would take care of it. Again, he flatly denied that there was ever any occasion when he signed (i.e. initialed) any preshift book indicating that he had examined the East Mains, when in fact, he had not done so. Tr. 196-197. Notably, there is no documentary evidence contradicting Caudill on this point.

Frank Smith, the mine's superintendent was also called as a witness. Tr. 282. The hierarchy is such that James Slone is Smith's boss and Jack Holbrook is Slone's. Tr. 283. Smith's office at the time in issue was at the Marrowbone side. Smith acknowledged that he traveled with Inspector Mounts on March 17, 2010 and that Caudill took over for Perry Norman as the preshift examiner. Tr. 285. Superintendent Smith denied that Caudill ever made any complaints to him about being unable to do his job.[18] Tr. 286. The Court does not subscribe to the superintendent's version. Smith was aware of Inspector Mounts presence at the mine on the

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[17](...continued)
some extra time, such as ten more minutes, to complete it. Tr. 175. Caudill also agreed that there is no requirement that he be provided with a ride to complete his exam. Tr. 176. Though not exactly sure, he agreed that, without a ride, completing the examination would take an extra 10 to 15 minutes time. Tr. 176. Also, in a response which, it would seem, did not tend to help Respondent's claims, Caudill believed that he *was* able to complete his exam the night before the ride broke down. Tr. 176. Although he stated at his deposition that once he saw the ride was down, that he didn't go any further, it was his contention that there simply wasn't sufficient time to do the exam. Tr. 177. Caudill also agreed that he didn't record in any book that he was not able to complete his examination. Tr. 177-178. This last remark has already been discussed in this decision.

[18] As noted, Smith maintained the Caudill never had any discussions with him regarding problems with the ride during the period of March 11th through March 17th. Tr. 350. Nor, he asserted, did Caudill raise any issues regarding sections of the East Mains. Tr. 351. The Court finds Caudill's testimony to be more credible.

morning of the 17th. Directed to R 7 at page 2, a document dated March 15, 2010, Smith stated the signature there is not his, but rather that of James Smith, the section foreman. Tr. 287. Smith agreed that Joe Akers signed the preshift examination report and that Reggie Bates countersigned it. Tr. 288. As to gas readings reflected in that exhibit, Smith stated that he never requested any discipline against anyone for recording a gas reading on March 15th between 3:30 and 5:30 a.m. when no reading had actually been taken. Tr. 291. At any rate, when asked if anyone else was disciplined, Smith advised that "Travis and [Mac] Sweeney retired." Tr. 291. Accordingly, the Court observes that whether those individuals would have been disciplined is in the realm of speculation only.

More relevant to the issues at hand, Smith agreed that for March 15th, there is no mention of the East Mains being examined while conceding that the preshift book was signed by Jeff Smith. [19] Tr. 292. Yet, Frank Smith agreed that no disciplinary action was taken against Jeff Smith.[20] Tr. 293. Frank Smith also agreed that *he never tried* to determine who else countersigned the examination book besides Jeff Smith and that no disciplinary action was taken against anyone else either. Tr. 294. And, Superintendent Smith also agreed that while the book

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[19] Smith also saw a difference between a preshift examiner not doing his job and a supervisor not noting that the job was not complete, because the one reviewing the exam book could simply miss the fact that an exam was incomplete. Tr. 364. The Court would agree that the preshift examiner is the front line person, but it does not agree that diminished responsibility should be awarded to those who are to check, verify, and sign the preshift report. To conclude otherwise would endorse the notion that the follow-up is not important. It is and this case demonstrates how important that task is. Further, the failure of the person reviewing the book was not a one-time event. The failure was repeated over several days.

[20] As to Smith's interactions with Reggie Bates, Smith stated that MSHA never wrote any kind of preshift violation to Bates, but instead a "claim violation maybe and [a] few more things." Tr. 351. Smith was not sure what was issued. Tr. 351. Following that, Smith went to the section in issue, observed conditions, compared his observations with Bates' preshift, and then suspended him. Later he was discharged for those events. Tr. 352. Smith also agreed that, in March or April of 2010, another miner, Mr. Gray, was "removed" from Mine 28, for not going to the deepest point of penetration in his weekly examination. Tr. 352. Upon questioning by the government however, Smith admitted that Gray encountered dangerous roof conditions in that area and a 105(c) complaint was filed in connection with that matter. That charge was apparently withdrawn but the record provides no further explanation about the circumstances, nor its ending. Tr. 378-379. MSHA issued an order for the Mine's failure to perform that task. Tr. 353. Trying to establish that Cam discharged employees apart from any MSHA citations being issued, Smith identified an employee who was fired following an altercation with a foreman and he "thought" employees have been suspended for drug test failures. Tr. 353. Suffice it to say that the Court did not conclude that any of this dispelled its conclusion that the Respondent's action against Caudill was in reaction to having received the (d) Order.

indicated that the East Mains was okay for March 16th, when they went underground no date, time, or initials were found for that area on that date. Tr. 294.

On the date in issue, Frank Smith stated that it was Jeff Smith who called out to Perry Norman that the crews could go underground, as the preshift would have been completed. Tr. 297. Smith stated that it would have been Perry Norman's duty to know if the East Mains had been examined. Smith admitted that he took no action against Norman for allowing miners to go underground without assuring that the preshift had actually occurred. Tr. 299.

Smith maintained that after he received the citation from the inspector he thought he spoke with James Slone about it, but couldn't remember exactly what he (Smith) said to him. Tr. 310. He thought the conversation was about what he and the inspector observed in the East Mains. Tr. 310. To that, he added that "there was proof that no one had been there to examine that area." Tr. 311. Smith stated that he told Danny Conn to have Caudill call him. Tr. 311. Smith also stated that although he spoke with his immediate boss, James Slone, about the situation, again he could not recall exactly what was said between them.[21] Tr. 311. Describing his memory deficit as an inability to recall "exactly what was said" was too generous a description on the witness' part, as Smith offered nothing at all about the substance of that conversation.

Directed to Exhibit G 4, dated March 17, 2010, Smith agreed that it shows his handwriting on the second page. He stated he probably completed that form on the 18th of March. Tr. 314. When he spoke to Caudill on the evening of the 17th and, with knowledge that MSHA had issued the order relating to this matter, Caudill told him that he had not been preshifting the area. According to Smith this was the first he knew that Caudill had not been preshifting that area. Tr. 314. Smith repeated that he had no prior conversation with Caudill in which Caudill informed him that the ride was down and that he was unable to do that area. According to Smith, Caudill then told him the ride was down and that he wasn't going to walk it. Tr. 315. Thus, Smith contended that Caudill refused to walk the area, not that it couldn't be done. Smith then advised Caudill of the three day suspension with intent to discharge, adding that first there would be a meeting with Jack Holbrook and James Slone before determining if Caudill could come back to work. Tr. 315. Also as unlikely, in the Court's view, as his memory failure regarding his discussion with Mr. Slone, Smith could not recall if he had any discussions with anybody about suspending Caudill before he made the call advising him of that decision. Tr. 315. The meeting between Caudill and upper management never occurred. Smith agreed that, as far as he knew, there was to be such a meeting but he claimed he didn't know if such a meeting ever occurred. Tr. 316.

[21] After the Court expressed skepticism about Smith's contention that he could not recall what was said but, Smith admitted that they probably did discuss the situation about Caudill. Tr. 311- 312.

It must be said that Smith was amazingly uninformed about an employee's right to a meeting in such employment decision circumstances. He stated he never followed up or inquired about whether Caudill would have or was to have his meeting, nor could he speak as to whether such meetings were regularly provided to others in such circumstances. Tr. 317. As alluded to earlier, regrettably, the Court did not find Smith to be credible. When asked if he told Caudill that a reason for his suspension was falsifying records, his answer was "[n]ot to my knowledge." Tr. 317. Further, when Smith filled out his report the very next morning, he admitted that it did *not* contain the claim in his testimony that Caudill refused to walk the area. Tr. 318. It is, to be polite, very unlikely that such a statement, if it actually had been made by Caudill, would have been omitted by Smith in that report. Instead, Smith's report had a very different tone from his claim at the hearing because the report stated that the ride was down and that Caudill didn't make the East Mains area for his preshift. Tr. 319. It is notable that, although the report Smith filled out has a box for "employee's remarks," Smith entered nothing in that space. Tr. 320. Further casting doubt upon the reliability of Smith's testimony, when asked if he ever had any conversation with Jack Holbrook about Caudill, Smith asserted that he didn't think he did. Tr. 321.

Regarding the ride Caudill used, Smith admitted its obvious purpose: "They had it out there from Mine 32 to help out." Tr. 342. Later, the ride was moved to the East Mains for use. Tr. 343. Smith maintained that he did not know of any problems with the ride until, he thought, "the evening when I talked with [Caudill]."[22] Tr. 343. At that time Caudill told him the ride was "down" (i.e. not working). Smith stated that prior to March 17th, when Inspector Mounts came to the mine, he did not know of any problems with the examinations of the East Mains. Tr. 344.

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[22] Along this line, Counsel for the Respondent elicited additional testimony designed to show that Caudill had sufficient time to do his preshift. Referencing a mine map, Smith's testimony then turned to the areas of the mine that Caudill was responsible and those areas for which he was not. Tr. 354-355, G 6. The purpose of this effort was to demonstrate that some areas MSHA had considered, in assessing whether Caudill had sufficient time to do his preshift, should not have been included in their estimates. This included disputing the speed of travel for the mantrip, with Smith expressing that the speed could be twice as fast as the Agency had suggested. Tr. 357-358, citing section 352.150 of the Kentucky revised statutes. That section, as the record reflects, actually places the maximum speed at 12 m.p.h., but the overriding requirement is that a mantrip "be operated at safe speeds consistent with the condition of the roads" among other considerations. Tr. 360. Cam also disputed other details of the Agency's time estimate, contending that the emergency shelter, with Smith estimating that, rather than 15 minutes, it would only take "eight to ten minutes" to examine it. Tr. 362. Not surprisingly, Smith expressed that a more reliable method of determining the time to do a preshift exam is by actually doing it and timing the results, as opposed to a paper calculation. Tr. 362. The Court agrees with that observation, but notes that it is not dispositive of the issue's resolution. It is noteworthy that Smith conceded that he had never accompanied either Mr. Caudill or Perry Norman during their examination of the East Mains. Tr. 381. In fact, Smith admitted that he has never accompanied anyone in the preshift area involved here for its entire route. Tr. 381.

As he recalled, when he then went to the East Mains, the last recorded date of an inspection was March 10th. Tr. 344. Smith and the Inspector returned to the surface around 3 (a.m). at which point the Inspector had a safety discussion with the men coming in on the evening shift. Tr. 346. Smith then received G 1 around 4 or 4:30.

Testimony was also received from Mr. William May, who is the Human Resource Manager at the mine and who has held that position for a very long period of time. Tr. 390. With no disrespect to the witness, he offered nothing of value to the determinations involved in this case. For that reason, May's testimony is included only in a footnote.[23]

James Slone, the mine's manager, was the final witness in the proceeding. At the time in issue, he was the underground mine manager. Tr. 407. Slone stated that he first became aware of the issue regarding Caudill on March 17th during Inspector Mounts' inspection.[24] Tr. 409. Slone was not underground with Mounts during the Inspector's examination and he had never heard of any problems in connection with the preshift of the East Mains prior to the 17th. Tr. 411. All Slone could offer was what others, Inspector Mounts and Frank Smith, told him. He then discussed the matter with Smith. Smith spoke with Caudill about Respondent's suspension

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[23] Part of May's duties include reviewing requests for terminations. In that task, he would "make any comments and forward it to the senior manager." Tr. 391. That typically would mean the company's president, Chris Moravec. Tr. 391. A recommendation for termination usually comes from the field and then to May, and from him to the president. Tr. 391. May stated he was familiar with Caudill's termination. As he later recalled, on March 22nd he received an email from Mr. Holbrook's secretary, requesting Caudill's termination. Tr. 392-394. The email, Exhibit R 7, states "pending investigation of preshift records." However, as far as May knew, no such investigation ever occurred. Tr. 394. Within about a half-hour, May had informed that since Caudill was a certified person, he agreed with the request for termination. In so opining, May stated that he looked at the disciplinary report *and the MSHA order.* Tr. 394. He made no other inquiry into the matter, such as whether others had responsibilities in connection with that preshift exam failure. Tr. 394. In light of the fact that there were references in the record to affording an employee a meeting before termination, May was asked about that procedure. He advised it was "[b]ased on the circumstances. Sometimes we do, sometimes we don't. It's not required." Tr. 397. In terms of whether May believed that any foreman associated with the preshift failure should be disciplined, May said he did not know, as he did not investigate the matter. Tr. 399. Nor has he ever disciplined a foreman for allowing men to enter a mine prior to a preshift having been done. Tr. 399. May could not recall objecting to any recent requests for termination. Though he's been on the job since 2004 with Cam, the last such termination request that he balked at, that he could recall, was over a decade before, in 2001. Tr. 406. It is fair to conclude that Mr. May simply moved paper along in such matters, without any substantive involvement.

[24] Slone also stated that Caudill had never made any safety complaints prior to March 2010, a fact which the Court considers to be immaterial to this matter. Tr.414.

with intent to discharge and Slone spoke with Mac Sweeney, the other examiner. Tr. 412-413. The upshot was Sweeney quit rather than face any disciplinary action, as he was ready for retirement anyway. Tr. 413. Slone also stated that Phil Gray and Reggie Bates were disciplined over examination issues in the spring of 2010. Bates' issue was failure to do a proper examination as was Gray's issue. Tr. 415.

Slone also agreed that, based on the fact that there were readings entered in the preshift book for dates that the East Mains was not actually examined, that someone had written that information into the book, despite there being no DTI's underground. Thus, he conceded that "evidently" someone had falsified the records. Tr. 422-423. Slone expressed that he believed Caudill had been the falsifier. Tr. 423. He blamed Caudill because it was his duty, along with Mac Sweeney, to do the preshift and have it entered in the books or at least call out the results and have someone make such entries. Tr. 423. Slone stuck to his view, blaming Caudill, even though Caudill's initials did not appear in the preshift book for the dates and matters in issue. This was based on Slone's view that it was Caudill's "duty." Tr. 424. Contrary to his opinion about placing responsibility solely on Caudill, as Slone ultimately conceded, it was *Akers and Smith's signatures* that appeared in the books. Tr. 424. Yet, despite holding his view, Slone admitted that he never went to Hopkins or Smith and asked them as to how that information found its way into the preshift book. Tr. 425. Though he agreed that such a false signing is a crime, Slone made no inquiry about who committed the apparent crime. Tr.426. Slone never took any action against Akers or Hopkins or Jeff Smith about those matters, nor did he have any discussions with Frank Smith about what to do regarding those individuals. Tr. 426-427. In sum, the Court concludes that Slone's testimony did not advance the contentions made by the Respondent.

Discussion

In discrimination actions under 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." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 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).

The Parties' Post-hearing contentions

A. Caudill's Tardy filing of his discrimination complaint

Because it was raised as an issue by the Respondent, the issue of Mr. Caudill's delay in filing his complaint of discrimination needs to be addressed. Caudill's complaint was due to be filed by May 21st, but he did not file his complaint until June 24th. Tr. 131. Thus, Caudill was 33 days late in filing his discrimination claim. Tr. 189.

For more than twenty-five years, the Commission has held that the 60 day limit for filing a discrimination complaint is not jurisdictional. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21 (January 1984), *aff'd* 750 F.2d 1093 (D.C. Cir. 1984). The question is whether "justifiable circumstances" have been established for the late filing. *Descutner v. Newmont USA, Ltd.,* ("2012 WL 894519. In resolving that issue, considerations should include whether the miner was proceding as a *pro se* litigant. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386-87 (Dec. 1999) and *Hermann v. IMCO Services,* 4 FMSHRC 2135 (1982).

While Caudill did not proceed *pro se*, he was effectively acting as such because he did not even know that he could make a discrimination complaint, operating as he did under the misimpression that a mine which claims a miner falsified records and discharges the miner on that basis, provides no grounds for a complaint. Tr. 126, 191-192. It was not until Caudill happened to speak to MSHA on a matter unrelated to his discharge that he learned of the inaccuracy of his premise.[25] Once that error was dispelled, MSHA acted promptly to launch the discrimination complaint. Tr. 127.

It is apparently true that miners, such as Caudill, are advised about their discrimination claim rights as part of their annual miner refresher training. However, the Court accepts as credible that Caudill was not well schooled in his rights regarding discrimination under the Mine Act and this further explains and excuses his missing the filing deadlines. More importantly, he was under the impression that those rights did not extend to a situation such as his, when a mine operator contends that a miner has falsified records.

A miner's inaccurate assumption about grounds for discrimination complaints was also referenced in a general sense in *Descutner v. Newmont,* where Judge Barbour noted that "[t]he 60-day statutory limitation is not a particularly long filing period in view of the lack of

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[25] An MSHA employee, with the nickname "Mousey," who works with the Agency's special investigations unit, so advised Mr. Caudill that he had recourse regarding his discharge. Tr. 215. She informed him that the circumstances he described to her were a basis to file a section 105(c) claim. . Mousey was present, as an observer, at the hearing. Tr. 127. Caudill never knew of another miner who had filed a 105(c) complaint and it was only after he spoke with Mousey and MSHA that he became aware of his right to file a wrongful termination claim. Tr. 129.

sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action." *Id.* at *2, quoting *Gross v. Leeco, Inc.*, 7 FMSHRC 219, 229 (February 1985).

Having observed Caudill and estimating his level of sophistication as minimal in such matters, the Court concludes that this was an understandable misperception. The Complainant did not appreciate that if a mine uses such a claim but that, in truth, its adverse action stems from displeasure that a MSHA enforcement action resulted against it, a cognizable action exists. With no disparagement toward Mr. Caudill, having watched and listened closely to the Complainant during his testimony, the Court concluded that he fits the description of the unsophisticated miner.

Another consideration in assessing the appropriateness of a tardy filing is the realization that the time limitations exist to assure fairness to the other side, by barring late filed claims where evidence has been lost, memories have faded and witnesses have disappeared. None of those aspects are involved here. See, *Nantz v. Nally & Hamilton Enterprises,* 16 FMSHRC 2208, 2214-15 (Nov. 1994) and *Eddie M. Jeanlouis Sr. v. Morton Int'l,* 25 FMSHRC 536, 2003 WL 22208186, Sept. 2003 (ALJ Feldman).

Accordingly, the Court allows the late filing in this instance.

B. Determination of Discrimination by Respondent

1. Though the findings of fact, above, implicitly and expressly address the contentions made by the Respondent in its post-hearing brief, a few additional observations and comments are in order. Respondent asserts that Mr. Caudill's discharge "was not motivated, in any way, by protected activity; rather it was solely the result of his refusal to do the very job he was being paid to do, which placed miners in harm's way." R's Brief at 27. Respondent maintains that the Secretary failed to make a prima facie case because Caudill never made a safety complaint to his supervisors nor to MSHA. Along this line of argument, Respondent asserts that Caudill never complained "that conducting the pre-shifts on foot was a dangerous or unsafe act." *Id.* at 28. Respondent goes on to note that the "alleged protected activity" was Caudill's reporting that he "did not have time to complete his pre-shift inspection of the area."[26] *Id.* Apart from the Respondent's witnesses who denied that Caudill ever advised them about the problem,

[26] A twist, Respondent notes that Caudill never recorded in writing that "he had not pre-shifted his examination areas." R's Br. at 28. That would indeed be an oddity to have occurred. However, as found by the Court, Caudill did advise, by several means, that the preshift was not being completed. He notified his supervisors orally on more than one occasion; he did not enter his DTI's on the boards underground, and he did not record that the preshifts had been done in the surface books. In spite of all that, those that review those records uniformly ignored the absence of the information.

Respondent makes the larger argument that, even if it is assumed that Caudill did so report the issue, it can not be deemed a safety complaint in any event. R's Br. at 29.

The Court does not agree with the Respondent's perspective. A safety complaint can be implicit. One need not expressly label a communication about a problem as a "safety complaint" in order for it to be so recognized. Here, Caudill's repeated expressions to those above him that it was no longer possible for him to do the preshift after the ride was broken, was implicitly a safety complaint. The whole, indeed the only purpose, of the preshift exam is to make sure the mine is safe before miners on the approaching shift enter the mine. If the preshift examiner can't get that vital job done and notifies those above him of that issue, clearly that miner has voiced a safety complaint.

Here, Cam Mining supervisors elected to look the other way, in the face of the safety issue raised by Caudill. This continued, despite the evidence right in front of Cam, as evidenced by the preshift book's absence of Caudill's doing the preshift, for a week. No disciplinary action was brought against Caudill until *after* MSHA learned of the failure and *after* it had called[27] Cam on the matter, issuing the Order. Only then did Cam react and its reaction was only against one miner, Caudill. Though others above Caudill shared responsibility for this week-long failure, no inquiry nor action resulted against those who improperly signed the preshift book. Accordingly, consistent with the Court's Findings of Fact (*supra*) the idea that Caudill was refusing to perform his job is rejected. Rather than *wouldn't*, Caudill *couldn't* do the entire preshift.[28]

Respondent's Brief also speaks to whether Cam was motivated by Caudill's protected activity when it discharged him. Cam maintains there is no evidence of unlawful activity on its part. R's Br. at 33. Suffice it to say that the Court's findings of fact demonstrate a different conclusion. Clearly, Cam was reacting against Mr. Caudill because of the Inspector's issuance of the 104(d)(1) Order. Cam made no inquiry about and took no action against those who also bore responsibility for the lack of preshift exams over a considerable period of time and who signed off on the exams despite the fact they should not have done so. Cam's action came right after, not before, the violation was cited by MSHA. So too, because of the Court's Findings, it has been concluded that Cam was aware of the safety problem, but for reasons known only to those individuals, decided to skate, rather than address the matter. These conclusions, when coupled with the foregoing findings of fact, disposes of Cam's other arguments at pages 33- 36 of its post-hearing brief. Finally, Cam makes the argument that, even if its motive was unlawful, it still had sufficient grounds to discharge Caudill for his unprotected activities alone. This defense rests on acceptance that Mr. Caudill allegedly told Mr. Smith that the ride was broken and therefore he *wouldn't* walk it. R's Br. at 38. The Court does not find that Mr. Caudill made

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[27] "Called" is used in the sense of a one calling another player's hand in a card game.

[28] The Court has already agreed with the Respondent's contention that Caudill's 2009 safety complaint issue when he was a roof bolter, is not germane to the issues in this case. Therefore, there is no need to discuss the Respondent's Brief at pages 31-33.

such a refusal. Instead it finds that he told those above him that he *couldn't, not wouldn't*, complete the preshift within the allotted time.

The Court also reviewed Respondent's Reply Brief but, in candor, it offers nothing more than a reiteration of the arguments made in its initial brief. It also continues to be founded upon the assumption of facts which the Court has declined to make. As already noted, the Court has found that Mr. Caudill did make a safety complaint, in fact several of them. Thus, as mentioned, a miner need not announce "THIS IS A SAFETY COMPLAINT" in order for such a complaint to have been lodged. As noted, Mr. Caudill's job was solely about safety and his multiple complaints that there was insufficient time to do that job were clearly safety complaints and nothing else. The ride was present, not for mine tours or some other cavalier activity. It was there because it was essential to the full and complete performance of the preshift exam.[29]

2. This case does not turn on a precise determination of the times it would take for the preshift examiner to examine particular areas during the course of his preshift.

As noted earlier, both sides spent considerable time attempting to establish that, according to their particular perspectives, that Caudill did or did not have sufficient time to carry out his preshift examination duties in the time allotted. To that end the government, of course, had Mr. Caudill testify. That testimony has already been discussed. Also, as noted, the government called MSHA Inspector Nathan Mounts on this issue. Mounts was the Inspector who issued the March 17, 2010 104 (d)(1) Order for the preshift examination failures. G 1, the order, and G 2, his notes associated with that. The violation occurs when miners go underground without the preshift exam having been made. Tr. 231. The Respondent did not challenge the violation.

Mounts was there to conduct an E02 spot inspection, which pertains to methane evaluations. At that time Mounts noted that the required inspection for the East Mains was not recorded. Tr. 224. Mounts, investigating this issue further, found that there had not been an inspection recorded in the books for the East Mains prior to the 17th until March 9th. Tr. 225. Mounts asked mine superintendent Frank Smith about this issue but Smith could not provide an answer. Tr. 225. Yet, Smith's signature was there in those books, reflecting that he had

[29] Accordingly, as Respondent has repeated its arguments, the Court will briefly repeat its conclusions. Mr Caudill did make safety complaints; his statements, which *were* made, were safety complaints; and there was a protected work activity. Unlike Respondent's characterization, Caudill did not make a work *refusal*. Rather, he informed management of an inability to do his assigned job because there was insufficient time to complete it. The remainder of Respondent's Reply, while read, offers nothing new and no further comment is warranted. R's Reply at 9-14.

countersigned them.[30] Tr. 226. Smith was unable to provide any evidence that the exam of that area had in fact occurred. Tr. 228. Page 5 of the Inspector's notes reflects the others who had signed the book, attesting that the East Mains had been inspected, when in fact it had not been. Tr. 229.

Mounts testimony also pertained to his view of the time it would take to complete Caudill's preshift exam. G 6 was used to assist in understanding Caudill's route and duties. Tr. 232. Mounts, whose experience included having performed preshift exams, made estimates of the time that it would take for Caudill to do his exam. Tr. 233. He concluded that it would take "around 3 hours 40 minutes" to do it and he considered that figure to be a "conservative" one. Tr. 239. This figure included preshifting the East Mains. Tr. 233-234. Mounts number was based on the distances involved, but it was not based on a dry run to see the actual amount of time it would take. Tr. 258. *However, the inspector's estimate worked on the assumption that no problems were found, as that would take additional time*. Thus, Mounts' conservative estimate accounted simply for the examination time under the assumption that Caudill was getting off his vehicle and doing the examining, with no accounting of the time involved if some problem was actually discovered. Tr. 234. Mounts' estimate was benefitted by the fact that he had personally inspected the number 28 mine, including viewing the East Mains, "several times," so it was not simply an academic exercise. Tr. 235. The Court finds that Mounts' estimate was a conservative one.

Mounts stated, and the Court agrees with his observation, that to perform the preshift adequately, the examiner must run the mantrip at a reasonable speed, i.e. a slow enough speed so that one can properly look for any hazards. Tr. 242. Mounts worked with the assumption that one could not travel faster than 6 mph to examine the area properly. Tr. 248. That speed assumption was based on the inspector's considerable mining experience, which encompassed some 10 to 12 years. Tr. 249. For example, a preshift examiner is to be looking for bad top or bad ribs, among other hazards. Tr. 242. To get a sense of the extent of the area that had to be preshifted, the Court inquired about the approximate distance involved and the answer was approximately nine miles. Tr. 244.

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[30] Mounts articulated the purpose of countersigning. It is, of course, to make sure that all areas have been examined and to see if there are any hazards that need to be attended. Tr. 273. Mounts expressed that those who did countersign had a responsibility for noticing omissions, such as that which was involved here. Tr. 273. After all, there was no date nor initials listed for the East Mains. Tr. 273. Consistent with that view, Mounts believed that anyone who signed and failed to note the problem should likewise be disciplined for their own failures. Tr. 274. Thus, it was Mounts' view that it is just as serious to miss an area during a preshift as to countersign on such a deficient preshift. Tr. 277. The Court will not engage in a comparative analysis of the relative importance of failures to preshift with failures to properly review the preshift books. Both are important tasks.

As one example of focusing on precise times in order to establish either that Caudill could or could not reasonably have completed his preshift exam, questions were asked as to how many minutes it would take to travel to the area of a rescue chamber, which was one of the places to be examined during the preshift. For that, Mounts calculated the time involved to be 15 minutes. Questions were asked if the inspector was aware that there was a crossing under the belt, so that no time would be consumed shutting it off first. Tr. 257. This focus truly misses the forest for the trees because there was testimony *from both sides* that the time to do an adequate preshift was close to taking the entire time allotted, with one side contending that there was sufficient time and the other, that there was not.[31] The difference maker however was that the ride was not working. That ride was not there for convenience. It served a purpose: namely, to aid the preshift exam. The Respondent concedes that on the dates in issue, the ride was not functioning. Tr. 201.

The Court also tried to get a better sense from the Complainant about the time it would take to walk the East Mains without the ride being available. Caudill explained that it wasn't that far but that there are nine headings to be inspected. These headings were of different depths.

On the day he did inspect the East Mains with no ride available, Caudill could only estimate that it took 45 minutes to an hour to inspect that area. Tr. 199. If problems are found, the inspection time would obviously increase, because the problems need to be corrected. Tr. 200. Caudill could not be precise as to the time it took walk the area,[32] but this case is not really about exact times as the overriding question is whether he had adequate time to inspect his assigned areas.

While not discounting the need for some evidence on the issue, at least to establish the plausibility of their respective viewpoints, the Court observes that the outcome does not depend on making findings of exactly how much time it would have Mr. Caudill to do the particular tasks attendant to his responsibilities. To approach the case in that manner would effectively reduce it to a time and motion study. [33]

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[31] Mounts did express at his deposition that "on a *perfect* day" it would take "the full three hours" to do the preshift. Tr. 261. However, Mounts advised that his initial time estimate failed to consider the time it would take to go over to the two refuge chambers. Tr. 262. On the other hand, his initial calculation included a mile long belt that didn't exist when Caudill was doing the preshifts in issue. Tr. 262. Mounts denied that Caudill told him that he could do the entire shift on March 10th in a three-hour period. Tr. 264.

[32] Respondent's Counsel tried to engage in such NASA-like time measurements, but that proved nothing because it loses sight of the overriding question. Caudill, understandably, could not provide such precise time measurements either. See, for e.g. Tr. 207.

[33] Time and motion studies became all the rage in the early twentieth century. They were employed as a business efficiency technique, combining the time study work of Frederick Winslow Taylor with the motion study work of Frank and Lillian Gilbreth. As one might

(continued...)

Instead, that determination is resolved by credibility determinations. As the Court explained during the hearing: "You know, for the benefit of Counsel, I'll tell you this. If you expect me to figuratively bring out a micrometer and figure out whether Mr. Caudill spent X number of minutes or X plus three or minus four, I mean come on. That's not what this case is about. And so you can both spend as much time as you want. It's your case, but that's not how I am going to decide this case in terms of the validity of discrimination or not. What I have to figure out is something broader than that. Okay." Tr. 372.

The Court finds that Mr. Caudill did not have sufficient time to do perform his preshift examination duties without the ride being available.[34]

3. Cam Mining discriminated against Travis Caudill in violation of Section 105 (c)(1) of the Mine Act

As stated earlier, the safety complaint here was Caudill's complaining about insufficient time to do his preshift exam. These were, as the secretary notes, legitimate complaints for which mine management failed to take action to correct. Sec. Br. At 14.

On this record it is clear that the mine's action was motivated by receiving the (d) order for failing to preshift and that this was the cause of its adverse action against Caudill.[35] See also, Tr. 323-325, making this evident. As the Secretary has noted, circumstantial indicia of discriminatory intent is recognized by the Commission upon showing "knowledge of the protected activity [,] hostility or animus towards the protected activity [,] coincidence in time between the protected activity and the adverse action [] and [] disparate treatment of the complainant." Sec. Br. at 9-10, citing *Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510, rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), Hicks v. Cobra Mining, Inc.* (April 1991) and *Schulte v. Lizza Industries, Inc.,* 6 FMSHRC 8 (Jan. 1984).

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[33](...continued)
presume, time study developed in the direction of establishing standard times, while motion study evolved into a technique for improving work methods.

[34] It is instructive to note that, upon questioning by the Court, Smith informed that a cart *is* presently available for those who do the preshift exams at the Number 28 mine. Because of the mining progressing from the time of the events in dispute, the East Mains itself is no longer preshifted. Tr. 384.

[35] The Court inquired as to the time frame regarding Mounts's arrival at the mine and the decision by the mine to suspend Caudill. Mounts informs the mine of its deficiency regarding the preshift exam at about 9:01 that morning and Caudill is informed when he arrives at the mine to begin his shift that evening, following the inspector's action. Tr. 256.

Order

Having determined that Caudill was discriminated against unlawfully, and unlawfully discharged, in violation of Section 105 (c) of the Mine Act, it follows that he is entitled to the relief sought in his complaint. Accordingly, subject to the direction that the parties confer, as stated below, it is ORDERED that the Respondent:

1. Expunge from Caudill's personnel file all references to the unlawful issuance of the written warning of disciplinary action, and to expunge any other such references from any other records maintained by the company which relate negatively to Mr. Caudill in connection with this matter.

2. Reimburse Caudill for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case. This is to include damages in an amount equal to full backpay, all employment benefits, all medical and hospital expenses and any and all other damages suffered and incurred by Complainant as a result of his discriminatory discharge. Further, that interest be added to backpay and other expenses, from the date of discharge until the date of payment, at the adjusted prime rate announced semi-annually by the Internal Revenue Service for this underpayment and over-payment of taxes.

3. Post this decision at all of its mining properties in conspicuous, unobstructed, places where notices to employees are customarily posted, for a period of 60 days.

4. Restore Mr. Caudill to his former position as preshift examiner with back pay and interest or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties.

5. Pay an appropriate civil money penalty to MSHA for its violation of Section 105(c)(1) of the Mine Act, in accordance with the provisions of Section 110 of that Act.

The parties are ORDERED TO CONFER within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted with 30 days of the date of this decision.

If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

The judge, or his duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Mr. Caudill is entitled are resolved and finalized. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered.

So ordered.

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

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April 3, 2012

LEFT FORK MINING CO., INC.	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. KENT 2012-443-R
v.	:	Order No. 9353807; 03/29/2011
	:	
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Straight Creek #1
Respondent.	:	Mine ID: 15-12564

DECISION

Appearances: John M. Williams, Esq., and Todd Myers, Esq., Rajkovich, Williams, Kirkpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY for Contestant

Mary Sue Taylor, Esq., and Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN for the Secretary

Before: Judge Andrews

STATEMENT OF THE CASE

This contest proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000)(the "Act"). A hearing was held on an expedited basis by agreement of the parties in Hazard, Kentucky, on January 30-31, 2012. This matter concerns the issuance of Order No. 8353807 under section 104(b) of the Act, 30 U.S.C. § 814(b), served on Contestant on March 29, 2011, and the modification of that order on January 11, 2012, that gave rise to the instant controversy. The parties submitted their prehearing materials on January 27, 2012. At the hearing, Contestant's Motion for Directed Verdict was denied on the record. Due to the compelling circumstances surrounding this case and the need for an expedited decision, the parties did not submit post-hearing briefs.

JURISDICTION

Contestant's activities in mining coal at its Straight Creek #1 Mine subjects it to the jurisdiction of the Act as a "coal or other mine" as defined by section 3(h) of the Act, 30 U.S.C. §802(h). Further, Contestant meets the definition of an "operator" as defined by section 3(d) of the Act, 30 U.S.C. §802(d). Hence, this proceeding is subject to the jurisdiction of the Federal

Mine Safety and Health Review Commission and its Administrative Law Judge (ALJ) pursuant to sections 105 and 113 of the Act, 30 U.S.C. §§805, 813.

The undersigned has jurisdiction only of the Section 104(b) Order No. 8353807 and the single modification of that order. The references to other citations and orders are for the purpose of placing the instant case in context with the circumstances that existed at the Straight Creek #1 Mine, and to maintain clarity in the discussion of this decision. It must be emphasized that the decision herein is strictly limited to the 104(b) order and modification, and may not be construed as adjudicating in any manner other citations and orders referenced and assigned to other ALJs.

TIMELINE OF EVENTS AND SUMMARY OF THE TESTIMONY

History of the Order at Issue

At 13:05 on March 22, 2011, MSHA Inspector Tom D. Middleton ("Middleton") issued 107(a) Order No. 8353800 and 104(a) Citation No. 8353801,[1] both based on methane and oxygen levels detected in the Straight Creek seam between seals #2 and #3. Ex. D.[2] The safety standard cited was 30 C.F.R. §75.323(b).[3]

Minutes later, at 13:40, Middleton issued 103(k) Order No. 8353802, closing the entire mine to all activity, based on the gas inundation discovery.[4] Prior approval would be required before mine operations could be restored. Exs. C, 2. The 103(k) order was modified four times that day to allow necessary persons to enter, to ventilate the area, to re-energize power, for required examinations, to monitor the seals in question, and to de-water the Rim seam. The 103(k) order was modified a fifth time, two days later, to allow power and pumping in the Straight Creek seam.

[1] Both the order and citation are currently assigned to another ALJ.

[2] Note that the Secretary's exhibits are designated by numbers and Contestant's exhibits are designated by letters.

[3] 30 C.F.R. § 75.323(b) states that (1) when 1.0 percent or more methane is present a working place or an intake air course, electrically powered equipment and other mechanized equipment in the affected area, other than intrinsically safe atmospheric monitoring systems, shall deenergized and/or shut off, changes shall be made to the ventilation system and no work shall be permitted in the affected area until the concentration is less an 1.0 percent; and (2) when 1.5 percent or more methane is present in a working place or an intake air course, everyone other than those referred to in § 104 of the Act shall be withdrawn and electrically powered equipment shall be disconnected from the power source, except for intrinsically safe atmospheric monitoring systems.

[4] This order is assigned to another ALJ.

Five hours after the discovery of methane, at 18:05 Middleton issued 104(a) Citation No. 8353804[5] citing safety standard 30 C.F.R §75 333(h), set forth above, regarding the maintenance of the #2 and #3 seals in the Straight Creek Seam. This is the specific event that underlies the subsequent 104(b) order and its modification. The condition in the citation reads:

> The #2 and #3 seals in the straight creek seam are not being maintained to serve the purpose for which they were built. The #2 seal water trap is below the normal travel route to the seal, the water trap would impound water behind seal before the trap could de-water the area behind the seal. The #3 seal is allowing the atmosphere behind the seal to be expelled into the intake air course through cracks in the roof strata.

Exs. B, 3. The time set for abatement was 21:00 that day.

Since the 103(k) order had been in effect since 13:40 that day, Left Fork was required to submit a plan for approval by MSHA prior to addressing the maintenance needed at the seals. Such a plan was submitted the very next day, on March 24, 2011. The plan was to inject a type of grout into the roof above the #3 seal to repair the leak. Ex. I. MSHA did not formally respond, in writing, to this plan. Despite the submission of this plan, Inspector Middleton issued 104(b) Order No. 8353807, the order contested here, on March 29, 2011, for failure to submit a plan to abate seal maintenance in accordance with 104(a) Citation No. 8353804, stating:

> The operator has not submitted a plan to repair the affected seals. Reasonable time has been given to the operator to submit a plan.

Exs. 4, B.

On April 8, 2011, Left Fork submitted a second plan to repair the #3 seal to prevent any further methane inundations, to allow for expert evaluation of the seals and depending on the findings of the experts, to remove equipment. This plan was denied in writing on April 11, 2011, by the District Manager. Ex. J.

Beginning in May 2011, and continuing into January 2012, Left Fork attempted to obtain approval of a plan to seal the entire Straight Creek seam of the mine by water inundation. The purpose was to allow work to resume in the Rim seam. [6] The record contains evidence of many communications between mine and MSHA personnel, and a number of required revisions to the extensive plan, all serving to illustrate that many weeks of work were invested by both parties in this plan. Exs. 8-13, 17-20, K-P. There were also various ventilation plans and revisions during this period. Ex. 14-16.

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[5] Assigned to another ALJ.

[6] The Rim seam is located on top of the Straight Creek seam and there are places where the two meet. Tr. 25; Ex. J-1. These seams are also conjoined by the same ventilation system. Tr. 26; Ex. J-1.

Also in this period, the 103(k) order was further modified. In May, the modification was to remove electrical power and stop all work and travel in the Straight Creek seam. The final modification in June referred to the plan being developed for sealing the entire Straight Creek seam and allowed for power and pumping in that seam as necessary for construction, but contingent upon submission of updated action plans throughout the process. Ex. C, 2.

On January 11, 2012, the 104(b) order of March 29, 2011, based on the failure of the mine to submit a repair plan, was modified by MSHA Inspector Dannie W. Lewis to de-energize all power and withdraw all miners with the following justification:

> Numerous hazards are present throughout the entire mine. There are 19 unabated 104(b) orders currently at this mine over a broad area. Some of these 104(b) orders have existed for up to approximately 18 months uncorrected by the operator. Additional hazards have been identified at this mine in several locations.
>
> The operator was cited for seals not being maintained as required (See 104(d)(2) order # 8353803 and 107(a) order # 8353800 on 3-22-11, The operator has previously submitted for approval a seal construction plan to construct new seals for which during this time the operator was to prepare the seal sites, conduct examinations and pump water. No work is being done to prepare for seal installation as verified by evaluation of these areas. The only work that has been done for some time has been examinations and pumping water.
>
> Resources are not being allocated or used to address the many hazards that exists and that continue to accumulate at this mine. These conditions expose those miners conducting examinations and doing work to pump water to numerous hazards that have the potential to result in injuries that range from lost workday/restricted duty up to include fatal. This order is being modified for the affected area to include the entire mine. The operator must withdraw all miners from the mine and de-energize all electrical power from the underground portion of the mine. This action is being taken for the safety of miners working in the mine. The operator is being allowed to run the mine fans to prevent the accumulation of explosive methane/ch4.

Ex. 4, A.

On January 13, 2012, two days after the mine was shut down by the 104(b) modification, the plan to seal the entire Straight Creek seam was approved contingent upon the submission of a specific rehabilitation plan. Ex. P.

The 103(k) order, as modified, remains in effect.

Testimony

David Partin ("Partin") is the safety compliance officer for Left Fork and he does all of the mine plans. He reported 30 years of experience in coal mining and certification as an inspector and mine foreman. Tr. 325. He testified that he was the author of the March 23, 2011 and April 8, 2011 Action Plans. Ex. I, J. He stated that on March 22, 2011, there was a crack in the strata above the #3 seal. Tr. 330, 331. Then, on March 23, 2011, he submitted a plan to MSHA to repair the leak at the #3 seal, but received no written response regarding this plan. Tr. 333, 334. Partin testified further that the repair as planned would have taken one day. Tr. 334. He then submitted another plan on April 8, 2011, but this was denied by a letter that gave as a reason a confluence of items which was not explained beyond reference to citations. Tr. 336, 337. He said at this point Left Fork began to make plans to seal off the entire Straight Creek seam of the mine, since this would terminate all of the violations. Tr. 337, 338. He added there were no discussions with anyone at MSHA that the #3 and #2 seals would have to be repaired or that every violation would have to be abated for approval of the new Straight Creek seam sealing plan. Tr. 367, 368.

Homer Cox ("Cox") testified that he has 33 years of experience in coal mining and has performed most tasks with the exception of running a miner. Tr. 274. He is the Outby Foreman and Examiner in the Straight Creek seam of the mine, where he has worked since 2006, and he holds certifications as Mine Foreman and Medical Technician Underground. Tr. 273, 274. Cox stated he is familiar with the old seals #2 and #3 and that on March 23, 2011 the #3 seal was perfect but there was a crack in the strata above it with a small leak. Tr. 279, 280. He further stated the mine made recommendations to fix the hole, and recalled that MSHA Inspector Bo Mills told him that the mine could not fix the problem, but Mills did not give him a reason for this decision. Tr. 280, 281. Cox also testified he was familiar with the 103(k) order issued because of leakage, and although there was a roadway to the #2 and #3 seals, they were not allowed to either go there or fix the seals. Tr. 279, 282, 305, 313. When testifying about the plan to seal off the entire Straight Creek seam, Cox said a lot of work was done in June 2011, to prepare two sites for the installations, and that the sites were ready for construction. Tr. 276, 277, 278, 298.

Cox reported he was present on January 11, 2012, and accompanied Inspector Lewis and Lewis' Supervisor to the Straight Creek seam. Tr. 282, 283. He was told to stay at the end of the Goat Trail while Lewis and his supervisor went to #2 and #3 seals, about 300 feet away. Tr. 283, 285, 297. He further reported that although the ventilation comes from the seals and past where he was positioned, his Solaris detector found no methane. Tr. 286, 287. Cox stated that when the two inspectors came back, they reported methane levels of 1.5 and 2.1 at the seals,[7] and, when outside the mine, they said the power to the mine should be cut. Tr. 287, 298.

The testimony of Jeff Craig ("Craig"), Superintendent at Left Fork, and Jim Brummet ("Brummet"), a Counselor at Left Fork, both corroborated the testimony of Cox regarding the new seal site preparation work. Craig testified the sites had been scooped and the ribs cleaned, and that a lot of work had been done including removal of old belt structure. Tr. 238-240. Cox

[7] *See* Analysis of Air Samples. Ex. 5.

said this work had been done in the summer of 2011. Tr. 242. Brummet testified that Mark Heiser ("Heiser") told him on January 12, 2012, that the two sites were "cleaned up good." Tr. 319. Heiser, a MSHA ventilation specialist, was called as a rebuttal witness regarding the conversation with Brummet when they were in the lighthouse on January 12, 2012, but he was unable to recall the conversation that had occurred only days before the hearing. Tr. 442, 443.

The Contestant's witnesses also included Jefferson Davis ("Davis"), General Manager of Left Fork and Michael Gambrel, Chief Engineer of Left Fork. Davis testified even if the (b) order was lifted, an action plan acceptable to MSHA would be required to re-establish power and de-water pump the mine. Tr. 398-399. He further testified that without pumping the mine will be decimated and completely inundated with water,[8] with the loss of equipment valued by the Contestant in the millions of dollars. Tr. 387-390; Ex. Q. Mr. Gambrel's testimony mainly concerned the ventilation system at the mine. Tr. 408-438.

Danny Wayne Lewis ("Lewis") has been a MSHA coal mine inspector for over nine years, with prior mining experience of about twenty-three years performing a number of tasks and holding several certifications. Tr. 21, 22. He testified that in 2011 he had completed ten day spot methane inspections at the Straight Creek #1 mine and in January 2012 was assigned the required quarterly E01 inspection at the mine. Tr. 24. He also testified that he was familiar with and was present on the day that Inspector Middleton wrote the 103(k) order of March 22, 2011. Tr. 84, 85.

On January 11, 2012, accompanied by his supervisor Paul Hurt ("Hurt") and Foreman Homer Cox, Lewis testified he and Hurt went to the area of the seals in the Straight Creek seam. Tr. 40. He reported that forty to fifty feet from seals #2 and #3 their detectors went off, and bottle samples taken[9] were later reported as showing methane of 1.120 for the #2 seal and 1.64 for the #3 seal. Tr. 46, 52, 53, 55. He acknowledged writing the 104(b) modification, and that his decision to turn off the power was directly related to the methane level at the #3 seal. Tr. 70, 74, 83. Lewis recalled becoming aware of a lack of air movement in the area related to a ventilation control curtain, which affected air to the seals, torn down by a rock. Tr. 54, 55, 106. He said the curtain would need to be put up to get air over to the seals; he admitted he did not include anything about this curtain or the methane discovery in the 104(b) modification. Tr. 110-112. Lewis also admitted that the atmosphere in front of the seals was not explosive. Tr. 103, 104.

Lewis testified that instead of writing more paper to the company, and even though there is a legal requirement to pull power under section 75.323(c), he decided to modify the (b) order to get other people involved and get the problem taken care of. Tr. 69-71. He stated that the issue of seal construction did not factor into this decision to modify the 104(b) order to require the de-energizing of the mine and the withdrawal of all the men. Tr. 72, 87. Lewis further stated that if the methane reading he had taken on January 11, 2012, had been less than one percent, he probably would not have issued the 104(b) modification. Tr. 72, 73.

[8] *See* Ex. R, the depth of the water levels within the mine.

[9] Ex. 5.

The Secretary's witnesses also included Charles "Jasey" Maggard, a MSHA Staff Assistant, who testified generally about power in the mine and the need to de-energize in the presence of methane, Tr. 113-161, and James Travis Proffitt ("Profitt"), a MSHA ventilation specialist whose testimony included the plan to seal the entire Straight Creek seam by water inundation. Proffitt's testimony also served to reveal the extensive amount of time and resources expended by Left Fork and MSHA in the development of the plan over a period of about six months. Tr. 163-216. Proffitt also opined that if Lewis thought the air was stagnant in the area of the #2 and #3 seals, and the ventilation control line curtain was down, then the air would not be properly sweeping across and ventilating those seals. Tr. 200, 201.

LAW AND REGULATIONS

Section 104(a) of the Act sets forth the conditions under which a citation may be issued to a mine operator. Section 104(a) provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, 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 chapter, 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 chapter.

30 U.S.C. § 814(a).

Section 104(b) of the Act describes the responsibilities of the Secretary when the problem or condition identified as the subject of a 104(a) citation has not been abated at the time of a follow-up inspection. Section 104(b) states:

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

30 U.S.C. § 814(b).

Section 103(k) of the Act establishes the authority of the Secretary to take appropriate action in the event of any accident in a mine. Section 103(k) reads:

> 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.

30 U.S.C § 813(k).

Regulation 30 C.F.R. §75.333 contains safety standards for ventilation controls, and subsection (h) addresses maintenance of the controls. Section 75.333(h) reads:

> All ventilation controls, including seals, shall be maintained to serve the purpose for which they were built.

30 C.F.R. §75.333(h).

CONTENTIONS OF THE PARTIES

Contestant argues that, since de-energizing the entire underground portion of the mine is not related to abatement of the underlying violation, *i.e.* failing to maintain the seal, and in fact makes abatement not possible, it cannot be so ordered under 104(b). Contestant further argues that under the 103(k) order, miners were not allowed to go to the seals. Contestant contends that the seals at issue in the 104(b) order could not have caused an accident that would affect the entire mine, and, therefore, expanding the scope of the 104(b) order to the entire mine was inappropriate. Contestant claims that the Secretary did not have the authority under Section 104(b) of the Act to require the operator to shut down the entire mine and to de-energize all underground electrical power. Contestant finally argues that, even if the Secretary has authority under 104(b) to order Left Fork to de-energize the mine, the order is arbitrary and capricious and does not contribute to the safety of the mine. As a result of the order, Contestant claims that the safety of the mine has decreased and it will become a total loss.

The Secretary contends that the 104(b) order itself is not at issue, but only the January 11, 2012 modification of that order. The Secretary argues that her actions in modifying the 104(b) order to extend to the entire mine and remove the electrical power underground were reasonable. Based on conditions observed near the No. 3 seal on January 11, 2012, the Secretary supports this argument by explaining that the degree of risk presented by keeping the power on with unknown quantities of potentially explosive methane levels was high enough to justify the requirement to remove the underground electrical power. Further, the Secretary claims that her actions were reasonable because several factors were considered in making the decision to modify the 104(b) order to extend to the entire mine and to require de-energization. According

to the Secretary, these factors include: prior inundation of methane, the potential for methane liberation in the seam, the potential harm presented by an explosion in the area, the risk of injury presented should an explosion occur and the continued deterioration of the mine. In addition, she argues that it was appropriate to require withdrawal of personnel and de-energization of the entire mine because the Rim seam and the Straight Creek seam are locked in the same ventilation system.

ANAYLYSIS AND CONCLUSIONS

Approaching the #2 and #3 seals in the Straight Creek seam on January 11, 2012, Inspector Lewis noticed the air was stagnant. A ventilation line curtain had been felled by a rock and air was not sweeping through the area as it otherwise would. As Lewis and Supervisor Hurt progressed to about forty feet from the seals, their detectors signaled the presence of methane. Bottle samples then taken later confirmed methane concentration levels of 1.12 and 1.64, and oxygen levels of 20.37 and 20.04. Ex 5.

The atmosphere encountered was not explosive,[10] but the levels did meet the criteria for application of the safety standard for excessive methane. As the Secretary candidly admitted in her opening statement at the hearing, a citation could have been issued under Section 75.323. Tr. 10,11. This would have served to shut off the power and withdraw miners. In the alternative, I observe that the 103(k) order, which was based on the March 2011 methane inundation and used twice before to remove power and stop work, could have been modified again to achieve the same result.

Instead, Lewis and Hurt chose the instant 104(b) order that had been issued in error and never corrected or vacated, and decided to issue a modification with a justification that is not sustainable. The attempt by the testimony of Lewis to explain this unfortunate choice as not wanting to write more paperwork to the company fails to convince because, with the rediscovery of methane, some paper would surely be written. Simply put, the Inspector and his Supervisor chose the wrong method to close down the Straight Creek #1 Mine.

The 104(b) Order of March 29, 2011

Under the Mine Act, the Secretary has the burden of proving the fact or occurrence of the cited violations by a preponderance of the evidence. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary may satisfy her preponderance of the evidence burden by demonstrating "that it was more likely than not" that the cited violation occurred. *Enlow Fork Mining Company*, 19 FMSHRC 5**,** 13 (January 1997). The Secretary may satisfy her burden of proof by relying on reasonable inferences drawn from indirect evidence, but such inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek*, 11 FMSHRC at 2153 *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138. According to *Mid-Continent*

[10] The atmosphere is considered to be explosive when the methane concentration is between 5 and 15 percent inclusively and the oxygen concentration is greater than 12.1 percent. *See CONSOL of Kentucky, Inc.,* 30 FMSHRC 1, 3 (Jan. 2008)(ALJ)

Resources, when the validity of a 104(b) order is challenged by an operator, the Secretary bears the burden of proving that the violation described in the underlying citation was not abated within the given time period. *Mid-Continent Resources, Inc*. 11 FMSHRC 505, 509 (April 1989).

Contrary to the argument of the Secretary that only the January 11, 2012 modification is at issue, I find that prior to consideration of whether the *modification* to the 104(b) order was proper, it is important to determine the validity of the issuance of the *initial* 104(b) order.

Though the condition subject to the 104(a) citation, the lack of maintenance of the seals, had not been abated on March 29, 2011, the 103(k) order in place prevented the operator from abating the condition without an approved plan. Also, mine personnel believed that the March 23, 2011 Action Plan had been denied, based apparently on the reported conversation between Cox and Mills. I find this belief to be credible, and therefore abatement by repair of the seals was not possible on March 29, 2011 due to both the 103(k) order and the unofficial denial of the March 23, 2011 Action Plan. Despite the fact that seal repair was not permitted up to and including March 29, 2011, the instant 104(b) order was issued. Compounding this mistake, both reasons given for the order were erroneous; a plan *had* been submitted to MSHA, and the time for abatement *could not* be considered reasonable because repairs had not been allowed by MSHA. It is the 103(k) requirement of an Action Plan that is the subject of the 104(b) order, and therefore, to meet her burden, the Secretary must provide evidence that no plan had been submitted to abate the underlying seal condition.

Since the mine was operating under a 103(k) order at the time the 104(b) order was issued, if the mine operator wanted to abate the underlying conditions in the 104(a) citation, the repair of seals, it would first have to submit a plan, and upon approval of that plan, seek a modification to the 103(k) order to permit workers to carry out the plan and abate the conditions. At the time of the 104(b) issuance on March 29, 2011, the 103(k) order permitted only energizing power center #1 and pumping water in the Straight Creek seam. Exs. 2, C. Contestant was also permitted to monitor the atmosphere outside several seals Exs. 2, C. Absent an approved plan and modification of the 103(k) order, miners were not permitted to go to the seals and perform work.

The 104(b) order was issued for failure to submit a plan, as pertinent to this decision, for repair at the #3 seal. Ex. B. However, Left Fork had submitted a plan for repairing the #3 seal on March 23, 2011, six days before the 104(b) order was issued. That plan proposed repairing the seal by injecting a polyurethane-type grout into the mine roof. Ex. I. According to the testimony of Cox, found credible when compared to the facts and circumstances in this case, that plan was not approved,[11] but no reason for the denial was given. Tr. 280, 281, 313. According to the testimony of Partin, also found credible for the same reason, there was no written denial of the March 23, 2011 plan. Tr. 333, 334. The first recognizable denial of a plan to fix the seal did not come until April 11, 2011, nearly two weeks after the 104(b) order was issued, and this was in response to the Action Plan of April 8, 2011. Ex. J

[11] This testimony concerns a conversation only between Cox and Mills, and neither the Secretary nor Respondent provided any written evidence indicating a formal denial of the Action Plan of March 23, 2011.

The Secretary did not offer sufficient evidence that no plan had been submitted, and did not even include the March 23, 2011 plan in her exhibits.

Due to the fact that Left Fork had submitted to MSHA a plan to fix the #3 seal, the premise on which the 104(b) order was based must be found to be in error. But was there a premise on which the 104(b) order could have been correctly written? If the order had been issued because the mine had not abated the condition, such order would have been in error since the 103(k) order prevented repairs being made without an approved Action Plan. If the order had been issued because an Action Plan had been denied, that would obviously be incorrect because the mine could not abate the condition until an Action Plan was approved. However, if the 104(b) order had been based on an *approved* Action Plan to repair the seals that Left Fork had *not* implemented, (assuming any appropriate modification of the 103(k)), the result could be different. But that is not the case here. I find that 104(b) Order No. 8353807 of March 29, 2011, based on a failure to submit a repair plan, was not validly issued.

The 104(b) Order Modification of January 11, 2012

It is well settled that, absent legal prejudice, MSHA may modify a section 104 citation. *Wyoming Fuel Company,* 14 FMSHRC 1282, 1289-1290 (Aug. 1992). But the question presented here is whether modification of a vacated order survives to be scrutinized for its validity. The result of vacating an order is to cancel it or render it null and void.[12] It is *as if* the order no longer exists. Unless the reviewing authority issuing the decision to vacate specifically limits the decision to only a particular portion of the order, the entire order is set aside. It follows, then, that an amendment or modification that had been made to a vacated section 104 order would be cancelled as well.

But even if I had found the initial 104(b) order to be valid, the obviously confused and even incorrect and irrelevant justifications written for the issuance of the modification would call into question its validity.

The first paragraph of the written justification does not in any way relate to either the 104(a) seal maintenance citation or the subsequent 104(b) order for failure to submit a repair plan. Rather, it states a general reference to *prior* unabated orders at the mine and unspecified hazards.

The second paragraph of the modification of the 104(b) order is not only confusing but also unrelated to the 104(b) order as well as the underlying 104(a) citation. With the first sentence, it appears that Lewis confused the instant 104(b) order with Order No. 8353800, which is actually the 107(a) imminent danger order due to methane inundation. He then further cites Order No. 8353803, which is a weekly examination violation that appears (from data on the MSHA website) to have nothing to do with the instant case. The second paragraph actually addresses the plan to seal the entire Straight Creek seam, not the seal maintenance that was at

[12] I note that the Merriam Webster Dictionary defines vacate as "to make legally void." "Vacate." Merriam Webster Dictionary. http://www.merriam-webster.com/dictionary/vacate (2012).

issue when the 104(a) citation was written. Lewis's attempts at hearing to discount his confusion and reframe the argument that the modification to the 104(b) order was appropriate were incredible to say the least. Lewis testified that he modified the 104(b) order because of the high methane readings and poor ventilation; however, other than the possibility that methane was leaking from above the seal but not being swept out of the mine due to the absence of the ventilation curtain, this testimony does not confirm a direct relationship between his findings forty to fifty feet from the seal and the state of strata above the seal which was not observed at that time. Lewis wrote nothing in the justification about the discovery of methane that day, and also failed to record what he knew about the ventilation line curtain being torn down. If methane was the reason for the order as was asserted, there were other, sustainable choices available to accomplish closure of the mine.

The first two sentences of the third paragraph are also irrelevant, referencing again the prior unabated violations and stating an opinion regarding hazards, but with no reference made to the repair of the old seals. The remainder of the third paragraph lists the actions to be taken to shut down the entire mine, with the exception of the ventilation fans. Even if I could find that the original 104(b) order was valid, albeit containing erroneous statements, the written reasons for modifying that order are unrelated to the repair of the old seals in the Straight Creek seam and incorrect.

Nothing in Section 104(b) of the Act authorizes the de-energizing of an entire mine, only the withdrawal of certain personnel. See 30 U.S.C. § 814(b). If the Secretary wanted to de-energize the mine, she would have had to do so under different authority, either a citation for the methane discovered or another modification of the 103(k) order, as discussed above. Further, a 104(b) order is not the appropriate vehicle for shutting down a mine for its history of violations, but rather must relate back to the lack of abatement of the specific violation cited in the original 104(a) citation. Although I have determined the modification of January 11, 2012, does not survive the decision to vacate the 104(b) Order of March 29, 2011, I also find in the alternative that the modification was issued in error and invalid.

Practical Impact of Decision

It might appear that upon finding the 104(b) order and modification invalid, the Straight Creek #1 Mine could restore power and begin pumping, assuming the mine is not already lost to flooding. But the mine cannot just turn on the power. As acknowledged by General Manager Jefferson Davis, if the 104(b) order were lifted, an action plan acceptable to MSHA would be required to re-establish power and de-water pump the mine. Tr. 398, 399. Even the finally approved plan to seal off the entire Straight Creek seam, so many months and so much manpower in the making, cannot be implemented without a rehabilitation plan approved by MSHA.

If the instant (104b) order and modification had been found to be valid, the result would not be much different. The mine would still be required to submit an acceptable rehabilitation plan, most likely addressing the multiple steps outlined by Mr. Davis in his testimony. Tr. 398-401.

Therefore, regardless of whether the 104(b) order and modification were found valid or invalid, in the absence of an acceptable rehabilitation plan the only discernable result of the expenditure of many resources by all parties, including this proceeding, is the progressive flooding of the mine and loss of equipment. These comments, of course, are not a part of the decision, but are offered to explain why at the conclusion of the hearing on January 31, 2012, I suggested to the parties that the best resolution would be for the principals to meet and work out a plan to prevent destruction of the mine. If such an agreement could be reached, the parties were invited to contact my office. As of the date of this decision, there has been no contact.

ORDER

It is hereby **ORDERED** that 104(b) order No. 8353807, as modified, is **VACATED**. Having found that the order is invalid, this case is **DISMISSED**.

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

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April 4, 2012

BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2011-699-R
v.	:	Order No. 8424291; 05/16/2011
	:	
	:	Docket No. LAKE 2011-700-R
SECRETARY OF LABOR	:	Citation No. 8428712; 05/19/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 11-03054
Respondent.	:	Mine: Willow Lake Portal

DECISION

Representatives: Suzanne F. Dunne, Esq., and Kevin Wilemon, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Room 844, Chicago, IL for the Respondent

R. Henry Moore, Esq., and Arthur Wolfson, Esq., Jackson Kelly, PLLC, Three Gateway Tower, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA for the Contestant

Before: Judge Lewis

STATEMENT OF THE CASE

The above-captioned matter is before me pursuant to the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 801 *et seq*. Pursuant to the agreement of the parties, an in-person hearing was waived. The within decision is based upon the record, including the pleadings, stipulations of fact and arguments advanced by counsel in their written memoranda.

PROCEDURAL HISTORY

This case has a rather thorny procedural history:

On May 16, 2011, an incident occurred at Big Ridges's ("Big Ridge" or "Contestant") Willow Lake Portal mine which led to a 103(j) order, Order No. 8424291, being issued by Mine Safety and Health Administration ("MSHA") inspector Anthony Fazzalare. After MSHA investigators arrived on the scene, the 103(j) order was modified to a 103(k) order. Said Order was again modified on May 17, 2011. Due to Contestant's failure to follow the approved plan of

action, Citation No. 8428712 was issued on May 19, 2011 pursuant to § 104(a) of the Act. 30 U.S.C. § 814(a).

On May 31, 2011, Contestant filed its Notice of Contest, averring that Citation No. 8248712 was invalid in that "no accident" occurred, "no violation of the cited provision of the act existed," and that the inspector's evaluation was not valid or appropriate.

On July 8, 2011, the undersigned held a telephone conference during which the parties essentially indicated that there were few, if any, genuine issues of material fact in dispute. Rather, the critical question was legal in nature, i.e. whether the incident in controversy, as a matter of law, warranted the issuance of the 103(j) and subsequent 103(k) orders.

On October 31, 2011, Contestant filed its Motion to Dismiss Order No. 8424291 and Citation No. 8428712. In its Motion, Contestant again averred that Order No. 8424291 was invalidly issued pursuant to 103(j) and 103(k) of the Act and that, consequently, Citation No. 8428712 should be vacated as being issued based upon an invalid order. In support of its motion, Contestant also filed a memorandum of law with stipulations of fact.[1] On November 21, 2011, the Secretary filed her Response to Contestant's Motion to Dismiss Order No. 8424291 and Citation No. 8428712. Then, on November 29, 2011, the undersigned issued an Order Denying the Contestant's Motion.[2]

On December 9, 2011, the Contestant filed a Motion for Reconsideration. *Inter alia*, Contestant advanced that the undersigned had mischaracterized its principal argument for invalidating Order No. 8424291 in his November 29, 2011 denial of its dismissal request. Contestant advanced that its principal argument was that the Secretary's authority to issue 103(j) orders was "dependent upon and appropriate only when 'rescue and recovery work was necessary.'"

On January 19, 2012, the undersigned held another prehearing conference. He advised the parties that he intended to deny Contestant's Motion for Reconsideration, and further requested that the parties inform him within two weeks how they wished to proceed, including whether they wished to have an in-person hearing as to any of the remaining issues in the case, including the underlying 104(a) Citation No. 8428712. On January 20, 2012, the undersigned issued the written Order Denying Contestant's Motion for Reconsideration, and again requested that the parties provide a status update within two weeks.

[1] See Exhibit A attached to Contestant's Motion to Dismiss.

[2] This Order was incorrectly titled Order Denying Respondent's Motion to Dismiss, rather than Order Denying Contestant's Motion to Dismiss.

On January 22, 2012, the Contestant filed a "Precautionary Petition for Discretionary Review" with the Commission.[3] On February 27, 2012, the Commission denied the Petition, finding the January 20, 2012 Order Denying Reconsideration was not a final decision ending the undersigned's jurisdiction over the matter. The Commission noted that the undersigned had neither explicitly affirmed Order No. 8424291 as reasonable nor dismissed Big Ridge's notice of contest.

The parties subsequently submitted to me a joint stipulation of fact with respect to Citation No. 8428712 providing that "to the degree that Order No. 8424291 is valid, the parties stipulate that a violation of the Order occurred as alleged in Citation No. 8428712 and that the proper negligence designation for such violation is high negligence."[4] The Contestant maintained its position that Order No. 8424291 was invalid and preserved its argument for appeal.[5]

On March 9, 2012, I held a final telephone conference with the parties during which they both agreed to waive their right to an in-person hearing and requested that the undersigned dispose of the within matter on the record, based upon the stipulations of fact and written pleadings and arguments that had previously been submitted.

STIPULATIONS OF FACT

1. Big Ridge is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the Citation and Order at issue in this proceeding were issued.

2. Operations of Big Ridge, at the Willow Lake Portal Mine ("Willow Lake") at which the Citation and Order were issued in this proceeding are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individual whose signature appears in Block 22 of the Citation and Order at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Citation and Order were issued.

5. True copies of the Citation and Order at issue in this proceeding were served on Big Ridge as required by the Mine Act.

[3] On January 28, 2012, the Secretary filed her Motion in Opposition to such.
[4] See Joint Stipulations of fact with respect to Citation No. 8487712 filed on February 29, 2012.

[5] See also Exhibit A attached to Contestant's Motion to Dismiss.

6. Order No. 8424291 and Citation No. 8428712 were issued to Big Ridge in response to an event that occurred on May 16, 2011.

7. The event occurred during the third shift at Willow Lake on Unit 2.

8. Third Shift was a production shift, commencing on May 15, 2011, at 11:00 pm and concluding at 7:00 am on May 16, 2011.

9. A production crew was working on Unit 2, which included Unit Mechanic, Tim Borders.

10. Unit 2 was a super-section, which permitted two production crews to work simultaneously.

11. Nathan Genesio was Mine Manager. Shift Leader Brian Duty was supervising a crew on the left side of Unit 2. The right side crew was led by Section Forman Jason Shelton.

12. Mr. Duty's crew consisted of Ram Car Operators Jon Farmer, Thomas Mahan and Robert Roach; Roof Bolter Operators Darrell Kirk and Caleb Webb; and Miner Operator Reuban Markham. Scoop Operator Matt Fletcher assisted both the left and right side crews.

13. After arriving on the Unit at approximately 11:55 pm, Brian Duty and Jason Shelton performed their onshift examination of the working areas. The assessed the unit for hazards, finding none, and confirmed that the requisite quantity of air was present and free of concentrations of methane.

14. After completing his hazard check and checking the air at the working faces, Mr. Duty ordered Joy Continuous Mining Machine No. 245 ("continuous miner") moved to the 9L crosscut to begin production.

15. The first cut taken completed or "blew through" the crosscut separating the 9 and 10 entries that had been partially mined on a prior shift.

16. The continuous miner became stuck in 9L during the second cut, which was the first full cut of the shift.

17. Mr. Markham attempted to back the continuous miner out but it would not move.

18. The continuous miner became stuck at about 2:45 am; Messrs. Duty, Shelton and Genesio were notified on the radio of the problem.

19. The tail of the continuous miner was located underneath roof that had been bolted in compliance with the provisions of the roof control plan. The body of the vehicle or its main chassis was beyond the last row of bolts under unsupported roof that had not yet been bolted.

20. The roof in the subject area was composed of gray shale.

21. No hazards were identified with the roof and no evidence of prior roof falls was evident on the ground.

22. After being apprised of the problem, Mr. Genesio traveled to the area and walked around the pillar in an attempt to look back through the hole created by the blown out crosscut. He was unable to identify the problem from that vantage point.
23. Mr. Borders observed the affected continuous miner but was not certain what had caused it to become immobilized.

24. Due to a rut or sloping of the ground, the left cat-track of the continuous miner was not in contact with the ground.

25. Mr. Duty sent for timbers or crib-ties, which were delivered to the area by the Ram Car Operator Robert Roach for use in extricating the miner.

26. Messrs. Duty, Farmer, Borders, Markham and Roach were all present at the time the cribs were delivered.

27. Several crib ties were tossed from beyond the miner's tail and under supported roof towards the miner's left side cat track.

28. Mr. Borders was positioned to the right and behind the rear of the continuous miner's tail under supported roof when he tossed a crib tie towards the cat-track.

29. At approximately 3:15 am, just after tossing the crib tie, the roof popped and cracked. A portion of the unsupported roof dislodged and fell. The rock that dislodged from the roof was approximately 7 feet long, 2 feet wide, and 1 to 8 inches thick. The break terminated at the last row of bolts.The roof was undisturbed between the last row of bolts and the second row of bolts.

30. Mr. Borders was kneeling at the right side of the end of the continuous miner's tail, facing in by when he was struck by a piece of the rock. The rock that fell from the roof first struck the continuous miner's tail, causing the rock to break apart.

31. A portion of the broken rock struck Mr. Borders after it hit the tail. The parties disagree as to whether Mr. Borders was standing under supported or unsupported roof when he was struck by the falling material.

32. Mr. Markham and Mr. Roach removed the rock from Mr. Borders and Mr. Duty helped Mr. Borders to his feet.

33. Mr. Borders' left arm was bleeding. It was wrapped in Mr. Roach's bandana at the scene and pressure was applied.

34. Mr. Border's walked under his own power to the mine manager's EMU, a four wheeled electric vehicle that was driven by Mr. Genesio.

35. On the ride from Unit 2 to the surface, Mr. Genesio stopped at the dinner hole and obtained additional bandages that were used to treat Mr. Border's arm injury.

36. Mr. Genesio did not observe significant blood loss while driving Mr. Borders out of the mine.

37. Mr. Broders never lost consciousness and was able to converse normally with Mr. Genesio during the ride out of the mine.

38. They reached the surface at approximately 3:14 am.

39. An ambulance was present when Mr. Borders reached the surface.

40. Mr. Borders retrieved his cell phone after reaching the surface. It was in his basket in the bath house, which he raised and lowered two times without assistance. The basket when full weighs nearly 20 pounds and requires a miner to pull a chain to raise the basket into position.

41. Mr. Borders received the following injuries: a broken left wrist, a laceration to his upper left arm that required 25 stitches and multiple abrasions to his body, including his head. He was treated and released at the Harrisburg Medical Center, but was never admitted.

42. On May 16, 2011, at 05:10 am, MSHA issued a verbal 103(j) Order.

43. The 103(j) Order was modified at 06:28 am to a 103(k) Order upon MSHA's arrive (sic) at Willow Lake, and memorialized at Order No. 8424291.

44. Mr. Borders returned to work on third shift Tuesday night, May 17, 2011 at 11:00 pm on restricted duty.

45. On the morning of May 18, 2011 Mr. Borders was interviewed by MSHA and Illinois state mining officials during an inquiry into this matter.

46. 104(a) Citation 8428712 was issued on May 19, 2011.

STIPULATIONS OF FACT WITH RESPECT TO CITATION NO. 8428712

1. Citation No. 8428712 alleges that Big Ridge violated Order No. 8424291, an Order issued under Sections 103(j) and 103(k) of the Act.

2. Big Ridge has argued in past filings that Order No. 8424291 is invalid.

3. After considering Big Ridge's Motion to Dismiss, the Secretary's Response, and Bid Ridge's Motion for Reconsideration, the Administrative Law Judge found Order No. 8424291 to be valid.

4. Big Ridge maintains its position that Order No. 8424291 is invalid and preserves that argument for appeal. However, to the degree that Order No. 8424291 is valid, the parties stipulate that a violation of that Order occurred as alleged in Citation No. 8428712 and that the proper negligence designation for such violation is high negligence.

ISSUES

The issues before me are: 1) does the Secretary have the authority to issue 103(j) and 103(k) orders in incidents involving no need for rescue and recovery; 2) did the Secretary reasonably exercise her authority in the case *sub judice* in its issuance of 103(j) Order No. 8424291 and subsequent 103(k) order modifications; 3) should Contestant's notice of contest be dismissed and Citation No. 8428712 be affirmed as stipulated.

FINDINGS OF FACT AND CONCLUSTIONS OF LAW

A. Does the Secretary have the authority to issue 103(j) and 103(k) orders in incidents where rescue and recovery are not necessary?[6]

Contrary to the Contestant's assertions otherwise, I find that the triggering event for the issuance of a 103(j) order is the occurrence of an "accident" as that term is defined in Section 3(k) of the Act.[7]

The formula for statutory interpretation in Commission cases is well-known: the ALJ must first examine the plain meaning of the statutory terms; if any ambiguity exists, deference is to be afforded to the Secretary's reasonable interpretations of such. *See Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994)(citing *Chevron*, 467 U.S at 483); *Jim Water Resources, Inc*., 2012 WL 362189 (Jan. 2012)(ALJ).

Inter alia, the Contestant argues that the Secretary's power to issue 103(j) and 103(k) orders is limited to situations involving rescue or recovery. While conceding that "rescue and recovery" are not defined in the Act at 30 U.S.C. § 803, Contestant argues that the events

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[6] I have already, in brief, addressed this issue in prior denials of Contestant's motions for dismissal and reconsideration. I hereby incorporate the rationales therein without a full recitation thereof in the within discussion.

[7] "Accident includes a mine explosion, mine ignition, mine fire or mine inundation, or injury to, or death, of any person." 30 U.S.C. § 813(k).

stipulated to *sub judice* would not meet the definition of "rescue and recovery" in the United States Bureau of Mines' *Dictionary of Mining Terms* (1968). (See also Exhibit A attached to Contestant's Motion to Dismiss Order No. 8424291 and Citation No. 8428712 at 5-8)

As shall be discussed *infra*, I find that the roof fall and associated miner's injury that took place on May 16, 2011, constituted an "accident" which statutorily authorized the Secretary to issue a 103(j) order. However, I must also observe that the stipulated facts arguably fall within the definition of "rescue" in the *Dictionary of Mining Terms* at 913 stating, "to move men or dead bodies from a mine after a mine disaster. Sometimes called recover."

Here, after the roof collapse, fallen rock had to be removed from Tom Borders, the injured miner, by Mr. Markham and Mr. Roach. Borders had to be helped to his feet. See Stip No. 32 above.[8] Mine manager Genesio drove (moved) Borders to the surface in a four-wheeled electric vehicle. After receiving treatment at the scene and on the way to the surface, Border was driven (moved) by ambulance to Harrisburg Medical Center for further treatment. Stip. Nos. 32, 33, 41, 44.

Regardless, however, of whether the within roof fall and miner's injury meet Contestant's suggested standard for rescue and recovery, I find that the clear statutory language of § 103(j), given the stipulated facts of this case, authorized the Secretary to issue a 103(j) order.

Sections 103(j) and 103(k) of the Act provide as follows:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For the purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j)(emphasis added).

> 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

[8] "Stip. No." indicates the stipulations of fact entered by the parties.

> recover any person in such a mine or to recover the coal or other mine or to return affected area of such mine to normal.

30 U.S.C. § 813(k).

Order No. 8424219 states as follows:

> A non-fatal accident on Unit #2 on 5/16/2011 at approximately 0315 hours. This Order is being issued under Section 103(j) of the Federal Mine Safety and Health Act of 1977 to prevent the destruction of any evidence which would assist in investigating the cause or causes of the accident. It prohibits all activity in the area of the Unit #2 where the accident occurred until MSHA has determined that it is safe to resume normal operations in this area. This order was initially issued verbally to Tom Benner, Director of Midwest Operations at 0510 hours and has now been reduced to writing.

See Exhibit A attached to Contestant's Notice of Contest.

Contestant essentially argues that the term "accident in § 103(j) should be construed as an event involving "the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death [...]" See Contestant's Motion to Dismiss 11-12 (quoting 30 U.S.C. § 813(k)). However, as the Secretary correctly observes, this contention has no basis in any Commission precedent and flies in the face of the plain language of the Act's definition section. See Secretary's Response to Contestant's Motion to Dismiss at 9.

The term "accident" as set forth at § 3(k) of the Act includes a mine explosion, mine ignition, mine fire, or mine inundation, *or injury to*, or death of any person. 30 U.S.C. § 803(k). The plain language of § 103(d) of the Act specifies that an unplanned roof fall is an accident for purposes of Section 103. *Emerald Coal Resources, LP*, 30 FMSHRC 122, 124 (2008)(ALJ). The roof fall did not occur in an abandoned panel or inaccessible area so as to preclude 103(d) applicability. It is uncontroverted that there was an unplanned roof fall at Willow Lake on May 16, 2011 which collapsed on a continuous miner machine and struck a miner. Stip. Nos. 29-32.

It is further uncontroverted that a miner suffered an injury at Contestant's mine on May 16, 2011 due to said roof collapse. The miner was required to undergo emergency treatment at the scene and later hospital treatment for a fractured wrist, laceration to the upper arm requiring twenty-five stitches and multiple abrasions to the body and head. Stip. Nos. 33, 35, 41. Such an unplanned fall and injury clearly constituted an "accident" that required the mine operator to notify "the Secretary thereof" so that appropriate measures could be taken "to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." 30 U.S.C. 103(j).

Contestant's proposed restrictions on the Secretary's authority to issue § 103(j) orders so as to prevent the destruction of property and allow proper investigation of accident causation would patently defeat the general protective purpose of the Act. See 30 U.S.C. § 802. Such a

misguided statutory construction would lead to an unconscionable vitiation of the Secretary's authority. Extremely untoward incidents could take place, *i.e.* roof collapses, explosions, floods, machinery malfunctions, etc, but the Secretary would be unable to investigate and perhaps prevent the recurrence of such, simply because no rescue or recovery was needed during the event.

I find that, contrary to Contestant's assertions otherwise, the language in § 103(j) "the death of an individual at the mine, or an injury or entrapment of an individual at the mine which as reasonable potential to cause death" was plainly meant to describe the type of accident which would require notification to the Secretary within fifteen minutes. Said description was never intended to limit the Secretary's authority to investigate other types of accidents or to take any appropriate steps to insure safety. (*See inter alia*, S. Rep. No. 109-365 at 9 (2006) for Congress's expressed intention in this regard. "The Committee intends the 15 minute requirement to apply only to accidents [...] that involve the death of an individual at the mine, and those that involve an injury or entrapment of an individual at the mine which has a reasonable potential to cause death." *Id*.

In a recent decision, *Jim Walter Resources, Inc*. ("JWR"), Administrative Law Judge Moran addressed the issue of the Secretary's authority to issue orders under § 103(j). *Id*., 2012 WL 362189 (Jan. 2012)(ALJ). In JWR, there had been an ignition in a mine are where there had been some burning and welding. There were no deaths, injuries or entrapment. After the mine operator reported the incident, various oral and written orders under sections 103(J) and 103(k) were issued.

Inter alia, the mine operator, as here, contended that the 103(j) and 103(k) orders were unlawful in that such could "only be issued when rescue and recovery work is necessary. *Id*. ALJ Moran rejected operator's interpretation of § 103(j), finding that Congress had explicitly repeated the phrase "in the event of any accident" so to create two distinct classes of accidents: "those where there was an accident and those where the accident also necessitates rescue and recovery work." *Id*.

In JWR, ALJ Moran further noted Contestant's misunderstanding in failing to recognize that MSHA, not the mine operator, is charged with enforcement of the Mine Act. *Id*. To strictly limit the issuance of § 103(j) orders to only situations in which there is rescue and recovery would be to deny that the Secretary is the principal authority to conduct investigations. *Id*. Section 103(k) of the Act defines an accident as including "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person[.]" 30 U.S.C. § 802(k)(emphasis added). Any accident, not rescue and recovery efforts, as Contestant would argue, is what triggers these statutory provisions. 30 U.S.C. § 813(j); *Jim Walter Resources*, 2012 WL 362189. Once an accident has occurred at a mine, MSHA then has broad authority under Sections 103(j) and 103(k) to impose whatever reasonable measures it deems to be appropriate and necessary. *Id*.; *Pattison Sand Company*, 2011 WL 6880702 (Jan. 2011)(ALJ).

In fact, this particular case illustrates exactly why operators are not giving statutory authority to choose their own course of action. Although the Secretary issued Order No. 8424291 due to the roof fall, Respondent not only failed to preserve evidence at the accident site, it

continued to mine in the exact area of the roof fall for a an additional two feet in entry number 10 and removed approximately five feet of the number 10 entry for a distance of approximately eighteen feet squaring the face. *See* Citation No. 8428712. Not only did it completely disregard the 103(j) order, it disregarded the safety of the miners who continued to mine after its issuance.

B. Did the Secretary reasonably exercise her authority in issuing Order No. 8424291 in this case?

Based upon the foregoing analysis, the ALJ also finds that the Secretary reasonably exercised her authority under the Act in issuing Order No. 8424291 in this particular instance. Due to a roof fall, a miner was injured, received treatment at the mine and had to be taken offsite for further medical treatment. At the time that the 103(j) order was issued, the MSHA representative had no other tool in which to insure the preservation of the scene.[9] Upon arriving, this was modified to a 103(k) order to ensure that no other miners were injured to due the unsupported and dangerous roof conditions. As such, the undersigned finds that issuance of the Order is reasonable.

Moreover, there is some case law to suggest that the standard by which the Secretary's actions should be reviewed is "arbitrary and capricious." In *Pattison Sand Company, LLC*, ALJ McCarthy explained that "this standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test." Id. at 2011 WL 6880702. Under this standard, the agency must examine the relevant data and articulate an explanation for its action, including a rational connection between the facts found and the choices subsequently made. *Id*. (citing *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In the instant case, MSHA was contacted about a roof fall that resulted in the injury of a miner. Due to this, Inspector Fazzalare issued a 103(j) order to insure the preservation of the accident scene. Upon his arrival at the mine, the 103(j) order was then modified to a 103(k) order in order to insure the safety of the miners at the mine until such time that a complete investigation of the cause(s) of the roof fall could be investigated. I find that there is clearly a rational connection between the facts found and the choices subsequently made by the inspector and, as such, the Secretary's actions were not arbitrary and capricious.

[9] It is noted that the parties were unable to reach an agreement as to whether Mr. Borders was standing under supported or unsupported roof when struck by the falling material. Stip. No. 31. Arguably, this uncertainty would be another factor justifying preservation of the accident scene pending MSHA inspection and investigation.

C. Should Contestant's notice of contest be dismissed and Citation No. 8428712 be affirmed as stipulated?

Considering the specific stipulated-to circumstances of the accident discussed here and given the foregoing findings which support that the Secretary properly and reasonably exercised her authority in seeking to maintain the integrity of the accident scene, Contestant's contest of the Secretary's 103(j) and 103(k) orders should be dismissed. Citation No. 8428712 is affirmed pursuant to the stipulations of the parties.

ORDER

Given that the undersigned has found that the Secretary has authority of issue 103(j) and 103(k) orders in cases involving accidents and that the 103(j) order was reasonably issued in this case, it is hereby **ORDERED** that Contestant's Notice of Contest is **DISMISSED**, Order No. 8424291 is **AFFIRMED** and, therefore, Citation No. 8248712 is **AFFIRMED**, as stipulated.

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
April 19, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-280
Petitioner,	:	A.C. No. 46-08759-166002
	:	
v.	:	
	:	
NEWTOWN ENERGY, INC.,	:	
Respondent.	:	Mine: Eagle Mine

DECISION

Appearances: Paul J. Koob, Esq., and Matthew Epstein, Esq., of the U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;

Christopher D. Pence, Esq., and Wayne H. Xu, Esq., of Guthrie & Thomas, PLLC, Charleston, WV, on behalf of Respondent, Newtown Energy, Inc.

Before: Judge L. Zane Gill

Procedural History and Order Amending Pleadings

This case involves a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(d). As filed, the Petition alleged that Newtown Energy, Inc. ("Newtown"), was liable for two 104(d)(1) violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, 30 C.F.R. § 75.1722(a) and 75.1725(c), respectively, and sought a total civil penalty of $34,602.00.[1] A hearing was held on June 21, 2011, in Charleston, West Virginia, at which the parties presented evidence and argument regarding the remaining two violations. The parties filed briefs after receipt of the hearing transcript. In its post-hearing brief, Newtown argued, among other things, that the Secretary had improperly compounded charges by citing a single event as a violation under the two distinct standards listed above, giving rise to the two 104(d)(1) orders at issue.

[1] The Secretary's original Petition for Assessment of Civil Penalty charged Newtown with ten violations of the Act and proposed a total penalty of $131,821.00. The parties settled eight of those charges prior to the hearing. Only Order Nos. 6623273 and 6623274 remained to be decided in this case.

On January 25, 2012, the Court issued an Order to Show Cause requiring the parties to respond to the duplication of charges issue and suggested that the alleged violation could, and possibly should have been cited as a single event under 30 C.F.R. § 75.1722(c), which appeared to comprehend all aspects of the violating event and could resolve the argument over duplicative charges. In response to the Order to Show Cause, the Secretary agreed that the pleadings could be amended to conform to the evidence presented at trial, specifically that Order No. 6623274, which alleged a violation of 30 C.F.R. § 75.1725(c), could be vacated, leaving only Order No. 6623273, which could be amended to allege a violation of 30 C.F.R. § 75.1722(c). Newtown stated in passing that both orders should be vacated inasmuch as the Secretary should be held accountable for her erroneous choice to charge the event as she did. However, Newtown did not provide any authority or argument in support of its point. Newtown conceded that its alleged actions constituted a technical violation of 30 C.F.R. § 75.1722(c) and focused its arguments on whether the violation was significant and substantial ("S&S") or resulted from its unwarrantable failure to comply with the mandatory safety standard.

Accordingly, pursuant to FRCP 15(b)(2), 29 CFR § 2700.1(b), and *Faith Coal Co.*, 19 FMSHRC 1357, 1361–62 (Aug. 1997), the pleadings are **ORDERED** amended to conform with the facts presented at trial as follows: Order No. 6623274, which alleged a violation of 30 C.F.R. § 75.1725(c), is vacated, leaving only Order No. 6623273, which is amended to allege a single violation of 30 C.F.R. § 75.1722(c). This renders moot the issue of duplicative orders.

Decision Summary

For the reasons set forth below, I conclude that Newtown violated 30 C.F.R. § 75.1722(c) as set forth by Order No. 6623273, as amended. I find that Newtown's negligence was "high" and that a fatal accident involving one miner was highly likely to occur. I further conclude that the violation was S&S and constituted an unwarrantable failure to comply with the cited mandatory standard. Thus, I impose a civil penalty in the amount of $17,301.00.

Stipulations

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding pursuant to sections 104 and 113 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

2. Newtown is an operator of Eagle Mine, Mine ID No. 46-08759.

3. Operations at the Eagle Mine are subject to the jurisdiction of the Act 30 U.S.C. § 801 *et seq.*, as amended.

4. MSHA inspectors acted as authorized representatives of the Secretary of Labor when they issued the orders to Newtown Energy, Inc., referenced herein.

5. True copies of the orders issued to Newtown in these proceedings were served on Newtown's agents.

6. The imposition of civil penalties will have no effect on Newtown's ability to continue in business.

7. The citations and orders issued to Newtown contained in Government Exhibits S-3, S-44, and S-6 are authentic copies of the orders at issue in these proceedings.

Allegations

Order No. 6623273 (Ex. S-3), as amended, alleges that Newtown violated the mandatory standard found at 30 C.F.R. § 75.1722(c),[2] relating to "gears; 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." 30 C.F.R. § 75.1722(a). Specifically, it alleges that Newtown's agents and miners created a hazard in violation of the standard by removing a guard panel on the tail pulley assembly while the belt line was running. The standard requires that guarding structures, such as the panel in question, be "securely in place" any time the related machinery is being operated. The order alleges "high" negligence and characterizes the gravity as S&S and "highly likely" to result in a fatality for one person. It also alleges that the violation occurred as the result of an unwarrantable failure on the part of Newtown to comply with the standard.

Fact Summary

MSHA Inspector, Gary Bragg ("Bragg") wrote the orders at issue in this case as part of a quarterly E01 inspection of the Eagle mine on August 4, 2008.[3] Bragg was accompanied by Sam Gore ("Gore"), a section boss and compliance coordinator at the Eagle mine. (Tr. 34:2–16, 205:2–20)

Bragg came upon foreman Michael Taylor ("Taylor") working with other men in the area of the slope conveyor belt tail pulley take-up unit. Taylor was an experienced and seasoned mine foreman with nearly thirty years of foreman experience. (Tr. 175:15–21) Taylor and a "red hat" (trainee) miner were in the process of replacing a deteriorated 4-by-8 foot section of guard panel attached to the take-up unit. (Tr. 44:6–16, 181:19–182:12) The conveyor belt was

[2] 30 C.F.R. § 75.1722(c): "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

[3] The inspection was a bit out of the ordinary inasmuch as Newtown was in a "potential" pattern-of-violation ("POV") status at the time. (Tr. 29:9–30:22, 120:10–122:11) During the 90-day period that Newtown was in "potential" POV status, it reduced the number of S&S enforcement actions, and the POV notice was terminated. (Tr. 122:12–16.)

running at a speed of 300–400 feet per minute at the time. (Tr. 55:1–11) Bragg concluded that this situation was unreasonably dangerous. He verbally declared an imminent danger, which required that the conveyor belt be immediately shut down. (Tr. 35:18–36:12, 44:17–22, 197:10–16) The replacement guard panel was then safely installed, and Bragg lifted the imminent danger order in less than fifteen minutes, allowing the conveyor belt to resume operation. (Exhibit S-3) Bragg issued Orders 6623273 and 6623274 in due course. (Tr. 46:13–18) The amended Order No. 6623273 relates to these facts.

Findings of Fact and Analysis

There is no dispute that: (1) the guard panel was—for at least a short time—not firmly attached in place[4] (Tr. 185:9–187:9, 266:22–267:3); (2) repairs on the guard panel were attempted while the belt line was in operation (Tr. 198:7–200:1); and (3) this constituted a violation of 30 C.F.R. § 75.1722(c).[5] What remains disputed is: (1) whether Bragg's assessment of negligence, gravity, S&S, and unwarrantable failure is supported by the record; and (2) what penalty, if any, is appropriate.

Bragg based his decision on the following factors:

1. The likelihood of an injury-producing incident was increased because of the environment where the work was being done. The tail pulley assembly was located in a damp, cramped, and steep area. The conveyor belt and the tail pulley elements remained in operation only a short distance away from where the men were working on the guard panel. (Tr: 37:9–39:15)

2. The tail pulley assembly, in addition to being close at hand, is massive, and comprises several parts that are large, heavy, and moving fast enough to instantly maim or kill a miner. (Tr. 51:4–14, 138:4–139:1, 180:10–13)

3. Taylor was doing the work with an inexperienced "red hat" assistant who presumably would not have the depth of mining experience necessary to exercise appropriate independent caution. (Tr. 180:19–181:18) In contrast, Taylor was an experienced supervisor, and at least from Bragg's perspective, should have known better than to attempt the guard panel repair under these conditions. (Tr. 60:14–62:18)

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[4] There is also no dispute that before Bragg arrived, Taylor and his helpers had replaced other guard panels on the take-up unit on the same shift and under similar circumstances. (Tr. 180:19–181:18, 235:8–18)

[5] "While Newtown believes that the Secretary should be held accountable for the section of law she cited and ultimately tried [. . .], it agrees that 30 C.F.R. § 75.1722(c) is applicable and agrees that there was a technical violation of this section." (Newtown's Resp. to Order to Show Cause 2)

Newtown argues that the order is unsupported for the following reasons:[6]

1. The men were never exposed to an unguarded conveyor belt. At all times, they were either standing to the side of the opening where the guard panel fit and/or were adequately shielded from the belt by the guard panel itself, although it was not attached in place. (Tr. 182:12–185:7, 213:15–214:17, 257:5–258:4.) If there was a moment when the guard panel was not in place, it was so brief as to be *de minimus*. (Tr. 198:7–199:1, 266:22–267:3)

2. In the alternative, the portion of the belt exposed when the guard panel was removed was no different than any other unguarded portion of the belt. (Tr. 124:18–125:11) There is no prohibition against working in close, unprotected proximity to the belt, except at specifically designated locations, such as the tail pulley assembly.[7] (Tr. 210:10–212:7) Although the men were working on a guard panel which might be considered part of the tail pulley assembly, the tail pulley was not exposed when the guard panel was removed. (Tr. 237:19–240:5, 255:11–256:17; Ex. S-3) The belt behind the panel was no different than any other unguarded portion of the belt. (Tr. 209:22–210:7)[8]

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[6] Prior to the Court's Order to Show Cause regarding the issue of duplicative orders, Newtown argued that the portion of the tail piece assembly exposed when the guard panel was removed was not covered by either 30 C.F.R. § 75.1722(a) or § 75.1725(c) because it: (1) was not a piece of machinery that could be powered off, thus obviating any liability under §75.1725(c); and (2) guarded a section of the belt line that was no different than any other portion of the belt line that would not require any guarding mechanism, and thus was not covered by §75.1722(a) . In addition, Newtown argued that, even though it had installed guarding panels in the area observed by Inspector Taylor, it was not required to do so by regulation. Therefore, Newtown should not be held accountable for violating a regulation that it would not otherwise be subject to but for its voluntary and unrequired prior decision to install superfluous guard panels. However, with Newtown's concession that it violated 30 C.F.R. § 75.1722(c), its creative but convoluted arguments are moot as to the issue of liability. What remains is whether these factors have any bearing on my determination of the degree of negligence, the severity of the violation, whether the violation is properly characterized as S&S or an unwarrantable failure, or what civil penalty amount should be assessed.

[7] Taylor conceded on cross examination that guarding is required at the location where he and his men were working because it is part of the tail pulley assembly. (Tr. 266:8–21)

[8] Taylor conceded on cross examination that regulations do not allow a person to walk by a section of a belt line that is supposed to be guarded, but is not. Doing so is properly considered a hazard. (Tr. 262:14–264:1)

Order No. 6623273

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.*, 4 FMSHRC at 1463–64. *See also Nacco Mining Co.*, 3 FMSHRC at 848, 850–51 (Apr. 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company*, 5 FMSHRC 13, (Jan. 1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required […] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id*. High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Order No. 6623273 (Ex. S-3) alleges "high" negligence. Table X of 30 C.F.R. § 100.3 links an allegation of high negligence with the absence of mitigating circumstances. From the evidence summarized above, I conclude that Newtown's actions taken through its agent, Foreman Taylor, exhibit a high degree of negligence, as alleged. More important than the absence of mitigating circumstance in this situation is the fact that there is no ambiguity whatsoever that doing maintenance on a guard panel such as this requires that the belt line be powered off. This is a matter of self-preservation and common sense. Furthermore, it is made completely clear by being the subject of two of the standards relevant to this decision, 30 C.F.R. § 75.1725(c) and 30 C.F.R. § 75.1722(c)—if something more than common sense is required.

With this as backdrop, it becomes clear that a foreman should know better than to risk life and limb by cutting corners like Taylor did here. That, in itself could be seen as a sufficiently aggravating circumstance to support findings of high negligence and S&S, but Taylor's actions are clearly an aggravating circumstance when we consider that he did what he did in the presence and with the assistance of a trainee miner. I find and conclude that Taylor's actions constituted high negligence even without considering the involvement of the red hat miner, which will be dealt with separately in the context of S&S analysis below.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294–95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). *See Quinland Coals Inc.*, 9 FMSHRC 1614, 1622 n.1 (Sept. 1987).

Order No. 6623273 (Ex. S-3) alleges a high likelihood of a fatal injury to at least one miner as a result of this violation. I concur. The evidence establishes firmly that this two-person operation of replacing a 4-by-8 foot guard panel was done while the belt line was in operation only inches away from Taylor and the trainee miner. This is compounded by the fact that the immediate work environment was, at best, a complicating factor. The area was cramped, damp, and slightly angled, increasing the likelihood that the inherently awkward operation of staging the replacement panel, setting the old panel partially out of the way, and then maneuvering the new panel around, past, and behind the old panel would go dangerously awry. This will be discussed again below in relation to the S&S evaluation.

As stated above, the gravity analysis should deal more directly with the potential severity of the injury made more likely by the violating actions. Although Newtown argued that the section of the belt mechanism guarded by the panel in question here was mechanically

indistinguishable from any other portion of the belt line that would not require special guarding, I am not convinced. The simple fact that Newtown chose to guard this portion of the belt assembly is potent evidence that it recognized the potential hazard and the need to guard against it when it installed the guarding in the first place. Newtown acted in recognition of its own perception of increased hazard when it installed the guarding where it did. Newtown, Inspector Bragg, and I are all in agreement that guarding at this location was a proper response to the increased hazard created by its association with and proximity to the massive tail pulley components. The facts summarized above show that a potentially maiming or fatal injury was likely. I am convinced and conclude that Inspector Bragg's findings of a high likelihood of fatal injury to at least one miner are justified.

Significant and Substantial and Unwarrantable Failure

It is clear in the Mine Act that because negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and "more," when talking about S&S and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders. In order to invoke the enhanced enforcement provisions in Section 104(d), she must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards**.** If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements[9] when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("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.

Id. at 3–4.

[9] The Secretary must also prove the existence of the underlying violation of a health or safety standard. Newtown concedes the violation, as mentioned above.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

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." [. . .] 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."
Id. at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999)

The underlying violation of a safety standard is conceded by Newtown. It is a discrete safety hazard to perform maintenance work on any guarding element identified by 30 C.F.R. § 75.1722(a) without first shutting down the mechanism to which the guarding is attached. The likelihood that an injury caused by the violation would be of a reasonably serious nature is discussed above. Here I focus on the likelihood that the hazard arising from performing maintenance work on a guard panel while the associated belt line is still operating will result in an injury. I will discuss Newtown's argument that any exposure to the running belt line was *de minimus* because the men stood to the side of the opening made by removing the guard panel and were thus shielded from contact with the belt line by other guard elements and were only exposed to the unguarded belt line for an inconsequential instant, if at all.

I credit Inspector Bragg's testimony that the situation he encountered was so hazardous in his view that he issued an immediate verbal "imminent danger" shut-down order. This is not a trivial act. I have no reason to discount Inspector Bragg's actions as reflected in the documentation of what he did on the scene or as presented in the testimony at trial. It appears that the inspector ordered the belt line shut down immediately due to the confluence of two factors: (1) the degree of certainty that an incident would occur and (2) the potential of devastating injury. The former is consistent with the third *Mathies* S&S element and is central to this portion of the analysis; the later corresponds roughly to the gravity assessment common to all citations and the fourth *Mathies* S&S factor in more egregious cases, which were discussed above.

Although the Commission has determined that there is no *ipso facto,* one-for-one correspondence between an uncontested imminent danger order and a related finding of S&S, *Wyoming Fuel Co.*,16 FMSHRC 1618, 1626 (Aug. 1994), it is clear that an inspector's decision at the scene of a violation to issue an immediate order to cease operations can be relevant to the ultimate issue of S&S. The issue of imminent danger is not before me for adjudication, but Commission case law helps clarify the parameters of the S&S determination and is useful in assessing the qualitative and quantitative elements of the hazard encountered in this violation. In

Western Slope Carbon, Inc., 5 FMSHRC 795 (Dec. 1980) (ALJ), Administrative Law Judge Carlson discussed the utility of assessing evidence of imminent danger in the context of an S&S allegation. He pointed out that in order to conclude that an imminent danger existed, the trier of fact must first find that the situation at hand can be reasonably expected to cause death or serious physical harm before the violating condition can be abated. *Id.* at 798–99 (*quoting* 30 U.S.C. § 802(j); *Old Ben Coal Corp. v. IBMOA*, 523 F.2d 25, 32 (7th Cir. 1975)). Obviously, as was pointed out by the Judge, concepts of "'imminent danger' and 'significant and substantial' [. . .] share a common element: the degree of possibility that a hazard will result in a death or serious injury." *Western Slope Carbon*, 5 FMSHRC at at 801. However, the two concepts are not identical. Clearly, imminent danger requires an additional finding of a potential of *immediate* serious harm if abatement is not done promptly. Nonetheless, the overlap between the two concepts supports my conclusion that this violation was S&S. Not only is there evidence of the basic elements of gravity, negligence, and likelihood needed to prove the underlying violation of the standard, but there is additional evidence to be taken from the Inspector's imminent danger order to support the enhanced allegation that the violation was significant and substantial.

A violation is more likely to be deemed *de minimus* if its gravity and/or likelihood is comparatively less. The inverse is also obviously true. The greater the gravity and/or likelihood of a potential incident, the greater the weight in favor of an S&S finding. Considering the interplay of factors and the weight of the evidence of those factors, I conclude that this violation was significant and substantial. I find it of considerable probative weight that Inspector Bragg reacted to the scene he encountered by issuing an immediate stop-work order. I find his reaction reasonable in light of the facts recited above. Conversely, I reject Newtown's argument that the admitted violation was *de minimus*. In doing so, I have fully considered Newtown's proffered evidence that Foreman Taylor and his red hat assistant(s) were largely shielded for most of the time they worked on replacing the guard panel. However, considering the grave consequences, the high probability of injury as a result of even a slight error, and the high probability of severe injury, I am convinced that this violation was far more than *de minimus* – it was S&S.

Inasmuch as S&S is an enhanced enforcement action and requires evidence of culpability above and beyond that required to prove mere negligence, it is important to consider the fact that Taylor required a "red hat" trainee miner to assist him as he violated the standard and exposed both of them to this serious hazard. Taylor exercised poor judgement which was compounded in its effect by the fact that he was acting as a foreman. His poor judgment and risk-taking placed his inexperienced assistant in the untenable position of being exposed to the worst kind of risk and example – the kind you can't protest or ignore without appearing to be insubordinate. This is the type of above-and-beyond evidence that makes an S&S finding imperative.

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act and, taken together with "significant and substantial," creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure has been paraphrased 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. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In *Gatliff Coal Co.*, 14 FMSHRC 1982 (Dec. 1993), the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. Consistent with the discussion of enhanced enforcement above, the Commission stated that 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 [. . .] [all] civil penalt[ies]." *Id.* at 1988 (quoting *E. Assoc'd Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991)). Further, "'[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." *Gatliff Coal*, 14 FMSHRC at 1989 (quoting *E. Assoc'd Coal*, 13 FMSHRC at186).

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that 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); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also considered an 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). *See also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as something more than ordinary negligence and that they are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is, and always has been, whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.,* 31 FMSHRC 1346, 1350–51 (Dec 2009).

A Judge must identify and discuss the factors considered in his unwarrantable failure analysis and should further discuss how and why the traditional list of factors discussed above either do or do not bear on the analysis. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"). The Commission has made clear that it is necessary for a Judge to

consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129–36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an Administrative Law 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, all of the factors must be taken into consideration and at least noted.

Was this aggravated conduct constituting more than ordinary negligence? The traditional factors used to determine unwarrantable failure do not lend themselves well to the facts of this case. For instance, most of them include a temporal element. The extent of a violative condition can be seen as an expression of how long a condition has existed as well as how widespread it is. The former formulation duplicates or supplements the inquiry into how long a violative condition has existed, which is often formulated as a separate factor. Whether an operator has been actually or constructively placed on notice that a violating condition or practice exists or that it should be more diligent in its compliance is also largely an expression of how long the violation has existed. Finally, the operator's effort to abate a violating condition is most meaningful in light of how long the condition has existed. Unfortunately, these time-based factors are of little analytical assistance in a situation such as this where the order arises from an act carried out in the direct presence of the MSHA inspector.

Another complication arises from the overlap between the high-degree-of-danger element of the traditional unwarrantable failure test and the negligence and gravity elements of the basic, underlying violation. They can both be proved by facts showing the relative seriousness and likelihood of an injury causing event. The distinguishing element is the weight given in the analysis.

If I were to consider only, or primarily, the traditional elements of the unwarrantable failure test set out in *IO Coal Company*, for instance, I might be steered toward the conclusion that because this was an isolated, *ad hoc* event, noteworthy primarily because of the potential severity of consequences from a highly likely event, factors that have been given decisive weight in my analysis of negligence, gravity, and S&S, it should not be considered an unwarrantable failure to comply with the relevant safety standard. This would result in a distorted treatment of this important element of the violation, and points out the need to focus more on the elemental definition of "unwarrantable failure" than on the traditional factors discussed above.

However, the Commission has provided guidance for a case which does not lend itself to a traditional factor-dependent analysis. *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997), involved a foreman's actions in an isolated ad hoc event involving a high degree of danger which resulted in the death of a miner. The miner's death occurred because a foreman was derelict in his supervision of the installation of an extension to a crane boom. Because the miner performed this operation incorrectly due, at least in part, to the foreman's negligence, a section of the boom collapsed on the miner, killing him. In rejecting the Judge's conclusion that the violation did not stem from the operator's unwarrantable failure to comply with the cited safety standard, the

Commission stated: "[t]he [J]udge's reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by [the foreman's] negligent conduct, that misconduct is readily distinguishable from other types of violations [. . .] where the degree of danger and the operator's responsibility for learning of and addressing the hazard may increase gradually over time." *Id.* at 36. Here, the Commission's analysis demonstrates that what is important in making an unwarrantable failure determination is ultimately whether there is evidence of aggravated conduct constituting more than ordinary negligence, irrespective of how closely the traditional factor-based test tracks the facts of the case. In fact, a single factor, even one that is not typically encountered, may lead to the conclusion that a violation resulted from the operator's unwarrantable failure.

The following factors convince me that the actions in question here constitute aggravated conduct by intention, indifference, or recklessness: (1) Foreman Taylor's purposeful decision to ignore the very specific mandate in 30 C.F.R. § 75.1722(c);[10] (2) his dereliction of duty as a foreman to model safe practices and to teach by example the importance and prudence of complying with safety standards;[11] and (3) the obvious and grave hazard created by attempting guard panel repairs while the belt line is in operation. The first is an example of behavior that illustrates Taylor's personal willingness to sacrifice safety to expediency. The second shows his indifference or recklessness towards his responsibility to look out for the safety of his crew. The third speaks to his notably poor judgement. All of these factors are consistent with the Commissions decision in *Midwest Material Company, supra,* and the following cases.

Capitol Cement Corp., 21 FMSHRC 883 (Aug. 1999), is also particularly instructive. There, a shift supervisor's failure to de-energize the rail of a crane and to wear a safety belt were deemed aggravated conduct. The Commission observed that both violations were obvious and dangerous. Further, the supervisor knew the consequence of his failure to de-energize and that not wearing a safety belt was dangerous. The Commission noted that "a high standard of care was required of [the] shift supervisor." *Id.* at 892. It then added, "'Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory 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 892–93 (quoting *Wilmot Mining*, 9 FMSHRC at 688). The

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[10] *Supra* notes 7–8.

[11] A key aspect of that case was the fact that the violation occurred "in the presence of a foreman, who under Commission precedent, is held [to] a high standard of care." *Id.* at 35. 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 (Dec. 1987); *Wilmont Mining Co.,* 9 FMSHRC 684, 688 (Apr. 1987); *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995)).

Commission also noted 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.* at 893.[12]

In this case, Foreman Taylor made a conscious and considered decision to undertake repairs on a guard panel attached to the tail pulley take-up unit while the associated belt line was in operation. There was no urgency that could be argued as mitigation. This was routine maintenance that could have been done at another time when the belt line was powered off or when fully qualified, non-red hat miners could have done the work.[13] Given the obvious danger associated with his actions, Taylor was or should have been aware of the potential danger involved and the enhanced likelihood of injury-causing accident attributable to the immediate environment where the work was done, including the cramped work space, the dangerous proximity of the moving belt line, the degree of grade in the area, and the size and momentum of the take-up pulley mechanism and its constituent parts. Finally, this was done with the aid of a trainee miner who would not have the experience or perspective to challenge the dangerous situation without risking censure. This should not have been done so deliberately by anyone, let alone a seasoned foreman.

Another factor not directly addressed by case law authority but nonetheless consistent with the purposes of section 104(d) is how easy it would be for Taylor to comply and avoid the violation altogether. Another way of looking at this is to consider what alternative options were available, but not used. If other options were arguably no more likely to promote safety or were not legally or practically feasible, it might be possible to find mitigating circumstances that would weigh against a finding of unwarrantable failure. But, in this case, safe options were obvious, and nothing in the facts presented at the hearing or in the pleadings indicates why safe options were not chosen. The events here were not the result of an inadvertent oversight or mitigating exigency. This was the result of planning, preparation, and deliberate and considered execution. Inspector Bragg's verbal imminent danger stop-work order is of note here. In response, the belt was shut down, the repairs were completed safely, and the belt was started back up in approximately fifteen minutes. Nothing in the record suggests, nor did Newtown argue, that not shutting down the belt line was in any way significantly necessary, justified, or that it would be difficult to do. There is nothing in the record that shows that it would be anything but routine to either shut the belt line down long enough to do this work, or, in the alternative, put the work off until a time when the belt line was down for other reasons. Moreover, the fact that Taylor and his trainee assistant endeavored to sequence and stage the work so that they would be partially

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[12] This discussion of a foreman's heightened duty of care *vis-a-vis* a subordinate miner is borrowed liberally from Judge Moran's excellent summary in *Stillhouse Mining*, 33 FMSHRC 864, 865–866 (April 2011).

[13] This is not to suggest that performing maintenance on this type of equipment outside the parameters allowed by 30 C.F.R. § 75.1722(a) when the belt line is in operation is appropriate at any time.

shielded from the moving belt line by the detached guard panels is evidence of a clear recognition of the presence of an immediate hazard—one that would have ceased to exist altogether if they had only shut off the belt line long enough to safely do the work, and incidentally, fully comply with the safety standard.

I recognize that the same acts could been seen as evidence of mitigation, but mitigation is much more convincing in the presence of exigency than as an excuse for a deliberate act. I see this much more as part of the process of violating the standard than as a reason to ameliorate the consequence of such a deliberate course of action.

Having considered traditional unwarrantable failure factors and determined that they are of little utility in determining whether these facts make out "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care," and having considered the factors of deliberate conduct, heightened supervisor duty-of-care, easy availability of safe alternatives, and lack of appropriately mitigating circumstances, I conclude that this violation is an example of an unwarrantable failure to comply with a safety standard.

Penalty

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables and considering the Secretary's justification, I conclude that the $17,301.00 civil penalty proposed by the Secretary is appropriate for this violation.

Order

It is **ORDERED** that the pleadings in this case be amended to conform with the facts presented at trial as follows: Order No. 6623274, which alleged a violation of 30 C.F.R. § 75.1725(c), is vacated, leaving only Order No. 6623273, which is amended to allege a single violation of 30 C.F.R. § 75.1722(c).

It is further **ORDERED** that Newtown pay a penalty of $17,301.00 within 30 days of this order. Upon receipt of payment, this case will be **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

April 20, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2009-167
Petitioner,	:	A.C. No. 15-02709-165287
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC,	:	Mine: Highland 9 Mine
Respondent.	:	

DECISION

Appearances: Angele M. Gregory, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Petitioner;
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY; on behalf of the Respondent.

Before: Judge Rae

This case comes before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to section 105 (d) of the Federal Mine Safety and Health Act of 1977, 30 U. S. C.§75.801 et seq., the "Act," charging Highland Mining Company, LLC, (Highland) with nine violations of the mandatory standards and proposing civil penalties of $22,710. The general issue before me is whether Highland violated the cited standards and, if so, what the appropriate civil penalty is to be assessed in accordance with section 110 (i) of the Act.

A hearing was held in Evansville Indiana on Tuesday, November 1, 2011 at which time the parties presented evidence. Due to the unavailability of one witness on behalf of the Secretary, a second hearing was held on December 6, 2011 by telephone conference call by the agreement of the parties, at which time the proceedings were concluded. [1] Subsequent to the hearing the parties submitted post-trial memorandum which have also considered in making this decision.

[1] The transcript from the first year hearing of November 1, 2011 will be designated as “Tr. (page number).” The transcript from the telephonic hearing shall be designated as “Tr. II. (page number).”

I. STATEMENT OF THE CASE

At the hearing, the Secretary advised the court that citations number 8489183, 8492065, and 8492067 were settled. The Secretary also advised that citations number 8489186, 84819139, 8489198, 8489200, and 6697594 will be vacated. The Secretary was instructed to provide a written motion with regard to those citations.

The parties entered into the following stipulations:
That Highland is subject to the Federal Mine Safety and Health Act of 1977, as amended;

1. That at all relevant times, Highland in the mine, Highland 9 Mine, (Mine ID 15-02709), mined and produced coal, which entered commerce, or had operations or products which affected commerce, within the meaning of the Act;
2. That Highland is subject to the jurisdiction of the Federal Mine Safety and Healthy Review Commission, and the administrative law judge has the authority to hear this case and issue a decision;
3. That Highland was an "operator," as defined by the Act, at the Highland 9 Mine, when the citations and orders at issue in this proceeding were issued;
4. That Highland 9 Mine produced 3,946,351 tons of coal and had 886,372 hours worked in 2007;
5. That Highland is a large operator;
6. That imposition of a reasonable penalty will not affect the ability of Highland to remain in business; and,
7. That each of the citations and orders at issue in these proceedings was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Highland.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Significant and Substantial (S&S)

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co*., 6 FMSHRC 3-4 (Jan. 1984); accord *Buck*

Creek Coal Co., Inc. 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor,* 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc*., 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co*., 18 FMSHRC 1541, 1550 (Sept. 1996).

1. *Citation No. 8489430 in violation of 30 C.F.R. §75.1502*

This citation was issued on August 21, 2008 by Jimmy "Dev" Owens. The condition or practice cited reads:

The operator failed to follow their approved Mine Emergency Evacuation and Firefighting Plan. The lifeline located on the Main North at crosscut 19 to 21 was not easily detachable.
Ex. S-1.

The violation was assessed as reasonably likely to cause an injury resulting in lost workdays or restricted duty, significant and substantial, affecting three persons and the result of moderate negligence. The proposed penalty is $1304.

The mandatory standard relating to escapeways requires that a continuous, durable directional lifeline or equivalent device shall be located in such a manner for miners to use effectively to escape. 30 C.F.R. 75.380 (7)(iv).[2]

Dev Owens is an Mine Safety and Health Administration ("MSHA") inspector who had not yet graduated from the Mine Academy at the time he issued this citation. He was accompanied by his supervisor during this inspection in August 2009. Prior to becoming an MSHA inspector, he spent six years as a miner performing general labor, roof bolting, scoop

[2] The Secretary moved to amend the citation which cited a violation of 30 C.F.R. §1502, the operator's Emergency Response Plan, to this mandatory standard. The Respondent conceded that the amendment did not alter their ability to defend against the allegations although raised very near to the trial date. I granted the motion to amend.

operating and curtain hanging duties. He earned his BA degree in Occupational Safety and Health. Tr. 36-38.

He cited Highland because the lifeline was suspended from the roof of the mine attached with twist-tie like wires and could not be pulled down for use. In his opinion, because the lifeline could not be detached from the roof, it was not easily accessible as required. In the event of a fire, miners would become disoriented and unable to access the line. Tr. 47-48. He estimated the height of the roof to be six to seven feet high but did not measure it. Tr. 43. The lifeline was continuous; it did have directional cones, appropriate reflectors and was durable in construction. Highland conducted drills on its use as required. Tr. 80-81. Owens admitted that the standard does not contain the requirement that the line be "detachable" as he cited and he could not recall if other mines used detachable line or not. Tr. 84-85. Owens stated that there were miners at Highland who would not be able to reach the lifeline due to height. He could not specifically state what height someone would have to be to be unable to reach a six foot line nor could he say he saw any miners at the mine who were of such short stature as to be unable to reach it. Tr. 80-81. Owens did confirm that there was no tripping hazard or obstacles on the mine floor where this 120' to-140' length of lifeline was situated. Tr. 81. He also did not have an opinion as to whether it would be more dangerous for the lifeline to be removed from the roof during an escape but did agree that such a scenario would result in the lifeline lying on the floor after the first miners used it making it more difficult for any miners following behind to find it. Tr. 82-83.

Highland presented evidence through Tommy Watkins who testified that the lifeline was suspended from the water lines that ran along the mine roof. It was suspended by chain links and was between five feet and five and one half feet above the mine floor. Tr. 151-52. Watkins worked as an engineer for 22 years in the mining industry. He then became the safety manager at Big Run and then at Highland for over two years during the time of this inspection. Tr. 149-50. He testified that Highland ran secondary escapeway drills once every six weeks by state mandate and again twice per year under MSHA law. Every miner was instructed how to find the lifelines in their current position. Tr. 153-55. He was not aware of any miners who were unable to reach the lifeline. In his opinion, the standard does not require the lifeline to be detachable as cited. Tr. 155.

The Commission discussed the legislative history of the requirement for lifelines in its *Cumberland* decision; *Cumberland Coal Resources,LP,* 33 FMSHRC __, slip. Op., at 15 (Oct. 5, 2011). The issue of that case was specifically whether the ALJ improperly found a violation to be non-S&S because there was insufficient evidence presented that an emergency situation was reasonably likely to occur as required by *Mathies*. The lifeline was suspended from the mine roof at a height of 7'8" which the ALJ found could not be easily reached and would necessitate being detached from the J hooks making escape more time consuming and treacherous. The Commission found that the ALJ erred because the standard requires a finding of whether there was a reasonable likelihood of escape in the event of an emergency, not that an emergency is reasonably likely to occur. *Cumberland* at 2. In reaching its conclusions, the Commission discussed the history of *The Emergency Temporary Standard* of March 9, 2006 issued by MSHA which underscored the dangers of mine accidents and the necessity for lifelines. It noted that lifelines need to be in a proper position and at *appropriate heights*.(Emphasis added.)

Emergency Mine Evacuation, 71 Fed. Reg. 12252, 12253 (2006). *The Miner Act* encompassed the requirements of the temporary emergency standard and set forth the requirement that the lifeline be easily accessible which depends upon the circumstances of the mine conditions. *See The Mine Improvement and New Emergency Response Act of 2006*, Pub.L. No.109-236, 120 Stat. 493 (2006).

I find that Highland is correct in their position that the mandatory standard does not require the lifeline be detachable. In fact, if the lifeline were detached, it would create a far more dangerous situation for any miners following any distance behind the first group to escape. The line would be on the mine floor creating a tripping hazard and necessitating the miners to feel long the floor to locate it. Such lines are, by necessity, stationary so that the miners, through training drills, know exactly where to find it in the event of diminished visibility or confused mental state. The relevant question is whether it was at an appropriate height and could be used effectively to escape in the event of an emergency. I accept the testimony of Watkins that the lifeline was positioned at a height of five feet to five feet six inches from the mine floor. The inspector did not measure the height and could not recall the details of the condition while Watkins was the safety manager at the time and was knowledgeable concerning its placement and conducted the evacuation drills. The Secretary presented no evidence that a miner would be unable to reach a lifeline positioned at a maximum height of five feet six inches above the mine floor. I find it unlikely that one would be unable to do so. There being no evidence of any other obstacles or hazards present to make the placement of the lifeline inappropriate under the present mine conditions, I find that the Secretary has not met her burden of proving this violation. The citation is VACATED.

2. *Citation No. 8489432 in violation of 30 C.F.R. §75.220(a)(1)*

This citation was issued on August 21, 2008 by Dev Owens. The condition or practice section states:

> The approved rood control plan was not being complied with on the #065-0 MMU in the 6th Sub-panel North off the 4th Panel North off the Main East. The #8 entry was bolted 9.5 ft. from the face. The approved roof control plan states that all faces will be bolted within 5 ft. of the face.

Ex. S-4.

The mandatory standard requires:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

30 C.F.R. §75.220(a)(1).

Owens referred to a diagram on page 13 of the Roof Control Plan in effect at the time of this inspection. Tr. 55, Ex. S-5. His reading of the diagram led him to conclude that bolts were required to be installed within five feet of the working face. Tr. 63. In the area cited, the last row of bolts was approximately nine to nine and one half feet from the face. There was an orange flag on this last row of bolts as a warning that beyond that point was unsupported top. Tr. 60-61. The area had been recently mined and was an active area of the mine. The condition had existed for about eight hours. Tr. 61.

On cross-examination, Owens was asked whether the diagram he referred to actually indicated that the roof control plan called for bolting every five feet from rib to rib and four feet in advance row to row. He acknowledged that the bolts were on five foot centers rib to rib and four feet as they advanced. Tr. 93-94. Additionally, he confirmed that resin bolts were being used which allowed the mine to install roof bolts "as soon as possible not to exceed 72 hours." The area had been mined within eight hours of the issuance of the citation. Tr. 94-95, Ex. S-5 pg 4. The only section of the plan that clearly indicated that bolts must be installed within five feet of the face is on page 8 of the plan applicable to "deadend places." Tr. 96.

James Hackney testified on behalf of Highland to clarify the requirements of the roof control plan of 2008. Hackney had been the roof control specialist for MSHA at the time this plan was approved. His name appears on the cover letter of the plan approval as the point of contact for questions and again on the revised plan letter as the person who was actively involved with Highland in developing the plan in early 2008. Ex. S-5. As the roof control specialist, Hackney reviewed the Highland plan every six months and investigated all roof falls within his jurisdiction. Tr. 130-31. He testified that the plan in question did not require bolting within five feet of the face. The diagram relied upon by Owens was a skid showing the spacing of the pins; not a diagram of how close to the face the bolts were to be installed. Tr. 135-36. They are required to be five feet from left to right as opposed to inby and outby. Tr. 135. New cuts have to be bolted within 72 hours. Tr. 133-34. The only area in which bolts were to be installed within five feet of the face was in "deadend," or abandoned, places as indicated on page 8 of the plan. Tr. 131-32. Hackney was aware of other inspectors who intended to cite Highland for this same condition and had told them that it was not a violation of the plan or the law. Tr. 136. In his opinion, although Highland did flag the last row of bolts to protect against a hazard, it was poor mining practice to leave the face unbolted for a prolonged period of time. Tr. 142-44.

Based upon Hackney's direct involvement with the development of Highland's roof control plan as the district roof control specialist and his exhibited detailed knowledge of the bolting requirements in effect at the time, I credit his testimony and find it controlling on this issue. The citation is therefore VACATED.

3. *Citation No. 8489434 in violation of 30 C.F.R. §75.370(a)(1).*

This citation was also issued by Inspector Owens on August 21, 2008. The narrative states:

> The approved ventilation, methane, dust control plan was not being complied with on the #064-0 MMU in the 6th Sub-panel North off the 4th Panel North off the Main East.
>
> When the air was measured with a calibrated anemometer behind the return roof bolter in the #1 entry 1350 CFM was present behind the line curtain. The approved plan requires a minimum of 3000 CFM.

Ex. S-6.

The inspector marked the alleged violation as reasonably likely to result in an injury causing lost workdays or restricted duty affecting two persons. It is marked as S&S and the result of moderate negligence. The proposed penalty is $2106.

The mandatory standard provides in relevant part that the operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

Highland contests this violation based upon the method used by Owens to take the air reading and the S&S designation.

Owens testified according to Highland's ventilation dust control plan, a line brattice shall be maintained with 3000 cfm of air delivered to the back of the roof bolting machine in any working place where the roof bolter is operating. Tr. 65, Ex. S-7 pg. 8. Owens took an anemometer reading inside the end of the line curtain while the roof bolter was operating. Tr. 64. He obtained a reading of 1350 cfm in violation of the plan. Highland questioned whether positioning himself between the rib and the curtain would have caused Owens to get an improper reduced velocity reading. Tr. 107. Inspector Caudill, an MSHA ventilation specialist, testified that the air reading should be taken with the entire body outside the curtain to get a more accurate reading. Tr. II. 21. However, he stated that if a reading were taken with someone standing inside the curtain as Owens was, the reading would be higher not lower as suggested by the Respondent. Tr. II. 36. Caudill has been an MSHA inspector for 15 years and has 27 years of mining experience prior that. Based upon his experience and training as a ventilation specialist, I accept his opinion and find the mandatory standard was violated.

S&S

Owens explained the lower air velocity poses a safety hazard of dust, fumes and gases building to a level that could reasonably result in an ignition. Tr. 65. The methane reading was at .25 % behind the curtain which is well below the ignition point; however, methane levels can change quickly in any mine including Highland which liberates 200,000 to 500,000 cubic feet of

methane every twenty-four hours. Tr. 66-67, 124. Installing roof bolts can cause sparks serving as a source of ignition for methane gas. Tr. 72. Should an ignition occur, the two miners operating the bolting machine would likely be injured by burns and smoke inhalation. Tr. 72.

Highland challenges the S&S designation based upon the fact that the Secretary has not proven the likelihood of an injury or illness under the third criterion of *Mathies*. They assert that because persons were in the working area for a short period of time, that the bolting machines had dust pumps on them monitoring the dust levels, that all gas levels were within acceptable limits at the time of the violation and that the bolter operators had run dust levels that day and measured 3400 cfm when they started bolting, there was no likelihood of injury. Tr. 102, 105, 107, 155-56. They cite the Commission's *Peabody* decision in support of their position. *Secretary of Labor v. Peabody Coal Co*., 17 FMSHRC 26 (Jan. 1995). In *Peabody*, the ventilation plan required 5000 cfm of air over the continuous miner before it was started and during cutting operations. The miner was in operation when the inspector arrived and he requested that it be shut down before he took his air readings. The continuous miner was equipped with a scrubber that was capable of generating the requisite amount of air flow while in operation. The Respondent argued that the Secretary did not establish a reasonable likelihood of an injury or illness when the miner was not in operation. The inspector testified that a person "could" be exposed to dust and that illness "can" result from exposure and that a methane explosion "can" result and an ignition source "could" still be present. The ALJ found that the evidence did not establish that the amount of airflow present before the miner was running, with no mining occurring, would be reasonably likely to result an injury or illness. *Id* at 4. The Commission agreed with the ALJ that the Secretary presented no evidence to prove that the air quantity prior to starting the miner was inadequate because the inspector did not measure it. The Secretary also conceded that the scrubber on the miner was capable of generating an adequate quantity of air when the miner was in operation. The Commission did emphasize that the S&S determination must be based upon the facts and circumstances surrounding each violation as evidenced by the record citing *Texagulf, Inc*., 10 FMSHRC 498, 501-03 (April, 1988). *Peabody* is readily distinguishable from this set of facts. Here, the violation pertains to the amount of air being delivered to a roof bolting machine that does not have the capacity to generate air flow when in operation. The quantity of air present when Owens measured it would not increase when production continued. The evidence established that Highland liberates a significant amount of methane each day, that the level can build rapidly and that roof bolting provides an ignition source. The fact that dust and gas levels were being monitored by other equipment does not reduce the hazard created by having inadequate air flow over the miner.

The gravity of this violation is serious and I find the inspector properly designated this violation as S&S. The Secretary has proven by a preponderance of the evidence that it was reasonably likely that the reduced air flow and presence of dust and methane created a reasonable likelihood of ignition, that the condition was reasonably likely to result in an injury causing event, and that the injuries would be reasonably serious from smoke inhalation and burns. The *Mathies* criteria have been satisfied.

Negligence

Inspector Owens testified that the mine had only this one single split air with eight or nine entries. This condition should have been detected by the face boss who is on the section at all times. He is responsible for the working area making runs throughout the section and taking periodic air readings. He should have discovered this condition of inadequate air over the bolter and should have had the line curtain adjusted. Tr. 73.

I have considered the evidence presented by the Respondent that the air level was within normal limits when taken at the time the bolting work commenced and that the condition had existed for a relatively short period of time in mitigation of negligence. I therefore find the negligence is properly assessed as moderate rather than high.

4. *Citation No. 8489182 in violation of 30 C.F.R. §75.1914(a).*

This citation was issued by MSHA inspector Archie Coburn on August 11, 2008. The condition or practice cited was that "[t]he No. 37 diesel 2 man personnel carrier was not being maintained in safe condition. The right tie rod end was worn out." Ex. S-8.

The standard requires that all diesel-powered equipment be maintained in approved and safe condition or be taken out of service. 30 C.F.R. §75.1941(a). Coburn marked the citation as reasonably likely to result in an injury causing lost workdays or restricted duty affecting two persons and resulting from moderate negligence. The Secretary proposes a penalty of $1111.

Highland contends that Coburn did not properly test the tie rod end to establish that it was not in safe condition and therefore, the citation must be vacated. Alternatively, they assert that there was no negligence or likelihood of injury.

Coburn testified that he spent six years in the Army as a motor sergeant responsible for running the motor pool at Ft. Bragg and Ft. Knox. Tr. 158. Subsequently, he worked at Peabody mine running shuttle cars, roof bolting machines and then working as a mechanic at Highland. He also worked at Green River Mining as a mechanic. Tr. 159. He then went on to obtain his MSHA certification as a coal mine inspector in 1989 and has since been assigned as an accident investigator in addition to his regular inspector's duties. Tr. 160. He has inspected Highland for accidents as well as regular inspections and is very familiar with the mine. He started inspecting Highland when they opened operations in 2001 and has been there once or twice a year ever since. Tr. 160-61.

On the day in question, he tested a two-man personnel carrier,a piece of diesel outby equipment. Tr. 165. He found that the tie rod, which is the control arm that translates movement of the steering wheel to the wheels allowing them to move back and forth, was worn out. The rubber boot on the end of the rod was missing, the grease was missing allowing metal to grind on metal, and the end was moving in all directions rather than only up and down. There was an accumulation of road dust indicating the condition had been present for some time. Tr. 162-64. This personnel carrier typically traveled on the main supply road carrying miners in and out of the unit running at approximately 10 to 15 miles per hour. Tr. 165. Traveling long an uneven

surface with ruts and holes can stress the tie rod causing it to come apart which would result in a loss of steering. Tr. 167. This condition led him to issue a citation for improperly maintained diesel equipment.

Coburn testified that it took him approximately 30 to 45 seconds to test the man-trip. He was able to determine the condition of the tie rod without putting the vehicle on a lift simply by observing how long it took for the steering link to start moving the tires when the steering wheel was turned with the motor running and the car in park. Tr. 218. While someone else moved the steering wheel, he observed the movement of the linkage. He could see the tie rod end moving up, down, sideways and back and forth and that the boot was missing and there was no grease on the tie rod. Tr. 219. He did not use a gauge or any other device to measure the amount of play in the rod. Tr. 221.

Highland asserts in its contest of this citation that a tie rod must be tested by putting the vehicle on a lift while in neutral and shaking the tire. In support of this testing method, they suggested that a particular website indicated that this was the appropriate way to conduct the test. Tr. 224. Coburn responded by pointing out that anyone can put up a website making any sort of unverified claims on how to do something. He, however, has been working as a mechanic his entire career and has tested tie rods in this manner thousands of time. Tr. 170, 224-26. Highland offered no witnesses or recognized authoritative source at trial to support their theory beyond this mentioned website.

In its *Post-Trial Memorandum*, Highland cited the decision of *Lafarge North America,* 33 FMSHRC 1621,(July 2011) in which ALJ Augustine found absent a consistent and objective standard by which to measure the vehicle ball joints, the Respondent was denied fair notice and due process in the issuance of a violation. The citation was issued under 30 C.F.R. §56.14100(c) which requires proof the existence of a defect, that continued operation would be hazardous to persons and that the defective item was not removed from service. The inspector and the expert witness called by the Petitioner were at odds with respect to what the proper measure of play in the joints was which the judge determined presented a moving target rather than a basis upon which the operator would be able to measure compliance with the standard. I find that situation distinguishable from the instant one. In this case, the missing rubber boot that holds the grease, prevents the tie rod from moving in all directions and prevents it from coming apart was detectable with the naked eye. Coburn did not need to take micro-measurements of play in a ball joint to discover this defect in the steering system on this personnel carrier. It took him less than one minute to discover the situation by simply peering through the bumper of the car down to the wheels while someone moved the steering wheel. Tr. 215-16. It was an obvious condition that needed no specialized equipment to verify. As Coburn testified, the pre-operational checks are required on this piece of equipment daily with a more thorough exam being performed on a weekly basis by the mechanics. Tr. 169-70. The condition should have been discovered during one of these exams just as easily as he had discovered it. The slack in the steering would be an obvious indication that the tie rods needed further attention. Looking underneath the vehicle would have enabled someone to see the condition of the tie rod as well. Tr. 170.

The Secretary has met her burden of proving this violation of the mandatory standard by a preponderance of the evidence.

S&S

Coburn marked this violation as S&S because, in his opinion, the tie rod was reasonably likely to come apart while traveling on the rutted and uneven supply road which would result in a loss of steering. It would be reasonably likely that this vehicle, traveling at 10 to 15 mph without steering control, would collide with another piece of equipment, a rib or a miner on foot, resulting in reasonably serious injuries of bruises and broken bones. Tr. 168, 173. This is a serious violation and I defer to the inspector's many years of experience as a mechanic and find his testimony credible.

Negligence

The evidence of record establishes that the rubber boot on the end of the tie rod was missing from this vehicle. The amount of accumulated road dirt and the lack of grease indicated to Coburn that the condition had existed for approximately 48 hours. This condition should have been discovered during the daily pre-operational checks. Tr. 169-70. The level of negligence is appropriately assessed as moderate.

5. *Citation number 8489197 in violation of 30 C. F. R. §75. 1100 – 3*

This citation was issued by inspector Archie Coburn on August 18, 2008. The narrative portion of the citation reads:

> The fire suppression system installed on the company number 14 scoop used on the number two (062 – 0) MMU was not being maintained in operating condition. The actuator bottle on the left side of the scoop was not installed. When examined the actuator bottle was under a chain in the storage compartment of the scoop.

Ex. S-11.

Coburn assessed this alleged safety violation as reasonably likely to result in an injury causing lost workdays or restricted duty, significant and substantial, affecting one person and the result of moderate negligence. The Secretary has proposed a penalty of $1203.

The mandatory standard provides all firefighting equipment shall be maintained in a usable and operative condition.

Coburn testified that the actuator bottle to the fire extinguisher on the No. 14 scoop was broken off the bracket and was in the bottom the storage compartment behind the operator's seat covered with log chains and other material. Tr. 174. The actuator bottle should have been mounted in the compartment and high up enough to be reached quickly by the scoop operator or a passenger. Tr. 175. The bottle was located 18 to 20 inches away from where it was supposed to be and could not be easily and readily accessed in the event of a fire. Tr. 231.

Highland contests this violation because they alleged that the actuator bottle itself had not been discharging and was in working order, according to Inspector Coburn. TR. 229. They state in their *Post-trial Memorandum* that the Secretary has failed to prove that the bottle was unusable and inoperative. They rely on the cases of *Secretary v. Energy West Mining Company*, 14 FMSHRC 1595, 1598 – 1600 (Sept. 1992)(ALJ), and *Secretary v. LJ's Coal Corporation*, 13 FMSHRC 1277, 11283 (AUG. 1991) (ALJ) in support of their position. Their reliance on these cases, however, is misplaced. In *Energy West*, the ALJ found that the cited hoses were extra lengths not required by the regulation. Therefore the fact that the hose did not have a nozzle was not a violation of the standard. However, the ALJ stated that this was not to intimate that in the case of a required hose that nozzles are not required. In the second case, the ALJ found that the inspector had not properly tested the deluge spray system by adding heat or opening the valve at the end of the line and could not therefore determine that the plug in the line caused the hose to be unusable. *LJ's Coal Corp.* at 1283. Here, the question is whether the location of the actuator bottle being on the bottom of the compartment buried underneath log chains and other materials rendered the system unusable. The fact that the actuator bottle itself was not discharged and was in working order is not dispositive of the definition of the term "useable." Judge Feldman said it well in his opinion in *Consolidation Coal Company* when he said a fire hose that could not reach the face from the water supply line violated the standard because a hose that cannot reach the face is equivalent to having no hose at all. *Consolidation Coal Company*, 15 FMSHRC 505 (March 1993). Common sense would dictate that a fire extinguisher that cannot be easily reached and employed in the event of a fire because of its location is not "useable" and is a violation of this mandatory standard.

S & S

Inspector Coburn testified that the electrical components in the scoop including the batteries or the cables running through the center of the scoop pose a risk of fire. Tr. S77. The discrete safety hazard involved in this violation is in the event of a fire, the scoop operator would not be able to quickly extinguish it. Coburn explained that the scoop operator is responsible for several jobs that he conducts outside of the piece of equipment including rock dusting and hanging line curtains. Tr. 237. If a fire broke out while the operator was working on the left side of the scoop, he would initially go to the closest fire suppression source which would be the left-sided actuator to put out the fire. During the time in which it would take to uncover the actuator bottle from underneath the log chains and materials in the compartment or run to the other side of the scoop to retrieve the other actuator, the fire would continue to grow. It is reasonably likely the miner would suffer injuries such as burns and smoke inhalation as a result of not being able to readily use the left-sided manual actuator.

Highland raises two arguments in support of the position that this violation is not significant and substantial. First, they argue that the law does not support the presumption of an emergency situation and secondly, they rely on the fact that the mine was outfitted with an automatic fire suppression system and that a second manual actuator was on the scoop itself. Tr. 235-36.

The Secretary responds to these arguments by citing the *Cumberland* case. In *Cumberland*, the Commission recognized that evacuation standards are intended to apply only in the event of an emergency. The Secretary analogizes that case with the instant one by stating the existence and reliability of firefighting measures serve no purpose except in the event of an emergency necessitating the extinguishing of the fire. *Secretary's Proposed Findings of Fact, Brief and Argument.* "The Commission has never required the establishment of a reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are significant and substantial." *Cumberland* at 10. The *Mathies* analysis involves consideration of an emergency. I find the same rationale applicable to the firefighting regulations. A fire suppression system violation would rarely be significant and substantial if it cannot be assumed that the standard applies in the event of a fire. The danger posed by inability to suppress fires in underground mines is as grave a danger as the inability to escape in the event of a fire or similar emergency. To hold otherwise would frustrate the intent of The Mine Act.

With regard to Highland's reliance on redundant fire suppression systems, the Commission stated in *Cumberland* "finding that redundant, mandatory safety protections provided defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S & S finding could be made. Such an approach directly contravenes the safety goals of the act." *Cumberland* at 10. Likewise the Commission rejected Respondent's contention that redundant fire suppression systems reduced the likelihood of serious injury in *Amax Coal Co*., 18 FMS HRC 1355, 1359 n.8 (Aug. 1996). Coburn pointed out, additionally, that the batteries are not covered by the fire suppression system. Tr. 238.

I find that the Secretary has proven by a preponderance of the evidence that, in the event of fire, there was a reasonable likelihood of the inability to suppress a fire in a timely manner and the reasonable likely of reasonably serious injuries of burns and smoke inhalation. The *Mathies* criteria have been satisfied.

Negligence

This violation was assessed as a result of moderate negligence. The scoop was supposed to have been checked each time it was used and during the weekly permissibility inspection. Tr. 180. Coburn estimated from the amount of materials piled on top of the actuator and the presence of rock dust on top of that that this condition had existed since before the last preoperational check. Tr. 181.

I find the gravity of this violation is serious and find that the assessment of negligence as moderate as appropriate.

6. *Citation number 8489199, violation of 30 C. F. R. §75. 503.*

Inspector Coburn wrote this violation on August 18, 2008. The condition or practice portion of the violation reads as follows:

> The company No.4 continuous miner being used on the number two (062-0) MMU was not being maintained in permissible condition. An opening was present in the cable junction box cover in excess of .005 of an inch plane flange joint. This mine is on a 15 day spot for methane liberation.

Ex. S – 13.

Coburn assessed this violation as reasonably likely to result in an injury causing lost workdays or restricted duty, S & S, affecting three persons and the result of moderate negligence. The Secretary has proposed a penalty of $2901.

The mandatory standard provides:

> The operator of each mine shall maintain in permissible condition all electrical face equipment required by §75.500, 7.501, 75.504 to be permissible which is taken into or used inby the last crosscut of any such mine.

During his inspection, Coburn found this junction box had an impermissible gap measuring greater than .004 inches in violation of this mandatory standard. Highland does not contest this violation but challenges the designation as S&S.

S&S

This junction box is on the back end of the operator's side of the continuous miner. It is approximately 15 to 20 feet from the operator. Tr. 184. Coburn testified that because this mine is on a 15 day methane liberation spot inspection, it is reasonably likely that there would be a high concentration of methane present inby the box. *Id*. While the methane monitor is programmed to shut the machine off at a concentration of 2% methane, Coburn has known the methane monitors to be out of proper calibration at Highland meaning they would not function properly. Coburn has been present when the monitor has alerted at a concentration of greater than 1% in this mine. Tr. 185. Coburn also stated that when the monitor shuts off the machine electricity is not shut off; the motor is stopped but the equipment is still energized. Tr. 242. Additionally, Coburn testified that methane can ignite at less than 2% concentration when coal dust is also present. Tr. 187. The gap that he found in the junction box would allow a flame to escape and enter the mine atmosphere causing a methane explosion. Tr. 182-83. In Coburn's opinion this was reasonably likely to occur. An explosion of this nature would be reasonably likely to result in reasonably serious injuries including burns and possibly fatalities to three people - the minor operator his helper and the car operator. Tr. 187-88. He therefore designated the violation as S & S.

Upon questioning by the respondent, Coburn stated that the gap in the junction box was approximately 3 to 4 inches long. Tr. 241. He also stated that methane generally combusts at a concentration of 5 to 15%. Coburn admitted that he has never monitored methane above the 5%

concentration level at Highland mine. Tr. 244. Randy Duncan, safety manager at Highland mine, testified that Highland does not liberate methane at the face. The mine was put on a 15 day spot inspection when there was a problem with seals in the location of the old works that liberated methane. Tr. 263. He also stated that the monitor will shut the miner down and the operators have also been trained to pull the cable out when methane reaches 2% concentration. Tr. 265. For these reasons, the respondent asserts that this violation is not S & S.

I find these facts do not overcome a finding that this violation is S&S based upon the testimony from Coburn that he has been in Highland when the continuous miner monitor indicated that the methane level had exceeded 1%, he is aware of the monitors not being properly calibrated at times, and the fact that methane can increase in concentration at a very rapid rate and can ignite at less than 2% concentration. This violation was properly designated S & S.

Negligence

Coburn testified that examinations for permissibility are required on a weekly basis. This examination would include running a gauge around the box which would detect this violation. Additionally, any time an electrician is in the box, he is required to check for openings when putting the box back into service. Tr. 189. Coburn could not say how long this condition had existed because he could not determine when the last time was that someone had been inside the junction box. Tr. 190.

While I find this violation to be serious, I find the fact that Coburn could not state how long this violation had existed; it is possible that this condition arose sometime after the previous weekly permissibility inspection. I therefore find the negligence is properly assessed as low.

7. *Citation number 8489201 in violation of 30 C. F. R. §75.370 (a)(1)*

The inspector wrote this citation as a violation of the respondent's ventilation plan. The citation reads:

> The approved ventilation, methane and dust control plan in affect at this time was not being complied with on the No. 2 (062-0) MMU. The company No. 39 diesel service vehicle was observed been (sic) operated with out (sic) the required 3,500 CFM been (sic) present over the service vehicle. When in operation the service vehicle was sitting in the crosscut next to the intake brattice line and did not have enough air movement to the blades on anemometer (sic).

Ex. S – 14.

The ventilation plan does not address this issue at all. The Secretary sought to amend this citation from a violation of the operator's ventilation plan under 30 C.F.R. §75. 370(a)(1) to a violation of §75. 325(f) which provides that the minimum ventilating air quantity for a piece of

diesel-powered equipment shall be at least the amount specified on the approval plate for that piece of equipment. I denied the Secretary's motion at hearing and deny it again now for the following reasons.

The Secretary filed her petition for civil penalties on December 1, 2008. I issued my Prehearing Order on August 16, 2010 which directed the parties to engage in settlement negotiations over the next 75 days. On October 7, 2010, at the request of the Secretary, I issued an extension of 60 days during which the parties were again directed to communicate with one another in the effort to settle the docket. When settlement was not forthcoming, I issued a Notice of Hearing on May 31, 2011, following a telephone conference call with the parties. The hearing was set to commence on November 1, 2011. My Prehearing Order directed the parties to comply with all rules of pretrial discovery and to submit a prehearing report identifying all exhibits and a list of witnesses to the court and opposing counsel 20 days prior to the commencement of trial. Any objections to proposed exhibits were to be made five days prior to trial. On October 26, 2011, a second Notice of Hearing was sent to the parties to identify the location of the hearing. The same language regarding discovery was included in this notice.

On Friday, October 28, 2011 at 1:08PM, the Secretary filed her Motion to Amend the citation – almost two years after filing her petition for penalties, over one year after my order to engage in settlement negotiations and five months after my Notice of Hearing which directed submission of prehearing reports 20 days before the start of trial which would require that all discovery and identification of witnesses would be completed at that time. The Secretary stated in a conference call that I held with the parties on October 28, 2011 at 2:30 PM, that she had sent an email to counsel for the Respondent on October 26th, six days prior to trial, alerting Respondent of the forthcoming motion to amend. Counsel for the Respondent informed me during that Friday afternoon call that he had not yet had the opportunity to read the Secretary's motion which had just been sent one hour earlier and he was not prepared to respond to it. I provided counsel the opportunity to argue the motion at the commencement of the hearing.

The Secretary argued that the standard proposed in her motion was merely a change from a more general standard to a more specific one and the Respondent had been on notice all along that the violation rested upon the fact that inadequate air was present while operating a piece of diesel equipment. Because the quantity of airflow did not change, the operator will suffer no prejudice as a result of the proposed amendment. *Secretary's Memorandum of Law in Support of Motion to Amend*.

Highland, on the other hand, points out that the standard proposed in the motion, filed on Friday, is a different and distinct allegation which would completely change the basis of their defense. Their defense had been that the ventilation plan did not require the cited airflow quantity. Under the proposed amendment, it would be necessary to change their defense strategy when the time for discovery was over and with insufficient time to investigate the facts under the newly proposed standard.

I agree with the Respondent that the proposed amendment was submitted too late to afford Highland any meaningful notice and opportunity to defend against it. The Secretary had engaged in extensive negotiations of the citations involved in this docket. In fact, they resolved eight citations prior to hearing. They should have been aware of the need to amend this citation at a far earlier date. Moreover, the Secretary did not file her motion until Friday afternoon; some two weeks after the discovery period had ended, with a weekend and a Monday travel day intervening before the start of trial on Tuesday morning. This left the Respondent with little or no time to contact a representative of the manufacturer or identify any additional witnesses needed to defend against the new allegation. While I granted the Secretary's motion with respect to the lifeline violation, it admittedly did not alter the Respondent's trial strategy. I find this proposed standard does sufficiently impact upon their theory of defense as to have denied them fair notice and due process.

The cited condition or practice is not a violation of the ventilation plan. Therefore, the citation must be VACATED.

8. *Citation No. 848920 in violation of 30 C.F.R. §75.220(a)(1)*

This citation written by Inspector Coburn on August 21, 2008 cites the following condition:

> The approved roof control plan in affect (sic) at this time was not being complied with on the No. 3 (063-0) MMU. The No. 6 entry was driven 21' to 21'6" wide for a distance of 25 feet and no additional roof supports were installed.

Ex. S-15.

The violation was assessed as reasonably likely to result in an injury causing lost workdays or restricted duty to one person, S&S, and the result of moderate negligence. The proposed penalty is $1203.

The standard provides that each mine shall develop and follow a roof control plan approved by the District Manager, that is suitable to the geologic conditions and the mining system employed by the mine.

Highland concedes the violation but contests the S&S designation because the wide entry did not run the entire length of the entry and the roof conditions were satisfactory.

S&S

Coburn felt this violation was S&S because there was a reasonable likelihood of a roof fall as a result of this violation. The wide cut reduced the size of the pillar which reduced the

strength of the roof exposing miners to draw rock, slips and fallout between the roof bolts. Tr. 202. In his opinion, it was reasonably likely to occur because there were a number of slips and faults in this unit. In the event of a roof fall, it would be reasonably likely that one miner would be affected being the miner operator, FCT operator or miner helper who work in this area and travel close to the rib. The likely injuries would be bruises or broken bones. Tr. 204-05. Coburn was aware of accidents at Highland resulting from draw rock falls that resulted such injuries. Tr. 204.

Highland established that the entry was 70 to 110 feet in length while the area in violation extended for 25 feet. Tr. 247. The pins from rib to rib were required to be four feet apart. There was no unacceptable spacing between the pins in this entry. Tr. 249-50. MSHA allows a one foot variance in the width of an entry, therefore, it would have been lawful for the entry to have been cut to 21' for a distance of five or ten feet. Tr. 254.

I accept the opinion of Inspector Coburn in finding this violation was S&S. Although the roof bolts were spaced appropriately according to the roof control plan, the pillar was reduced in size due to the wide cut in a unit that had slips and faults which made the possibility of a roof fall likely had normal mining operations continued. The fact that draw rock falls had occurred in this mine supports Coburn's opinion and overrides the fact that the wide cut did not extend the entire length of the entry.

Negligence

The level of negligence was assessed as moderate based upon the fact that this violation had existed for approximately 16 hours, which Coburn established based upon the location the face. Tr. 204. The foreman and the roof bolter are charged with checking the roof at all times, both of whom should have recognized the condition and ordered additional supports be installed. Tr. 203. I find this assessment of negligence to be supported by the evidence.

9. *Citation No. 8492066 in violation of 30 C.F.R. §75.400*

This citation was issued by Felix Caudill on August 12, 2008. The alleged violation is:

> The #24 Wallace 14 man bus, serial #625 has accumulations of oil and transmission fluid in (sic) the floor of the transmission compartment, engine compartment, and on the side of the engine. The exhaust is laying in these accumulations.

Ex. S-17.

The standard provides, in relevant part, that combustible materials shall be cleaned up and not be allowed to accumulate on diesel-powered equipment in active workings.

Caudill assessed this violation as reasonably likely to cause an injury resulting in lost workdays or restricted duty affecting nine persons, S&S and the result of moderate negligence. The proposed penalty is $9634.

Caudill has been an MSHA inspector for 15 years. Previously, he worked for Peabody for 27 years rising through the ranks from a general laborer to an equipment operator and fire and face boss. On the day of the inspection, he was responding to an anonymous hotline complaint of a smoking bus that was being used exposing miners to smoke inhalation. Tr. II. 5. He went underground to check the fourteen-man bus and found accumulations of fluids in the transmission and engine compartments as well as around the exhaust which he said was lying in the fluid. Tr. II. 6. As a result, he issued this citation.

Highland does not contest the violation but challenges the S&S designation.

S&S

Caudill designated the violation as S&S because he believed that the exhaust was reasonably likely to generate sufficient heat to ignite the fluids, causing injuries from smoke inhalation, burns and asphyxiation. Tr. II. 6. He testified that although he marked the violation as a safety hazard, he could have marked it as S&S for health reasons as well for CO inhalation. He measured CO at 4 parts per million, well below the violative amount, and detected none when the bus was started up. Tr. II. 8, 32.

Caudill testified that he had no independent recollection of this inspection; he relied solely on the notes he took at the time of the inspection. Tr. II .7, 21. The hotline complaint mentioned that a bus was smoking but he could not recall, or find in his notes, if the source of the smoke was reported. He could not say if it was from the accumulations or not. Tr. II 7. He also could not be sure if the bus he cited on the 12th of August was the same bus that was the subject of the hotline complaint as he was told by a company representative that that bus had been removed from service the day before for a blown head gasket. Tr. II. 24-25. He assumed it was the same bus in calculating the amount of time the condition existed, however. Tr. II. 13. While he cited the accumulations as both oil and transmission fluid, he admitted that his notes indicate it was oil. He testified that he did not determine what the fluid was exactly. Tr. II. 26, 30. Whatever the fluid was, he did not take any measurements of it, stating the amount was immaterial. Tr. II. 26, 38. He had no idea at what temperature the fluid would ignite. Tr. II. 30. Caudill also could not recall if the exhaust was wrapped in fire resistant material, or whether there was a Murphy automatic cut-off switch on the bus or at what temperature it would be activated. Tr. II. 29, 30, 54. He did not measure the temperature of the bus after it had been driven to the repair shack because he had nothing with which to measure it. Tr. II. 31.

Tommy Watkins, safety manager at Highland, testified that he recalled the issuance of this citation. Tr. II. 48. He testified that the bus was equipped with a Murphy switch which would shut down the equipment and was set around 200 to 225 degrees which is below the

ignition point of the Conoco oil used at Highland. Tr. II. 54. It is also equipped with a fire suppression system. Tr. II. 58. He also recalled the accumulations being paper thin. The bus traveled by several CO monitors on its way to the repair shack that did not alert, nor did Watkins' personal spotter which was set to alarm at low levels of CO, methane and oxygen. Tr. II. 55. He also confirmed that there was a fire resistant sleeve surrounding the exhaust and all hydraulic lines which would prevent a fire in the event of a fluid leak on those components. Tr. II. 56.

The Secretary's evidence lacks essential facts upon which to find a likelihood of ignition of the fluid. She could not establish the quantity of the accumulation, the composition of the fluid, the flash point of the material, the temperature of the bus after being operated, whether the exhaust was wrapped in fire resistant covering or whether the bus was equipped with an automatic cutoff switch and at what temperature it would be activated. The testimony of Watkins was persuasive on these points and I find that the violation is not significant and substantial as a safety hazard. With respect to the allegation that this violation was also a health hazard, I find that the evidence is lacking to establish actual exposure to violative amounts of harmful gases to establish a reasonable risk of injury. Furthermore, the Secretary did not establish by credible medical evidence that inhalation of 4 ppm of methane (which could have been from ambient air rather than from this bus) would pose a serious health risk. This violation is not significant and substantial as a health hazard.

Negligence

I find the gravity of this violation is low and the negligence is reduced accordingly for the same reasons as set forth above.

III. PENALITES

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of the violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The parties have stipulated that the mine is a large mine and that the proposed penalties would not affect the operator's ability to continue in

business. There is no dispute that the conditions were abated in good faith or that the mine has a significant history of violations. The findings with regard to the gravity and negligence involved in each citation are set forth above. I find that the following penalties are appropriate:

Citation No. 8489430	$1304.00
Citation No. 8489432	Vacated
Citation No. 8489434	$2106.00
Citation No. 8489182	$1111.00
Citation No. 8489197	$1203.00
Citation No. 8489199	$1200.00
Citation No. 8489201	Vacated
Citation No. 8489204	$1203.00
Citation No. 8492066	$250.00

IV. ORDER

Citation numbers 8489432 and 8489201 are VACATED; citation numbers 8489430, 8489434, 8489182, 8489197 and 8489204 are affirmed as written with the penalties proposed by the Secretary; citation number 8489159 has been modified to low with a penalty of $1200.00; and, citation no. 8492066 is modified to non-significant and substantial with low negligence with an assessed penalty of $250.00. It is hereby **ORDERED** that Respondent pay penalties on the citations adjudicated herein in the amount of $8,377.00 within 30 days of this order.[3]

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

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[3] Payment is to be made 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

April 20, 2012

SECRETARY OF LABOR, MSHA on behalf of REUBEN SHEMWELL, Complainant	: : :	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. KENT 2012-655-D
	:	MADI CD 2012-08
v.	:	
ARMSTRONG COAL COMPANY, INC.,	:	Parkway Mine Surface Facilities
and	:	
ARMSTRONG FABRICATORS INC., Respondents	: :	Mine ID: 15-19356

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION AND ORDER GRANTING AMENDED APPLICATION FOR TEMPORARY REINSTATEMENT

Before: Judge Feldman

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) ("Act" or "Mine Act"). Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

I. Background

Before me is the Secretary's March 21, 2012, motion for summary decision seeking the temporary reinstatement of Reuben Shemwell by Armstrong Coal Company, Inc. ("Armstrong Coal Company"). Shemwell was employed as a welder at Armstrong Coal Company's Parkway Mine Surface Facilities located in Muhlenberg County, Kentucky. Shemwell's employment was terminated on September 14, 2011. The Secretary alleges that

Shemwell's dismissal was motivated by his repeated complaints concerning the need for respirator protection from fumes that were generated during the welding process. Respirators were ultimately provided to personnel in April 2011.

Armstrong Coal Company opposed the Secretary's motion on March 27, 2012. In its opposition, Armstrong Coal Company argued, *inter alia*, that although Shemwell was working as a welder at the Parkway Mine Surface Facilities at the time of the September 14, 2011, discharge, he was employed by a business entity known as Armstrong Fabricators, Inc. ("Armstrong Fabricators"). Nevertheless, Armstrong Coal Company asserted Shemwell was discharged on September 14, 2011, for excessive personal cell phone use during working hours. Significantly, Armstrong Coal Company does not specifically deny that Shemwell communicated protected safety and health related complaints concerning the lack of respirator protection.

Armstrong Coal Company's March 27, 2012, opposition primarily is based on its assertion that it is not a proper party to this proceeding because, although Shemwell was working as a welder at its surface facilities at the time of the September 14, 2011, discharge, Shemwell was employed by Armstrong Fabricators. Armstrong Coal Company characterizes Armstrong Fabricators as a "a sister company." *Resp. Initial Opp.* at 7.

Given these representations, during a March 28, 2012, telephone conference, the Secretary was given the opportunity to file an amended application for temporary reinstatement adding Armstrong Fabricators as a party to this proceeding. Armstrong Coal Company and Armstrong Fabricators are represented by the same counsel.[1] During the telephone conference, counsel for these entities represented that they would not object, on procedural grounds to the Secretary's filing of an amended reinstatement application. Accordingly the Secretary's request for leave to file an amended application for temporary reinstatement **HAS BEEN GRANTED**.

[1] While a formal notice of appearance has not been filed on behalf of Armstrong Fabricators, during the March 28, 2012, telephone conference counsel for Armstrong Coal Company represented that they also represented Armstrong Fabricators. Commonality of counsel is also deemed to have been admitted in pleadings in this proceeding wherein it was represented that counsel for "Fabricators would not oppose [the Secretary's] motion . . . to so amend her Application [to add Fabricators as a party]." *Resp. Supp. Opp. to Sec'y's Amended App.* at 2 n. 1. Thus, it is clear that counsel in this proceeding have been acting on behalf of both Armstrong Coal Company and Armstrong Fabricators.

II. Proper Parties in this Matter

On April 2, 2012, the Secretary filed her motion to amend her temporary reinstatement application by seeking to add Armstrong Fabricators as a party. At the outset, I note that it is not disputed that Armstrong Fabricators is a proper party to this proceeding. In this regard, Oscar Ramsey, Armstrong Fabricators' shop manager, admits Reuben Shemwell was employed by Armstrong Fabricators until his September 14, 2011, termination. *Resp. Initial Opp.,* Ex. 3. The Secretary argues that Armstrong Coal Company should be estopped from denying that it employed Shemwell, or, that Armstrong Coal Company and Armstrong Fabricators are "joint employers" named as proper parties in this proceeding. *Sec'y mem. in support of amend. app*., at 2-5. In support of the Secretary's amended application, the Secretary notes that Shemwell's September 14, 2011, termination letter, which was written on Armstrong Coal Company stationery, states:

> Reuben [W. Shemwell],
>
> This letter is to inform you that *your employment with Armstrong Coal Company* has been terminated effective 9/14/11.
>
> Respectfully,
>
> [/s]
>
> Gary Phillips
> Director of Human Resources [for Armstrong Coal Company][2]

Sec'y Mot. for Summ. Dec., Ex. A; *Sec'y Amended App.,* Ex. A (emphasis added).

The Secretary's amended application also relies on several additional written statements by Phillips stating that Shemwell was an employee of Armstrong Coal Company. In a letter to Jonathan S. King dated September 19, 2011, and, in responses to the Commonwealth of Kentucky's Unemployment Insurance Office, dated October 4, 2011, Phillips represented that Shemwell was employed by Armstrong Coal Company. See *Sec'y Amended App.,* Exs. B and C.

Armstrong Coal Company filed a supplemental response on April 12, 2012, again opposing its inclusion as a party. Armstrong Coal Company's opposition is primarily based on Shemwell's pay stubs and 2011 W-2 tax forms that reflect his employer was Armstrong Fabricators, Inc., at the address of 407 Brown Road, Madisonville, Kentucky 42431. It is noteworthy that the address of Armstrong Fabricators is the same as the address for Armstrong Coal Company as reflected in its official correspondence letterhead. *Sec'y Amended App.,* Ex.

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[2] Although Phillips may have provided advice to Armstrong Fabricators, he "is officially employed by Armstrong Coal as its Human Resources Director." *Resp. Initial Opp.* at 7.

A. Moreover, Armstrong Coal Company's attempt to extricate itself at this early preliminary stage despite its status as an admitted "sister corporation" of Armstrong Fabricators is unavailing. The Commission has addressed the issue of when a parent corporation and its subsidiary corporations constitute a "unitary operator" subjecting the affiliated corporations to liability under the Mine Act. *Berwind*, 21 FMSHRC 1284, 1316-17 (Dec. 1999). In *Berwind*, the Commission stated:

> Accordingly, we will consider the following factors in determining whether entities will be treated as a unitary operator for purposes of the Mine Act: (1) interrelation of operations, (2) common management, (3) centralized control over mine health and safety, and (4) common ownership. To demonstrate unitary operator status, not every factor need be present, and no particular factor is controlling. Instead, we will weigh the totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one.

21 FMSHRC at 1317.

During the March 28, 2012, telephone conference, Respondents' counsel represented that Armstrong Energy, Inc., is the parent company of "sister companies" Armstrong Coal Company and Armstrong Fabricators. Thus, the appearance of interrelated ownership is sufficient in light of the Secretary's minimal burden of proof at this early stage of the proceeding to satisfy the fourth element of *Berwind*. The fact that "sister corporation" Armstrong Fabricators was providing services at Armstrong Coal Company's surface facilities, and that these affiliated corporations share the same business address, provide further evidence of common ownership, as well as an interrelation of operations satisfying the first *Berwind* criterion. Additionally, the notification of Shemwell's discharge by the Director of Human Resources for Armstrong Coal Company demonstrates common mine management. Phillips' role also reflects centralized control over personnel matters that could impact mine safety and health demonstrating the second and third indicia for a "unitary operator" enunciated in *Berwind*.

Furthermore, with respect to "unitary operator" status, it is significant that Armstrong Fabricators has failed to comply with the reporting requirements of 30 C.F.R. Part 41 of the Secretary's regulations because it has not registered as a mine operator. *Sec'y mem. in support of amend. app*., at 1 n. 1. Thus, the only entity of the subject affiliated corporations that acquiesced to Mine Act jurisdiction was Armstrong Coal Company by virtue of its Mine ID No. of 15-19356. Under the "alter ego" theory of corporation law, a business entity cannot seek to escape liability arising out of the operation of one business entity that was conducted for the benefit of the affiliated enterprise. *Berwind*, 21 FMSHRC at 1314-15. Simply put, Armstrong Coal Company may not now escape exposure to liability for mining related operations at its Parkway Mine Surface Facilities by seeking to shift liability to an affiliated corporation when Armstrong Coal Company was the only relevant authorized mine operator at the time of Shemwell's discharge.

In addition, it should be noted parenthetically that corporations may be liable, as successors, for relief under section 105(c)(2) of the Mine Act even if the management and ownership of the corporation is different and distinct from that of the mine operator that discriminated. *Clifford Meek v. Essroc Corp*., 15 FMSHRC 606, 609 (Apr. 1993). In discrimination cases involving successorship, the Commission looks to such factors as notice of the alleged discriminatory action, the ability of the successor to provide relief, whether the substitute employer uses the same mine site with a similar workforce, and, whether the successor company has the same management (human resource) personnel. *Id.* at 610 (citations omitted).

All of these indicia are present in this case. It is undisputed that Armstrong Coal Company had notice of the alleged underlying facts that support the application for temporary reinstatement by virtue of the termination letter and the information provided to the Kentucky State Unemployment Insurance Office. It obviously has the ability to provide reinstatement of Shemwell to his former position as a welder/laborer given its continuing mining operations. With regard to the remaining issue of successorship, there is a commonality of employment location and management, as reflected by the active participation of Armstrong Coal Company's Human Resources Director in the decision to terminate Shemwell.

The decision to hold Armstrong Coal Company and Armstrong Fabricators subject to joint and several liability for relief under the antidiscrimination provisions of section 105(c)(2) of the Mine Act is essential at this stage of the proceeding. The Secretary asserts that Armstrong Fabricators is not registered to do business in the State of Kentucky. *Sec'y mem. in support of amend. app*., at 1 n. 1. Regardless of whether Armstrong Fabricators is authorized to operate in Kentucky, Mine Safety and Health Administration records reflect that Armstrong Fabricators has failed to comply with the reporting requirements in 30 C.F.R. § 41.10 of the Secretary's regulations because it has not registered as an operator performing services at a mine. *Id.* Also, it is significant that counsel represented during the March 28, 2012, telephone conference that Armstrong Fabricators is not actively engaged in business, and, that it may not have the ability to reinstate Shemwell.

It is instructive that the legislative history of the Mine Act reflects Congress' concern that effective relief must be afforded to victims of discrimination. The Commission has noted this congressional concern:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to[,] reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

Consolidation Coal, 20 FMSHRC 1293, 1307 (Dec. 1998) *citing* S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 625 (1978).

Thus, the Commission possesses broad remedial power in fashioning relief in discrimination cases that is appropriate for varied and diverse circumstances. *See Consolidation Coal*, 20 FMSHRC at 1306-07. This is especially true in this situation where only one of several relevant business entities may be capable of providing such relief.

It is not the judge's duty to resolve real party-in-interest issues on the merits at this preliminary stage of a temporary reinstatement proceeding. *Sec'y o/b/o Albu v. Chicopee Coal*, 21 FMSHRC 717, 719 (July 1999). Given the Commission's broad remedial authority, it is clear that the Secretary's assertion that Armstrong Coal Company is a proper party to this proceeding as an affiliated corporate entity is not frivolous. Armstrong Coal Company has the ability to temporarily reinstate Shemwell. Armstrong Coal Company may contest its party status at a hearing on the merits if the Secretary elects to bring a discrimination case on behalf of Shemwell. Consequently, the Secretary's motion to amend its application for temporary reinstatement to include both Armstrong Coal Company and Armstrong Fabricators as parties to this proceeding **IS GRANTED**.

III. Timeliness

Section 105(c)(2) of the Mine Act provides that a miner alleging to be the victim of discriminatory discharge ". . . may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). Armstrong Coal Company asserts that Shemwell's complaint must be dismissed as untimely because it was filed on January 23, 2012, a period of 131 days after his September 2011 termination, which I construe as a motion to dismiss. *Resp. Initial Opp.* at 8.

Dismissal is a harsh remedy. Moreover, Commission case law is clear that the 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem*, 750 F.2d 1093 (D.C. Cir. 1984). An analysis of the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" is required in order to determine whether a miner's late filing should be excused. *Id.* For example, "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999) *citing Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984).

Absent a showing of prejudice, a reasonable delay in filing a discrimination complaint should not disqualify a miner from exercising his statutory right to seek relief from adverse action that he believes was motivated by his protected activity. An approximate four month filing delay does not significantly undermine the recollection of witnesses, or otherwise interfere with the Respondents' ability to defend themselves. Consequently, a reasonable filing delay,

absent prejudice, does not confer rights or defenses on an opposing party. Accordingly, the Respondent's request to dismiss this matter because the underlying discrimination complaint was not filed in a timely manner **IS DENIED**.

IV. Not Frivolously Brought Standard

While the Secretary is not required to present a *prima facie* case in a temporary reinstatement proceeding, it is helpful to review the ultimate proof to support a discrimination claim to determine whether the nonfrivolous test in this matter has been met. In order to demonstrate a *prima facie* case of discrimination under section 105(c) of the Act, the Secretary must establish that Shemwell: (1) engaged in protected activity and (2) that the adverse action complained of, in this case Shemwell's termination, was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Direct evidence of a discriminatory motive is rarely encountered. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Rather the Commission has identified several circumstantial indicia of discriminatory intent, namely: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity; and (iii) coincidence in time between the protected activity and adverse action. *Id.*

The Respondents, in essence, assert that Shemwell's termination was motivated solely by his unauthorized cell phone use, and, that his discharge was not motivated, in any part, by protected activity. The Secretary contends that Shemwell's termination was motivated by his repeated requests for respirator protection. As previously noted, given the narrow scope of a temporary reinstatement proceeding, it is premature to resolve issues regarding the underlying motivation for Shemwell's termination at this preliminary stage of the proceeding. *Chicopee Coal, supra,* at 21 FMSHRC 719.

It is sufficient that Armstrong Coal Company has directly, and indirectly, acknowledged Shemwell's protected activity. As a threshold matter, during the March 13, 2012, conference call, counsel for Armstrong Coal Company acknowledged Shemwell's complaints concerning respirators. Moreover, in its opposition to the Secretary's motion for summary decision, Armstrong Coal Company states "[it] assumes *arguendo* for the purposes of the Secretary's present Motion [for Summary Decision] that Shemwell has engaged in protected activity." *Resp. Initial Opp.* at 11. However Armstrong Coal Company reserved the right to later dispute any allegation that Shemwell in fact engaged in protected activity. *Id.* at n. 5.

Turning to the *Chacon* indicia for discriminatory intent, a temporary reinstatement proceeding also is not the appropriate vehicle for resolving credibility conflicts. *Chicopee Coal, supra,* at 21 FMSHRC 719. Thus as Armstrong Coal Company apparently recognizes, it is appropriate to assume for the purposes of this proceeding that Shemwell engaged in protected

activity culminating in the provision of respirators in April 2011, particularly in the absence of an explicit denial that protected activity occurred. With respect to coincidence in time, the approximate five month period between the asserted April 2011 response to Shemwell's complaints and the September 2011 termination is of sufficiently short duration to satisfy the Secretary's not frivolously brought evidentiary burden.

Even if Shemwell engaged in protected activity, Armstrong Coal contends that mine management personnel who participated in the decision to terminate Shemwell were unaware of such activity. The Commission has long held that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Jayson Turner v. Nat'l Cement Co. of California,* 33 FMSHRC 1059, 1067 (May 2011) citing Metric Constructors, Inc., 6 FMSHRC 226, 230 n. 4 (Feb. 1984). In any event, such a defense cannot be relied upon to defeat reinstatement during this preliminary proceeding.

Finally, the ultimate issue of whether there was hostility or animus towards Shemwell for his purported protected activity must await a full evidentiary hearing on the merits of the discrimination complaint. At this time the Secretary continues to investigate.

ORDER

Disposition by summary decision is appropriate provided (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). *See Missouri Gravel Co.,* 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). To prevail in this preliminary matter, the Secretary must only demonstrate that the application for temporary reinstatement is not frivolous. As discussed above, the record, consisting of the appearance of interrelated corporate ownership; protected activity uncontested for the purposes of this proceeding; and coincidence in time between the reported protected activity and Shemwell's termination establishes that the application for temporary reinstatement has not been frivolously brought. Accordingly, **IT IS ORDERED** that the Secretary's amended motion for summary decision with respect to her application for temporary reinstatement **IS GRANTED**.

Consequently, **IT IS FURTHER ORDERED** that Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc., immediately reinstate Reuben Shemwell, **no later than Wednesday, April 25, 2012**, to the position he immediately held prior to his September 14, 2011, termination, or, to a similar position as a laborer at the same rate of pay and benefits, and with the same or equivalent duties assigned to him.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

April 4, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1834
Petitioner	:	A.C. No. 46-08266-161160
v.	:	
	:	
POCAHONTAS COAL COMPANY, LLC,	:	Mine: Josephine No. 3
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

This proceeding has been brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("the Act"). The proceeding concerns Citation Nos. 7260671 and 7260672 that allege violations of 30 C.F.R. § 75.403 for Pocahontas Coal Company, LLC's ("Pocahontas'") alleged failure to maintain the required percentage of rock dust in the 007 and 003 mechanized mining units ("MMU's"). Citation Nos. 7260671 and 7260672 were specially assessed by the Secretary at $14,700.00 each, for a total proposed penalty of $29,400.00. Pocahontas has filed a motion to compel the production of the Secretary's special assessment review forms concerning Citation Nos. 7260671 and 7260672 that serve as the basis for the proposed $29,400.00 total civil penalty.[1]

Pocahontas asserts that the special assessment forms are relevant and discoverable. *Resp. Mot.* at 3. Pocahontas states that it does not possess the information contained in the forms, and that such information is "necessary to effectively defend this case and to carry on a dialogue regarding potential settlement." *Id.* Pocahontas relies on Commission Rule 56(b), 29 C.F.R. § 2700.56(b), and Rule 26(b)(1) of the Federal Rules of Civil Procedure that provide that all relevant material not privileged is subject to discovery. *Id.* Pocahontas additionally addresses why the deliberative process privilege should not apply. *Id.* at 4.

[1] The Secretary's criteria for proposing civil penalties is contained in Part 100 of the Secretary's regulations. 30 C.F.R. Part 100. Section 100.5(a) of the regulations provides "MSHA may elect to waive the regular assessment under section 100.3 if it determines that conditions warrant a special assessment." The calculation methods for determining special assessments are not contained in Part 100, and as discussed herein, are not relevant in this proceeding.

The Secretary also relies on Commission Rule 56(b), and Rule 26(b)(1) of the Fed. R. Civ. P., but emphasizes that only *relevant material* not privileged is subject to discovery. *Sec'y Resp.* at 2. (Emphasis added). The Secretary, however, asserts special assessment review forms are not relevant. *Id.* In this regard, the Secretary notes that under section 110(i) of the Act "[t]he Commission shall have authority to assess all civil penalties provided in this Act." *Id.* at 3 *citing* 30 U.S.C. § 820(i). The Secretary also references *Douglas R Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000), for the proposition that the Commission and its Administrative Law Judges make penalty determinations *de novo*. *Sec'y Resp.* at 3. Notwithstanding the relevance issue, the Secretary also addresses why the deliberative process privilege should apply. *Id.*

As noted by the Secretary, it is well settled that the Commission and its judges have the authority to determine and assess the appropriate civil penalty in contested civil penalty matters. The Commission has outlined the parameters of its responsibility for assessing civil penalties:

> 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:
>
> > [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.

Rushford Trucking 22 FMSHRC at 600 *citing* 30 U.S.C. § 820(i).

The Secretary bears the burden of proving each element of a cited violation. The Commission has held that findings of fact on the statutory penalty criteria must be made by its judges based on the evidence presented during a hearing proceeding. *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). The Commission has noted that

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).

As noted, discovery may be obtained if the information or documentation sought is relevant in that it is admissible evidence, or, the information appears likely to lead to the discovery of admissible evidence. Commission Rule 56(b). As the Secretary's special assessment criteria, as vague as it may be, is not relevant given the *de novo* authority of the Commission to assess civil penalties, the special assessment review forms sought by Pocahontas are not discoverable. Consequently, Pocahontas' motion to compel **IS DENIED**. Given the non-relevant nature of the information sought to be compelled, I need not address whether the special assessment forms are protected by the deliberative process or otherwise privileged.

I note however that information concerning the personal observations of the issuing MSHA inspector, *i.e.*, the inspector's actual knowledge, which may have served as the basis for the special assessment, is discoverable. Such information can be obtained through depositions. This captioned proceeding remains scheduled for hearing on the merits at **9:00 a.m., on Tuesday, May 15, 2012,** in the vicinity of Beckley, West Virginia. The hearing location will be specified in a subsequent order.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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Federal Mine Safety and Health Review Commission
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April 6, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-422-M
Petitioner,	:	A.C. No.: 11-03114-136
	:	
v.	:	
	:	
VOSS SAND WORKS, INC.,	:	
Respondent.	:	Mine: Portable Plant #1

Appearances: Beau Ellis, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
Daniel P. Foltniewicz, Voss Sand Works, Inc., Wheaton, Illinois for Respondent.

Before: Judge Miller

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION ORDER TO PAY

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Act"). The case involves three 104(a) citations issued to Voss Sand Works ("Voss") on April 25, 2007. Voss has agreed to accept Citation Nos. 6186227 and 6186228 as written and pay the associated penalties. Citation No. 6186226 remains at issue and is the subject of this order.

On May 9, 2011, the Secretary of Labor (the "Secretary") filed a Motion for Summary Decision ("Motion") pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. On May 25, 2011, Voss filed a Response to Secretary's Motion for Summary Decision ("Response"). Subsequently, the Secretary filed a Reply to Voss's Response ("Reply"), which was then followed by Voss's Surreply ("Surreply").

I. BACKGROUND

On April 25, 2007, Inspector Jay Bell with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6186226 under section 104(a) of the Act alleging a violation of Section 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. The citation alleges:

> On the plants secondary work boat used to work on the pipeline and dredge, as well as the back up for the transportation to and from the dredge. Was not provided with any railings to include mid-rail, to keep a person from falling into the water should the boat shift for any reason while being worked on. The operator did have a lifejacket on when he went to operate the unit. If a man fell from the boat it could result in lost work days or restricted duty. Depending on how the man fell. Boat was in operation when the violation was cited. Boat is usually operated by one person.

Inspector Bell determined that an injury or illness was unlikely to occur, but that any injury would result in lost workdays or restricted duty, that the violation was not significant and substantial ("S&S"), that one person would be affected, and that the violation was a result of moderate negligence on the part of the operator. The Secretary has proposed a penalty of $100.00 for this violation.

On March 9, 2011, the Secretary filed a Motion to Amend Citation No. 6186226 and the Petition for Assessment of Penalty to Allege, in the Alternative, a Violation of 30 C.F.R. § 56.11027 ("Motion to Amend). The Motion to Amend was granted by the Court on April 21, 2011. Section 56.11027 provides, in pertinent part, that "working platforms shall be . . . provided with handrails[.]" 30 C.F.R. § 56.11027.

II. STIPULATIONS

The parties jointly stipulated to a number of key facts. The stipulations are as follows:[1]

1. Voss Sand Works is the operator of the mine in this case, Mine ID 1103114.
2. Voss Sand Works is a mine as that term is defined in the Mine Act.
3. Voss Sand Works' operation or the products of the mine enter commerce within the scope of the Mine Act.
4. The Administrative Law Judge has subject matter and personal jurisdiction over the dispute in this case.
5. On April 25, 2007, the Mine Safety and Health Administration ("MSHA") inspected the Voss Sand Works, Portable #1 mine.
6. MSHA Inspector Jay Bell was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.
7. MSHA issued Citation No. 6186226 to Voss Sand Works on April 25, 2007, alleging a violation of 30 C.F.R. § 56.11001.
8. The Secretary requested that she also be allowed to plead in the alternative a violation of 30 C.F.R. § 56.11027.

[1] I note that Stipulation Nos. 10 and 11, while not included in the Secretary's Motion, were included in Voss' Response. The Secretary does not dispute those stipulations. I find that Voss has stipulated to such.

9. The equipment involved in this citation is a secondary work boat that can be seen in Exhibits G and H.
10. At the time of inspection on April 25, 2007, this boat was used by Respondent to work on the pipeline and the dredge, as well as used as a source of transportation to and from working on the dredge pipeline.
11. Citation No. 6186226 was terminated at 1:00 p.m. on April 26, 2007, after Voss Sand Works added a safety railing around the entire boat, and the violation was thereby abated.
12. MSHA also issued Citation No. 6186227 to Voss Sand Works on April 25, 2007, alleging a violation of 30 C.F.R. § 56.4201(a)(2).
13. Respondent no longer contests Citation No. 6186227 and agrees it has been proven for the purposes of this case.
14. MSHA also issued Citation No. 6186228 to Voss Sand Works on April 25, 2007, alleging a violation of 30 C.F.R. § 56.20003(a).
15. Respondent no longer contests Citation No. 6186228 and agrees it has been proven for the purposes of this case.
16. The Respondent exercised good faith in timely abating all of the conditions cited as violations.
17. MSHA's penalty assessment is based upon the following and calculated pursuant to 30 C.F.R. § 100.3:
    a. Mine Hours: 8,455
    b. Controller Hours: 15,045
    c. Number of Violations: 3 written individually
    d. Number of Inspection Days: 2
    e. Number of Repeat Violations: 0
    f. Number of Persons Affected: 1
    g. Mine Size Points: 1
    h. Controller Size Points: 0
    i. VPID Points: 0
    j. RPID Points: 0
    k. Negligence Points: 20
    l. Likelihood Points: 10
    m. Severity of Injury Points: 5
    n. Number of Persons Affected Points: 1
    o. Good Faith Points: 0
    p. Total Points: 37
18. 30 C.F.R. § 100.3 provides that 37 assessed points result in the penalty of $112.00 for each of the three violations, totaling $336.00. With the 10% good faith reduction, the total penalty amount proposed by the Secretary for all three violations totals $300.00.
19. Payment of the proposed penalty will not affect Voss Sand Works' ability to continue in business.

III. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor's Motion for Summary Decision

The Secretary asserts that she is entitled to summary decision. She contends that the boat, also referred to as the "secondary work boat," is both a "working platform [and working place] . . . used to work on the pipeline and the dredge, as well as for transportation [over the lake] to and from work on the dredge and pipe line." Sec'y Mot. 5, 9. At the time the subject citation was issued, the boat did not have handrails of any kind. *Id*. at 5.

The Secretary argues that, by failing to provide handrails of any kind on the boat, Voss violated Section 56.11001, which requires that "[s]afe means of access be maintained to all working places." *Id*. at 6-7. The boat was designed and built "to carry miners from the dock to the dredge and pipe line" and "safe access would include a railing around the sides of the boat/platform." *Id*. at 7. As support for her position, the Secretary cites *Evansville Materials, Inc.* in which a Commission judge determined that safe access was not provided because hand-holds were not available for miners to use when getting off of a ferry boat and onto a dredge deck. 12 FMSHRC 6, 14 (1990) (ALJ); Sec'y Mot. 7-8. Further, in *Redland Genstar, Inc*., a Commission judge found that an operator failed to provide safe access when a boat, which was used by the operator to transport employees to the dredge, was too heavy and sank. 19 FMSHRC 442 (1997) (ALJ); Sec'y Mot. 8.

Alternatively, the Secretary argues that Voss does not satisfy Section 56.11027, which requires that "working platforms shall be . . . provided with handrails." Sec'y Mot. 6-7. She argues that the boat is a "working platform" and points to Judge Barbour's decision in *Rohloff Sand & Gravel Co*. where he held that platforms near water should have handrails in situations were a miner could slip and fall into the water. 20 FMSHRC 868, 872 (1998) (ALJ); Sec'y Mot. 8-9.

The Secretary notes that both the originally cited standard and the alternatively cited standard are grouped in her regulations under the larger heading of "travelways," which are defined as "a passage, walk or way regularly used and designated for person to go from one place to another." 30 C.F.R. § 56.2; Sec'y Mot. 7.

Finally, the Secretary argues that, based on the inspector's findings regarding the criteria set forth in Section 110(i) of the Mine Act and Section 100 of the Secretary's regulations, the proposed penalty of $100.00 is appropriate. Sec'y Mot. 9.

B. Voss' Response

Voss argues that there are factual issues that must be resolved and that the Secretary is not entitled to summary decision. Voss Resp. 1. Specifically, Voss contends that the Secretary's use of multiple standards raises factual questions. *Id*. at 1-2. Voss objects to the use of several different standards and argues that there is no standard that requires mid-rails or hand-holds to be

installed on boats. *Id*. at 7. Voss asks that the citation be vacated and the proposed penalty be dismissed. *Id*.

Voss argues that a MSHA investigator previously asked Josh Voss, owner of Voss, about any problems with the secondary work boat and Voss responded that lifejackets were worn when working on the water. *Id*. at 5. Subsequently, when Inspector Bell wrote Citation No. 6186226 he did not mention anything about a platform, so the secondary boat cannot be considered a platform. *Id*. at 5-6. Moreover, during a previous inspection, Kevin LeGrand, a MSHA field office supervisor observed the boat but did not issue a citation. *Id*. at 6. Case law points to the fact that MSHA inspectors have conceded that handholds and mid-rails are not required on a dredge. *Fleniken's Sand & Gravel*, 10 FMSHRC 1509 (1988) (ALJ); Voss Resp. 6. In *Fleniken*, the ALJ found that, "if MSHA believes that such safety devices (mid-rails/hand holds) are necessary to prevent persons from falling off a dredge operating over water, it should promulgate standards covering this hazard." *Id*. at 1517; Voss Resp. 6. Additionally, Voss points to the fact that, in *Fleniken*, the inspector's interpretation of Section 56.15020 was that lifejackets were to be worn at all times when an employee is working on a dredge deck. Voss Resp. 6.

Voss also points to *APAC-Mississippi, Inc.*, 26 FMSHRC 811 (2004) (ALJ), where a walkway on a floating dredge had not been fixed with railings to prevent a person from walking, tripping or slipping into the water when traversing the walkway. There, the judge found that the Secretary's evidence fell short of establishing that the cited area was a travelway. *Id*. at 812; Voss Resp. 7.

Voss no longer contests Citation Nos. 6186227 and 6186228 and concedes that the penalties for those citations are appropriate. Voss Resp. 7. Voss requests Citation No 6186226 be vacated and that "the Administrative Law Judge den[y] the proposed penalty." *Id*.

C. Secretary of Labor's Reply

Although Voss alleges that there are factual issues that still need to be resolved, Voss offers no information regarding the relevant facts that remain at issue. Sec'y Rep. 1. Voss contends that the Secretary's use of different standards raises factual issues, however, that is not the case. *Id*. The Court has already granted the Secretary's Motion to Amend Citation No. 6186226 and Plead in the Alternative. *Id*. at 2. The Secretary can move to amend her petition at any time during the investigation. *Id*. at 3. An amendment is a procedural issue and "not a factual issue to be resolved." *Id*.

Voss' argument that an inspector saw the secondary workboat during a prior inspection and did not cite it does not mean that a hazard did not exist at the time of the subject inspection. *See Sunny Ridge Mining Co.,* 19 FMSHRC 254, 267-7 (1997) (ALJ) (citations omitted); Sec'y Rep. 3. Moreover, the other cases cited by Voss in support of its arguments are distinguishable from the matter at hand. Sec'y Rep. 3-4.

D. Voss' Surreply.

Voss again claims there are factual issues to be resolved. Voss Surr. 1. When the Secretary filed her Motion to Amend Citation No. 6186226, it was the third standard the Secretary used to address the alleged violation. *Id*. at 2. When Voss offered to settle the case, the Secretary responded by changing the standard. *Id*. Voss contends that the Secretary is using "procedural options" to find a violation for the condition. *Id*. Voss is at a disadvantage when another standard is used to fit the conduct. *Id*. Citation No. 6186226 should be vacated and the proposed penalty should be dismissed. *Id*.

IV. DISCUSSION

Commission's Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

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

29 C.F.R. § 2700.67. I find that there are no genuine issues as to any material fact and the Secretary is entitled to summary decision as a matter of law. While Voss does not stylize its Response or Surreply as a cross-motion for summary decision, I treat them as such given that the parties have submitted joint stipulations and that Voss argues that the citation should be vacated based on the evidence before me. Finally, I note that the parties have relied primarily on the decisions of other administrative law judges. While I am not bound by the decisions of other Commission judges, in appropriate circumstances I may be guided by those decisions.

For organizational purposes, I first address Voss' argument that the Secretary's use of multiple legal standards raises genuine issues regarding material facts of this case. Voss maintains that there is a factual issue embedded in the alternative pleadings that needs to be resolved. Voss Rep. 2; Voss Surr. 2. I disagree with Voss, and agree with the Secretary, who stated in her Reply that, while Voss "believes 'there are factual issues to be resolved,' it offers no argument of the factual issues." Sec'y Rep. 2 (*citing* Sec'y Resp. 1). The use of alternative standards in the context of this proceeding is a question of law that has already been answered. The Secretary properly filed a Motion to Amend Citation No. 6186226 and allege, in the alternative, a violation of 30 C.F.R. § 56.11027. On April 21, 2011, in granting the Secretary's motion, Judge Biro held:

> The gravamen of the charge described in the text of Citation Number 618226 is the lack of any railings on Respondent's work boat. The standard that the Secretary now seeks to allege

> Respondent violated (30 C.F.R. 56.11027) more precisely specifies a legal requirement for handrails than the general "safe access" rules originally cited (30 C.F.R. § 56.11001).

Order Granting Sec'y Mot. to Plead in the Alternative 4 (Apr. 21, 2011).[2] I see no reason to disturb Judge Biro's ruling and agree that the Secretary properly amended her petition and that the Respondent's argument is without merit. Accordingly, I will first analyze the record in the context of the originally cited standard, Section 56.11001, and then in the context of the alternatively cited standard, Section 56.11027.

Section 56.11001 requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. The Secretary's regulations define "working place" to be "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. It is undisputed that the secondary boat "was used by Respondent to work on the pipeline and the dredge, as well as being used as a source of transportation to and from working on the dredge pipe[]line." Stip. 10. I find that both the boat and the dredge are working places. The stipulation makes clear that, at times, miners stood on the boat while working on the pipeline and dredge. Moreover, the statement that the boat was used to transport miners "to and from *working on the dredge*[,]" makes clear that work was also done while standing on the dredge itself. *Id*. (emphasis added). The standard requires that safe access be provided and maintained to all working places. While the facts do not reveal if there was safe access to the boat, it is clear that safe access to dredge, via the boat, was not provided. The boat provided the means of access to the dredge. While Section 56.11001 does not explicitly require handrails, "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would certainly not expect the subject boat, which had no restraints to prevent a miner from falling off of the boat, to be considered a "safe means of access" to the dredge. *See Ideal Cement Co*., 12 FMSHRC 2409, 2416 (Nov. 1990). The boat had no restraints to prevent a miner from falling off of the boat and, therefore, did not provide the safe access required by the Secretary's regulation. While lifejackets do provide a measure of safety to prevent against drowning, they do not prevent a miner from falling off the boat and sustaining other types of injuries, e.g., striking their head on the side of the boat, dredge, pipeline, etc. I find that the undisputed material facts evidence a violation of 30 C.F.R. § 56.11001.

Given that I have already found a violation of Section 56.11001, I need not address the Secretary's alternative pleading. However, had the undisputed material facts not shown a violation of Section 56.11001, I nevertheless would have found a violation of Section 56.11027. Section 56.11027 requires, in pertinent part, that "working platforms shall be . . . provided with handrails[.]." 30 C.F.R. § 56.11027. The Secretary's regulations do not define the term "working platform." "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The dictionary defines "platform" as "a horizontal flat surface usu. higher than the adjoining area." *Webster's New Collegiate Dictionary* 873 (1979). Given that a "working *place*" is "any *place* in or about a mine where work is being performed," 30 C.F.R. §

[2] On January 26, 2012, LAKE 2008-422-M was reassigned from Judge Biro to the undersigned judge.

56.2, logically, a "working *platform*" is any elevated, horizontal, flat surface in or about a mine where work is being performed. (emphasis added); 30 C.F.R. § 56.2; *see also Empire Iron Mining*, 19 FMSHRC 1912, 1920 (Dec. 1997) (ALJ). Again, it is undisputed that the boat "was used by Respondent to work on the pipeline and the dredge, as well as being used as a source of transportation to and from working on the dredge pipe[]line." Stip. 10. The stipulation makes clear that miners stood on the boat while working on the pipeline and dredge. Moreover, it is undisputed that handrails were not provided on the boat. The only question that remains is whether the boat is a "platform." I find that the boat is a platform. The photographs of the boat reveal that the deck was an elevated, horizontal, flat surface. Sec'y Mot. Exs. G and H. The boat's deck was higher than the waterline. Moreover, while it is not clear how deep the water in the area was, obviously the boat's deck was higher than the lake bed beneath the surface of the water. The boat had no restraints to prevent a miner from falling off of the boat and into the water. Given that the boat was a working platform, and that there were no handrails provided, the undisputed material facts evidence a violation of 30 C.F.R. § 56.11027.

Voss argues that the secondary boat had not been cited during previous inspections and that, consequently, the citation should be vacated. However, this argument does not address the existence or nonexistence of this particular violation. Hazardous conditions can develop quickly, and an investigator may inadvertently overlook violative conditions. In short, even if the violation was not cited during previous MSHA inspections, it does not mean the hazard did not exist at the time the subject citation was issued.

Voss cites two other Commission ALJ decisions for the proposition that a handrail was not needed on the boat, i.e., *Fleniken's Sand & Gravel* and APAC *Mississipi*. However, as correctly pointed out by the Secretary, neither of these cases addresses the standards at issue.

Consistent with the above analysis, I find that the Secretary has established a violation of Section 56.11001.

V. CITATION NOS. 6186227 AND 6186228

Voss has agreed to accept Citation Nos. 6186227 and 6186228 as written and pay the associated penalties. Accordingly, I assess the $100.00 penalties originally proposed by the Secretary for Citation Nos. 6186227 and 6186228.

VI. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Act lists six criteria to be considered in determining appropriate civil penalties.[3] Notably, Voss does not dispute the Secretary's assessment of the penalty criteria. Rather, Voss only argues that the citation should be vacated and no penalty should be assessed. Voss Resp. 7. I have already found a violation of the originally cited standard. I accept the Secretary's assessment of the penalty criteria and Voss' stipulation that the proposed penalty will not affect its ability to continue in business. Stip. Nos. 17 and 19. I find that the Secretary's proposed penalty of $100.00 is appropriate for Citation No. 6186226.

VII. ORDER

The Secretary's motion for summary decision is **GRANTED**. Citation Nos. 6186226, 6186227, and 6186228 are **AFFIRMED** in all respects. Voss is **ORDERED TO PAY** the secretary of Labor the sum of $300.00 within 30 days of the date of this decision.

/s/ Margaret Miller
Margaret Miller
Administrative Law Judge

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Daniel P. Foltniewicz, Voss Sand Works, Inc., P.O. Box 5312, Wheaton, IL 60189.

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[3] 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).

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April 12, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2011-167
Petitioner	:	A.C. No. 01-00851-237098
v.	:	
	:	
OAK GROVE RESOURCES, LLC,	:	Mine: Oak Grove Mine
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Zielinski

This case is before me upon a Petition for Assessment of Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. A Decision Approving Partial Settlement was entered on March 5, 2012, disposing of seven of the nine citations/orders at issue. Respondent has moved for summary decision as to the remaining citations, which allege violations of a safeguard issued to the Oak Grove Mine. The Secretary has opposed the motion. For the reasons stated below, Respondent's motion is denied.

Section 314(b) of the Act provides that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided. 30 U.S.C. 874(b); *see also* 30 C.F.R. 75.1403 (repeating verbatim section 314(b)). The Secretary has implemented section 314(b) by authorizing MSHA inspectors to issue safeguard notices on a mine-by-mine basis. To require a safeguard an inspector must identify a condition at the mine that presents a transportation hazard that is not addressed by an existing safety standard. He then issues a written safeguard notice to an operator specifying the safeguard the operator must provide and the operator is given a certain amount of time to comply. If the safeguard is not timely provided, or is not maintained thereafter, an inspector issues a citation to the operator pursuant to section 104 of the Act.

The two violations remaining at issue, Citation Nos. 7696485 and 8518472, allege violations of Safeguard No. 2811430, which was issued to the Oak Grove Mine on November 20, 1986, and states:

> The No. 20 personnel carrier was observed operating while not equipped with a well-maintained sanding device. This is a Notice to Provide Safeguards that all track-mounted personnel carriers shall be provided with a well-maintained fully operational sanding device.

Mot. Ex. 1.

Citation No. 7696485 was issued at 5:00 p.m., on September 22, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.1403-6(b)(3), and charges Respondent with failing to comply with Safeguard No. 2811430. The violation was described in the "Condition and Practice" section of the citation as follows:

> Three of the four sanders on the Co# 52 Brookville mantrip (s/n 9072) were not maintained and fully operational. This mantrip is capable of transporting 12 miners.

Mot. Ex. 2.

Citation No. 8518472 was issued at 5:45 p.m., on September 22, 2010, pursuant to section 104(a) of the Act. It also alleges a violation of 30 C.F.R. § 75.1403-6(b)(3), and charges Respondent with failing to comply with Safeguard No. 2811430. The violation was described in the "Condition and Practice" section of the citation as follows:

> Each self-propelled personnel carrier should be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys) which transport not more than 5 men, need not be equipped with such sanding device. Upon inspection of the c/n 57 (s/n 08403) Brookville diesel mantrip, the sanding devices (2) located on the south side of the manbus track location, did not function properly when tested. This mantrip is utilized to transport up to nine miners throughout the mine.

Mot. Ex. 3.

Oak Grove argues that the citations remaining at issue must be vacated because the subject safeguard fails to specifically identify the hazard it is intended to address and is, therefore, invalid. Oak Grove's challenge is to the facial validity of the safeguard. There are no material facts in dispute as to the content of the safeguard or the allegations of the citations. Consequently, this facet of Oak Grove's defense to the citations is appropriate for resolution by summary decision.

The Validity of the Safeguard

In *Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781, 1784-85 (Nov. 1997), the Commission reiterated the law applicable to a determination of the validity of a safeguard.

> Under section 314(b) of the Mine Act, the Secretary may issue "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials." 30 U.S.C. § 874(b). In order to issue such a safeguard, an inspector, must determine that there exists an actual transportation hazard not covered by a

mandatory standard and that a safeguard is necessary to correct the hazardous condition. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992). (*SOCCO II*). He must also specify the corrective measures an operator must take. The Commission reviews the Secretary's issuance of a safeguard under an abuse of discretion standard.

The inspector's decision to issue a safeguard must be based upon "his evaluation of the specific conditions at a particular mine and on his determination that such conditions create a transportation hazard in need of correction." *SOCCO II*, 14 FMSHRC at 11-12. A safeguard "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." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (*SOCCO I*). It is the Secretary's burden to prove the validity of a safeguard. *SOCCO II*, 14 FMSHRC at 14-15. While the language of a safeguard, which may be issued without consulting with representatives of the operator, must be narrowly construed, the Secretary's authority to issue a safeguard is interpreted broadly. *Cyprus Cumberland*, 19 FMSHRC at 1785; *SOCCO I*, 7 FMSHRC at 12.

Oak Grove argues that the safeguard "does not identify any hazard with specificity" and, therefore, fails to satisfy the *SOCCO I* requirement. Mot. at 2. It further asserts that the specificity requirement "demands that the hazard and the underlying condition be enumerated independent of one another." Mot. at 3. Oak Grove closes its argument by asserting that the safeguard is invalid because it does not "address a hazard associated with this condition [personnel carrier not equipped with a well maintained fully operational sanding device] or indicate that the cited condition would lead to an event that would create danger to miners." Mot. at 4.

The Secretary contends that the *SOCCO I* requirements are satisfied because the safeguard specifies the nature of the hazard at which it is directed; i.e., a personnel carrier operating without a well maintained sanding device. Opp. at 2. As to Respondent's assertion that the safeguard fails to indicate that the condition or hazard would lead to an event that would create danger to miners, she argues that there is no such requirement.

In that Oak Grove's argument is directed to the validity of the safeguard, it is a challenge to the exercise of the Secretary's broad discretion in issuing safeguards. Here, as the Secretary asserts, the subject safeguard identifies the nature of the hazard to which it is directed, i.e., a personnel carrier without a well maintained sanding device. Track-mounted personnel carriers transporting six or more men that are not equipped with a properly functioning sanding device to increase the friction between the carrier's wheels and the track may not have sufficient braking power to avoid derailments, collisions, or a host of similar events that could result in serious injuries to miners. Neither that obvious fact, nor the various potential scenarios in which operation of such a carrier might put miners in danger, need be spelled out in the safeguard itself. The statement of the nature of the hazard set forth in safeguard no. 2811430 is sufficient to defeat Oak Grove's attack on its facial validity under the abuse of discretion test.

Oak Grove's arguments are based on an overly technical reading of *SOCCO I*, which, if applied as Oak Grove and other operators raising similar arguments would have it, would no doubt invalidate a substantial percentage of safeguards that have been issued in the 40-plus years that the standard has been enforced.[1] As noted above, the Secretary's authority to issue a safeguard is interpreted broadly. Only in interpreting the requirements of a safeguard is the strict construction standard applicable.

As the Commission has repeatedly emphasized, the fact that safeguards are issued by individual inspectors without consulting with representatives of the operator dictates that additional protections from arbitrary enforcement must be afforded to mine operators. See *Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1202 (D.C.Cir. 2011) *citing SOCCO I and SOCCO II*. The Secretary must establish the validity of the safeguard by proving that it is based upon conditions at the mine that present a transportation hazard to which the safeguard is directed. If found valid, safeguards are interpreted based upon "a narrow construction of the terms of the safeguard and its intended reach." *(SOCCO I*), 7 FMSHRC at 512. The rejection of Oak Grove's "statement of hazard" argument deprives it of none of the protections to which operators are entitled.

Oak Grove relies only on its technical hazard argument in challenging the validity of the safeguard. It does not claim that the alleged failure to independently specify the nature of the hazard renders the requirements of the safeguard ambiguous. Nor could it, because the safeguard's requirement, which the mine has operated under for more than 25 years, is quite clear - all track-mounted personnel carriers [that transport six or more men] shall be provided with a well-maintained fully operational sanding device.[2]

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[1] Similar arguments have been raised and rejected in other cases. *See American Coal Co.*, 33 FMSHRC 2511, 2515-16 (Oct. 2011) (ALJ Zielinski); Docket No. LAKE 2001-171, et. al., Order Denying the American Coal Company's Motion for Summary Decision, December 17, 2010 (ALJ Manning); Docket No. LAKE 2007-139, et al., Order Denying Respondent's Motion for Summary Decision, September 20, 2010 (ALJ Miller). *But see Oak Grove Resources LLC*, 33 FMSHRC 846 (Mar. 2011) (ALJ Moran) *petition for review granted*.

[2] Section 75.1403-6(b)(3) itemizes guidelines, or "criteria," for safeguards covering self-propelled personnel carriers, and provides that track-mounted personnel carriers that transport five or fewer men need not be equipped with a sanding device. Although that restriction is not spelled out in safeguard no. 2811430, it apparently has been considered in interpreting the safeguard. The two citations at issue involve personnel carriers that transport six or more men.

ORDER

I find that safeguard no. 2811430 adequately specifies the nature of the hazard it is intended to address, and that issuance of the safeguard was appropriate under the Secretary's broad discretion. Accordingly, Respondent's Motion for Summary Decision is **DENIED.**

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

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April 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2011-678 A.C. No. 44-07087-262629 A
v.	:	
STEPHEN M. REASOR, employed by BIG LAUREL MINING CORPORATION Respondent	:	Mine No 2

ORDER ON MOTION TO DISMISS

Respondent, Stephen M. Reasor, through Counsel, seeks an Order dismissing the Secretary's Petition on the grounds that the Secretary "failed to act in a timely manner to prosecute her claim." Motion at 1. The events leading up to this matter began with an accident at the mine on August 20, 2009. Respondent relates that Orders were then issued to the mine on or about January 14, 2010 and terminated the same day. Thereafter, on or about August 8, 2011, the Secretary notified Mr. Reasor that she intended to propose a penalty against him under section 110(c) of the Mine Act.

Citing section 105(a) of the Mine Act, Respondent notes that it provides that when the Secretary has issued a citation or order, within a reasonable time after the termination of the related inspection or investigation, the Secretary is to notify the respondent of the proposed penalty for such violation.[1] Respondent contends that, as a matter of law, because the proposed penalty was issued nearly two years after the accident which precipitated these events, prejudice inherently resulted. Respondent cites, "the facts that memories grow dim with the passage of time, the potential of unavailable witnesses and lost evidence demonstrates actual prejudice to Mr. Reasor, the accused, who becomes less able to present a viable defense thus shifting the advantage unfairly to the government." Motion at 2.

Analogizing a section 110(c) matter to a criminal proceeding, Respondent asserts that fair play and due process concepts "must be even more carefully protected. *Id.,* citing two

[1] The parties agree that, per section 105(a), the "reasonable time" requirement is triggered *only after* MSHA completes its investigation. There is also no dispute that the MSHA investigation was concluded on January 14, 2010.

administrative law judge decisions.[2] (emphasis in motion).

The Secretary filed a "Reply" [3] to the Respondent's Motion, arguing, on several grounds, that the assessments here were issued within a "reasonable time."[4] The Secretary first notes that, following MSHA's investigation of the fatal accident at the mine, its section 110(c) investigation continued. The Secretary observes that the Commission itself has acknowledged that the Agency's increased enforcement efforts, coupled with a concomitant increase in matters being contested by mine operators, has led to longer times for the Agency to process matters of all sorts.

The Secretary also contends that, even if one uses the different, longer, time frame measure suggested by the Respondent, its efforts were still completed within a reasonable time. This contention is based on the "deliberate and careful investigation" MSHA must carry out, a responsibility it considers to be more significant where an individual is the subject of the investigation. Reply at 2-3.

Turning to *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984), ("*Chevron*"), the Secretary also states that its interpretation of the "reasonable time" provision is due deference and it notes that in *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005), that court concluded that the Secretary's interpretation of "reasonable

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[2] No Commission decisions were cited. Decisions by administrative law judges have no precedential effect. Their value is to the extent that reasoning in such decisions is persuasive. Respondent cited *Sec. v. Cox*, 19 FMSHRC 1094 (June 1997) and *Sec. v. Morgan*, 20 FMSHRC 38 (Jan. 1998). The Court examined the cited cases and notes that *Morgan* acknowledges that each case must be decided on its own facts, while in *Cox* documents were missing, a key witness had died and other witnesses had left the company. Here, the Court is ruling on the motion based on the facts as they now stand. Further, there are no "*Cox*" type facts presented at this point.

[3] While the Secretary described its reaction as a "Reply" to the motion, the Commission's Rules describe it as a "statement in opposition." 29 C.F.R. 2700.10(d). The term "reply" seems to be most appropriately applied, not to the reaction to a motion, but to the document filed by the moving party in reaction to a response. Accordingly, it is a "response" that is filed to a motion and a "reply" may follow, usually upon leave of court, to the response. *See, for e.g., Sicherman v. Nationwide Life Ins. Co.*, Slip Copy, 2012 WL 1122074, E.D.Pa.,2012, April 04, 2012, *U.S. v. Basham*, Slip Copy, 2012 WL 1130657, D.S.C.,2012, April 04, 2012, noting that Basham filed a response to the government's motion, that the government then filed a reply, and that Basham then filed a surreply.

[4] There is no disagreement about the relevant dates; the contentions here pertain to whether, given the agreed upon time frames, the assessments were issued within a "reasonable time."

time" was afforded deference where a 17 month span had elapsed.[5]

Moving to a different basis of defense to the motion, the Secretary contends that, even if one were to assume that the time frame was not reasonable, dismissal would not be the appropriate remedy. Reply at 5, citing *Brock v. Pierce County,* 476 U.S. 253, 265 (1986), a case which dealt with a Comprehensive Employment and Training Act matter. There, the Supreme Court viewed a 120 day time period as intending "to spur the Secretary to action, not limit the scope of his authority." Reply at 6. Thus, finding no case contradicting that tenet, the Secretary asserts that, absent an express statement from Congress that precludes government action after a time period expires, the government should not be precluded from acting on that basis alone. Supporting this view, the Secretary observes that Congress did not include any consequence for failing to complete an investigation within a reasonable time. *Id.* at 7. In fact, the contrary conclusion was indicated in the Mine Act's legislative history.[6]

The Secretary's Reply goes on to present additional reasons why the Respondent's Motion should be denied.[7] It notes that a contrary conclusion would effectively amount to a windfall to the Respondent. *Id.* at 10. The Court agrees that, *within the four corners of Respondent's Motion*, granting it would amount to a windfall.

Last, the Secretary maintains that, even if it were assumed that a penalty could be avoided on the basis that MSHA did not act within a reasonable time, prejudice must exist from the delay. While citing a host of cases in support of that principle under other Acts, the Secretary notes that, in an apt analogy, the Commission itself has endorsed that approach. In *Sec'y of Labor v. Old Dominion Power Co.*, 6 FMSHRC 1886 (1984), *rev'd on other grounds,* 772 F.2d 92 (4th Cir. 1985), it addressed the mine operator's "reasonable promptness" argument, observing that the mine had not shown any prejudice from the delay and further noting its full awareness

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[5] The Secretary notes that, then Chairman Duffy, in a concurring opinion, stated in *Sec'y v. Marfork Coal*, 29 FMSHRC 626, 637-638 n. 10 (2007), that it was for the Secretary to determine a reasonable time for purposes of section 105(a). Reply at 5.

[6] The Secretary cites in this regard S. Rep. No. 95-181, 95th Cong., 1st Sess. 34, *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 622 (1978). Reply at 8.

[7] Briefly summarized, these assert that the Act contemplates a civil penalty is to be imposed for every violation, and that there is no exclusion from this principle simply because the penalty is being assessed against an individual. Reply at 8-10. Viewing the criteria for the assessment of a civil penalty as the sole criteria to be weighed, the Secretary submits that the Commission cannot graft on to those criteria, the idea that the civil penalty can be eliminated in order to coerce the Secretary into acting more promptly in the future. Reply at 10. The Court agrees with this point but notes again that the Respondent is not barred from asserting defenses at a hearing demonstrating that government inaction has harmed his defenses in a tangible way.

since the miner's fatal accident.[8]

FURTHER DISCUSSION.

As the Secretary has noted, using two years as the time frame to assess whether MSHA issued its proposed civil penalty, per section 105(a) of the Mine Act, within a reasonable time is an incorrect measure because the starting point is *after* the termination of the pertinent inspection or investigation. Here, that means after January 14, 2010. Accordingly, the "two year" time frame becomes 1 year 7 months and 1 week. More significant, in terms of the jeopardy one faces under a section 110(c) proceeding, than either of these measures, is that Mr. Reasor was notified only 9 months after the orders were issued that he was being considered for a penalty under that

[8] Consistent with its obligations as an officer of the court, the Secretary acknowledges case law adverse to its position. The Court lauds the Secretary's high ethics approach. She notes that in *Sec'y of Labor v. Steele Branch Mining,* 18 FMSHRC 6, 14 (1996)(*Steele Branch*), which case adopted a two-step analysis articulated in *Sec'y of Labor v. Rhone-Poulenc of Wyoming Co.,* 15 FMSHRC 2089, 2092-93 (1993) (*Rhone-Poulenc)* , *aff'd on other grounds*, 57 F.3d 982 (10th Cir. 1995), the Commission expressed that the issue of prejudice should be examined only after adequate cause for the delay has been established. The Court has examined these cases but does not come away with the same perspective as the Secretary about their import. To begin, in *Steele Branch* the problem was an unavailable MSHA witness. The Commission stated that its examination looks at "the reason of the delay and whether the delay prejudiced the operator." Not only did the operator fail to show any prejudice, but the Commission took "official notice . . . of the Secretary's unusually high caseload in 1992, and the resultant delay it caused in the penalty proposal process." If that could be said then, the principle applies *a fortiori* now, with Congress having allotted significant additional funds to MSHA's budget, and the Commission's, to deal with such matters. In *Rhone-Poulenc,* the Tenth Circuit, in upholding the Commission found that adequate cause was shown for the Secretary's late filing of a proposed civil penalty. It too noted the Commission's recognition of high workload coupled with insufficient staff as grounds establishing adequate cause. Although it is true that the Commission spoke of a necessity to show adequate cause for a delay and indicated that if that is not shown, a dismissal could be shown, regardless of whether the mine operator demonstrated prejudice, it is noteworthy that the Tenth Circuit, noting the Secretary's position that prejudice must be shown, decided it was unnecessary to reach that question. 57 F.3d at *984. It is also worth pointing out that the Commission did not state in any absolute fashion that prejudice is not part of the conversation, as it observed that "even if the Secretary provides an adequate reason for the delay, dismissal my be warranted if the operator demonstrates that it was prejudiced by the . . . delay in filing." 15 FMSHRC 2089 at *2094. It went on to note that claiming "inherent prejudice" from a delay is insufficient as there must be factual basis to support a claim of prejudice. *Id.* In any event, the Court finds here that the Secretary has established adequate cause for its delay.

provision.[9] Thus, in terms of any concerns about fair play and due process, Mr. Reasor had actual knowledge as to what the Agency was considering for him in short order. Any prudent individual would be about preparing defenses from that time forward, as opposed to waiting to see if delay by MSHA could constitute a bar to its action. In the same vein, a prudent person, aware of MSHA's intentions, would be gathering evidence related to the events and talking with potential witnesses to guard against memories dimming.[10]

Accordingly, based on the foregoing, the Court concludes that, measured in the context of the large number of contested cases and the immense backlog which developed in connection with that, the Secretary has acted within a reasonable time. Further, Respondent Reasor has presented no evidence of any actual prejudice from the delay. Therefore, the Motion to Dismiss is DENIED.

While the motion has been ruled upon, none of the foregoing suggests at all that the "reasonable time" provision is meaningless. To the contrary, as the Court has indicated, Mr. Reasor will be able to present evidence that the delay prejudiced his defense, but this will have to be in a real, not a speculative, or presumptive, manner.

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

[9] As noted, MSHA completed its investigation into the fatality on January 14, 2010. Significantly, Respondent Reasor was notified by certified letter, dated October 14, 2010, that MSHA was proposing to issue an individual civil penalty against him. Thus, Mr. Reasor had actual knowledge that MSHA was considering the individual action against him as of that date, nine months after its investigation was finished. Reply at 3, n. 1.

[10] Notwithstanding that observation, the Court notes again that, as the burden of proof remains with the government, there is nothing to prevent the Respondent from asserting defenses at any hearing which may ensue, relating to lost evidence, as well as to witnesses who have become unavailable or whose memories have faded through time

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April 13, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2011-680 A.C. No. 44-07087-262627 A
v.	:	
ROBERT J. SILCOX, employed by BIG LAUREL MINING CORPORATION, Respondent	:	Mine No 2

ORDER ON MOTION TO DISMISS

Respondent, Robert J. Silcox, through Counsel, seeks an Order dismissing the Secretary's Petition on the grounds that the Secretary "failed to act in a timely manner." Motion at 1.

The events leading up to this matter began with an accident at the mine on or about August 19, 2009. Respondent relates that MSHA's accident report was completed and Orders were issued[1] to the mine, with both those events occurring on or about January 14, 2010. The Orders were then terminated that same day. Thereafter, on or about August 8, 2011, the Secretary notified Mr. Silcox that she intended to propose a penalty against him under section 110(c) of the Mine Act.

Citing section 105(a) of the Mine Act, Respondent notes that it provides that when the Secretary has issued a citation or order, within a reasonable time after the termination of the related inspection or investigation, the Secretary is to notify the respondent of the proposed penalty for such violation.[2] Respondent contends that, as a matter of law, because the proposed penalty was issued nearly two years after the accident which precipitated these events, prejudice inherently resulted. Respondent urges that "[b]ecause memories grow dim with the passage of time and witnesses disappear, the accused becomes less able to present a defense and the advantage shifts to the government. Prejudice in such a situation is inherent." Motion at 2.

[1] The Orders were identified as numbers 8158868 and 8158998-8159001. Motion at 1.

[2] The parties agree that, per section 105(a), the "reasonable time" requirement is triggered *only after* MSHA completes its investigation. There is also no dispute that the MSHA investigation was concluded on January 14, 2010.

Analogizing a section 110(c) matter to a criminal proceeding, Respondent asserts that fair play and due process concepts "must be even more carefully protected." *Id.,* citing administrative law judge decisions.[3] (emphasis in motion).

The Secretary filed a "Reply" [4] to the Respondent's Motion, arguing, on several grounds, that the assessments here were issued within a "reasonable time."[5] The Secretary first notes that, following MSHA's investigation of the fatal accident at the mine, its section 110(c) investigation continued. The Secretary observes that the Commission itself has acknowledged that the Agency's increased enforcement efforts, coupled with a concomitant increase in matters being contested by mine operators, has led to longer times for the Agency to process matters of all sorts. The Secretary also contends that, even if one uses the different, longer, time frame measure suggested by the Respondent, its efforts were still completed within a reasonable time. This contention is based on the "deliberate and careful investigation" MSHA must carry out, a responsibility it considers to be more significant where an individual is the subject of the investigation. Reply at 3-4.

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[3] No Commission decisions were cited. Decisions by administrative law judges have no precedential effect. Their value is to the extent that reasoning in such decisions is persuasive. Respondent cited *Sec. v. Cox*, 19 FMSHRC 1094 (June 1997) and *Sec. v. Morgan*, 20 FMSHRC 38 (Jan. 1998). The Court examined the cited cases and notes that *Morgan* acknowledges that each case must be decided on its own facts, while in *Cox* documents were missing, a key witness had died and other witnesses had left the company.

[4] While the Secretary described its reaction as a "Reply" to the motion, the Commission's Rules describe it as a "statement in opposition." 29 C.F.R. 2700.10(d). The term "reply" seems to be most appropriately applied, not to the reaction to a motion, but to the document filef by the moving party in reaction to a response. Accordingly, it is a "response" that is filed to a motion and a "reply" may follow, usually upon leave of court, to the response. *See, for e.g., Sicherman v. Nationwide Life Ins. Co.*, Slip Copy, 2012 WL 1122074, E.D.Pa.,2012, April 04, 2012, *U.S. v. Basham*, Slip Copy, 2012 WL 1130657, D.S.C.,2012, April 04, 2012, noting that Basham filed a response to the government's motion, that the government then filed a reply, and that Basham then filed a surreply.

[5] There is no disagreement about the relevant dates; the contentions here pertain to whether, given the agreed upon time frames, the assessments were issued within a "reasonable time."

7 XUQLQJ WR &KHYURQ 8 6$, QF Y 1 DWXUDO 5HVRXUFHV ' HIHQVH &RXQFLO , QF 8 6 (1984), ("*Chevron*"), the Secretary also states that its interpretation of the "reasonable time" provision is due deference and it notes that in *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005), that court concluded that the Secretary's interpretation of "reasonable time" was afforded deference where a 17 month span had elapsed.[6]

Moving to a different basis of defense to the motion, the Secretary contends that, even if one were to assume that the time frame was not reasonable, dismissal would not be the appropriate remedy. Reply at 5. Citing *Brock v. Pierce County,* 476 U.S. 253, 265 (1986), a case which dealt with a Comprehensive Employment and Training Act matter. There, the Supreme Court viewed a 120 day time period as intending "to spur the Secretary to action, not limit the scope of his authority." Reply at 6. Thus, finding no case contradicting that tenet, the Secretary asserts that, absent an express statement from Congress that precludes government action after a time period expires, the government should not be precluded from acting on that basis alone. Supporting this view, the Secretary observes that Congress did not include any consequence for failing to complete an investigation within a reasonable time. *Id.* at 7. In fact, the contrary conclusion was indicated in the Mine Act's legislative history.[7]

The Secretary's Reply goes on to present additional reasons why the Respondent's Motion should be denied.[8] It notes that a contrary conclusion would effectively amount to a windfall to the Respondent. *Id.* at 11. The Court agrees that, within the four corners of Respondent's Motion, granting it would amount to a windfall.

Last, the Secretary observes that, even if it were assumed that a penalty could be avoided on the basis that MSHA did not act within a reasonable time, prejudice must exist from the delay. While citing a host of cases in support of that principle under other Acts, the Secretary notes that, in an apt analogy, the Commission itself has endorsed that approach. In *Sec'y of*

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[8] Briefly summarized, these assert that the Act contemplates a civil penalty is to be imposed for every violation, and that there is no exclusion from this principle simply because the penalty is being assessed against an individual. Reply at 8-10. Viewing the criteria for the assessment of a civil penalty as the sole criteria to be weighed, the Secretary submits that the Commission cannot graft on to those criteria, the idea that the civil penalty can be eliminated in order to coerce the Secretary into acting more promptly in the future. Reply at 10. The Court agrees with this point but notes again that the Respondent is not barred from asserting defenses at a hearing demonstrating that government inaction has harmed his defenses in a tangible way.

Labor v. Old Dominion Power Co., 6 FMSHRC 1886 (1984), *rev'd on other grounds,* 772 F.2d 92 (4th Cir. 1985), it addressed the mine operator's "reasonable promptness" argument, observing that the mine had not shown any prejudice from the delay and further noting its full awareness since the miner's fatal accident.[9]

FURTHER DISCUSSION.

As the Secretary has noted, using two years as the time frame to assess whether MSHA issued its proposed civil penalty, per section 105(a) of the Mine Act, within a reasonable time is an incorrect measure because the starting point is *after* the termination of the pertinent inspection or investigation. Here, that means after January 14, 2010. Accordingly, the "two year" time frame becomes 1 year 7 months and 1 week. More significant, in terms of the jeopardy one faces under a section 110(c) proceeding, than either of these measures, is that Mr. Silcox was notified

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[9] Consistent with its obligations as an officer of the court, the Secretary acknowledges case law adverse to its position. The Court lauds the Secretary's high ethics approach. She notes that in *Sec'y of Labor v. Steele Branch Mining,* 18 FMSHRC 6, 14 (1996)(*Steele Branch*), which case adopted a two-step analysis articulated in *Sec'y of Labor v. Rhone-Poulenc of Wyoming Co.,* 15 FMSHRC 2089, 2092-93 (1993) (*Rhone-Poulenc)* , *aff'd on other grounds*, 57 F.3d 982 (10th Cir. 1995), the Commission expressed that the issue of prejudice should be examined only after adequate cause for the delay has been established. Reply at 14. The Court has examined these cases but does not come away with the same perspective as the Secretary about their import. To begin, in *Steele Branch* the problem was an unavailable MSHA witness. The Commission stated that its examination looks at "the reason of the delay and whether the delay prejudiced the operator." Not only did the operator fail to show any prejudice, but the Commission took "official notice . . . of the Secretary's unusually high caseload in 1992, and the resultant delay it caused in the penalty proposal process." If that could be said then, the principle applies *a fortiori* now, with Congress having allotted significant additional funds to MSHA's budget, and the Commission's, to deal with such matters. In *Rhone-Poulenc,* the Tenth Circuit, in upholding the Commission found that adequate cause was shown for the Secretary's late filing of a proposed civil penalty. It too noted the Commission's recognition of high workload coupled with insufficient staff as grounds establishing adequate cause. Although it is true that the Commission spoke of a necessity to show adequate cause for a delay and indicated that if that is not shown, a dismissal could be shown, regardless of whether the mine operator demonstrated prejudice, it is noteworthy that the Tenth Circuit, noting the Secretary's position that prejudice must be shown, decided it was unnecessary to reach that question. 57 F.3d at *984. It is also worth pointing out that the Commission did not state in any absolute fashion that prejudice is not part of the conversation, as it observed that "even if the Secretary provides an adequate reason for the delay, dismissal my be warranted if the operator demonstrates that it was prejudiced by the . . . delay in filing." 15 FMSHRC 2089 at *2094. It went on to note that claiming "inherent prejudice" from a delay is insufficient as there must be factual basis to support a claim of prejudice. *Id.* In any event, the Court finds here that the Secretary has established adequate cause for its delay.

about five months after the orders were issued that he was being considered for a penalty under that provision.[10] Thus, in terms of any concerns about fair play and due process, Mr. Silcox had actual knowledge as to what the Agency was considering for him in short order. Any prudent individual would be about preparing defenses from that time forward, as opposed to waiting to see if delay by MSHA could constitute a bar to its action. In the same vein, a prudent person, aware of MSHA's intentions, would be gathering evidence related to the events, and talking with potential witnesses to guard against memories dimming.[11]

Accordingly, based on the foregoing, the Court concludes that, measured in the context of the large number of contested cases and the immense backlog which developed in connection with that, the Secretary has acted within a reasonable time. Further, Respondent Silcox has presented no evidence of any actual prejudice from the delay. Therefore, the Motion to Dismiss is DENIED.

While the motion has been ruled upon, none of the foregoing suggests at all that the "reasonable time" provision is meaningless. To the contrary, as the Court has indicated, Mr. Silcox will be able to present evidence that the delay prejudiced his defense, but this will have to be in a real, not a speculative, or presumptive, manner.

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

[10] As noted, MSHA completed its investigation into the fatality on January 14, 2010. Significantly, Respondent Silcox was notified by certified letter, dated June 21, 2010, that MSHA was proposing to issue an individual civil penalty against him. Thus, Mr. Silcox had actual knowledge that MSHA was considering the individual action against him as of that date, about five months after its investigation was finished. Reply at 3, and n. 1.

[11] Notwithstanding that observation, the Court also notes that, as the burden of proof remains with the government, there is nothing to prevent the Respondent from asserting defenses at any hearing which may ensue, relating to lost evidence, and witnesses who have become unavailable or whose memories have faded through time

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April 20, 2012

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant,	:	
v.	:	Docket No. SE 2010-581-R
	:	Order No. 6698547; 02/18/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent.	:	No. 7 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2010-760
Petitioner,	:	A.C. No. 01-01401-215760
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent.	:	Mine: No. 7 Mine

ORDER GRANTING MOTION TO AMEND

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

This case is before upon the Notice of Contest of Jim Walter Resources, Inc. ("JWR"), and 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. On January 19, 2012, I issued my Notice of Hearing and Order to File Prehearing Report scheduling this matter for hearing on May 1 and 2, 2012. Two pretrial issues are before me. First, the Secretary filed her Motion to Amend to Cite Standard in the Alternative on December 16, 2011 ("Motion to Amend"). On April 16, 2012, the Secretary renewed her Motion by filing her Amended Motion to Amend to Cite Standard in the Alternative ("Amended Motion to Amend").[1] JWR did not submit responses to either of the Secretary's Motions.

The second issue before me is Contestant JWR's April 5, 2012, Motion for Partial Summary Decision ("MPSD") seeking dismissal of the section 107(a) imminent danger order contested in Docket No. SE 2010-581-R. The Secretary filed her response to the Motion on April 19, 2012. For the reasons set forth below, the Secretary's Motion to Amend is GRANTED and JWR's Motion for Partial Summary Decision is DENIED.

[1] Referencing the Secretary's original December 16, 2011, request to amend the cited standard, the Amended Motion to Amend merely restates the requests of the Secretary's original Motion.

I. Motion to Amend

The Secretary's Motion to Amend seeks to revise the cited standard of Citation No. 6698187 in Docket No. SE 2010-760 from 30 C.F.R. § 75.204(c)(1) to § 75.202(a). (Mot. Amend 1.) The Secretary submits that § 75.202(a) more accurately addresses the cited conditions. (*Id.*) She does not seek to change her factual pleadings and asserts that the facts, evidence, and witnesses involved in this matter remain the same. (*Id.*)

The Commission analogizes the amendment of citations to Federal Rule of Civil Procedure 15(a), which states that leave for amendment "shall be freely given when justice so requires." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Only bad faith of the moving party, purposeful delay, or legal prejudice should bar such amendments. 14 FMSHRC at 1290 (citing *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); 3 J. Moore & R. Freer, *Moore's Federal Practice* 15.08[2], 15-47 to 15-49 (2d ed. 1991)).

Here, the Secretary has established good cause to amend the cited standard of Citation No. 6698187. JWR has not shown any legal prejudice that would preclude amendment of the citation. JWR's only mention of either of the Secretary's Motions can be found in a footnote to its April 16, 2012, Amended Prehearing Report. There, JWR notifies the Court it "will submit a more formal opposition" if the parties are unable to settle the citation prior to the hearing. (Am. PHR 1 n.1.) No purposeful delay is evident or alleged. Accordingly, it is **ORDERED** that the cited standard of Citation No. 6698187 be amended to 30 C.F.R. § 75.202(a).

II. Motion for Partial Summary Decision

In its Motion for Partial Summary Decision, JWR seeks dismissal of Docket No. SE 2010-581-R involving its contest of Order No. 6698547.[2] MSHA Inspector John Terpo issued this order on February 18, 2010, during his inspection of JWR's No.7 Mine. As Inspector Terpo examined the No. 2 Longwall Section Face, he saw a miner walk in the conveyor pan line along the longwall face and issued the order. (Notice of Contest, Attach. A.) Order No. 6698547 specifically alleges:

> A replacement shield hydraulic jack leg was located at the No. 9 shield on the No. 2 Longwall Section face. The shield was advanced in the walkway area to the conveyor pan line to the extent that there was little or no clearance for personnel to travel due to the jack leg. A miner walking from the headgate side down the face was observed climbing into the conveyor pan line cable troth at shield 9 in order to get down the face. Once clearing the shield with the replacement jack leg he stepped back into the walkway. The shearer was advancing down the face at this time and the conveyor chain was transporting coal and rock. An oral 107(a)

[2] This Order abbreviates citations to the Secretary's exhibits as "MPSD Gov't Ex."

imminent danger order was issued to John Hamilton, Section Foreman at 0940 hours.

(*Id.*)

JWR argues the undisputed facts of record establish that Inspector Terpo abused his discretion in issuing Order No. 6698547. According to JWR, Inspector Terpo improperly issued the Order after the alleged imminent danger had passed. (MPSD 7–12.) JWR also asserts that Inspector Terpo reacted impulsively to the miner's walk through the conveyor pan and failed to conduct a reasonable investigation prior to issuing the Order. (*Id.* at 12–14.) JWR further argues that the hazardous risks associated with the conditions cited by Inspector Terpo did not rise to the degree of imminence required by the imminent danger standard. (*Id.* at 14–18.)

The Secretary responds that significant factual discrepancies remain and summary decision is not appropriate. (Resp. MPSD 1–5.) The Secretary further argues that Inspector Terpo issued the Order contemporaneously with the allegedly dangerous condition he observed. (*Id.* at 5–8.) Finally, the Secretary argues that Inspector Terpo had a reasonable basis upon which to issue the Order. (*Id.* at 8–10.)

A. Standard for Granting Summary Decision

Under Commission Rule 67, "A motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

The Commission "'has long recognized that [] 'summary decision is an extraordinary procedure,'' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which 'the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'"" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the Court must evaluate the evidence in "'the light most favorable to . . . the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences "'drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Standard of Review for Imminent Danger Orders

Section 107(a) of the Mine Act states:

> If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, 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 814(c) of this title, 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.

30 U.S.C. § 817(a). The Mine Act defines an "imminent danger" as "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." *Id.* § 802(j). More specifically, "'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated*.'" *Rochester & Pittsburgh Coal Co.* (*R&P Coal*), 11 FMSHRC 2159, 2163 (Nov. 1989) (emphasis in original) (quoting *Eastern Assoc'd Coal Corp. v. IBMA*, 491 F.2d 277, 278 (4th Cir. 1974)). The hazardous condition must have "a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

Because an inspector must act immediately in response to an imminently dangerous condition or practice, the Court must measure the validity of an imminent danger order under the abuse of discretion standard. *R&P Coal*, 11 FMSHRC at 2164 (quoting *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 31 (7th Cir. 1975). Though the Court must afford wide discretion to an inspector's judgment, "the reasonableness of an inspector's imminent danger finding is subject to subsequent examination at [an] evidentiary hearing." *Island Creek Coal Co.*, 15 FMSHRC 339, 346–47 (Mar. 1993). The inspector's decision must be reasonable in light of the information available to him or her at the time the order is issued. *Cumberland Coal Res., LP*, 28 FMSHRC 545, 558 (Aug. 2006); *Island Creek Coal*, 15 FMSHRC at 348. An imminent danger order does not require an underlying violation of a mandatory health or safety standard to be valid. *Cyprus Empire*, 12 FMSHRC at 918.

C. Analysis and Conclusions of Law

In the case before me, JWR argues that no issues of material fact remain surrounding the imminent danger order. According to JWR, "It is undisputed that the present [imminent danger order] was exclusively based on [the miner's] act of stepping onto the cable trough. It is also undisputed that the [imminent danger order] was issued *after* [the miner] withdrew himself from the cable trough and any danger he faced while on it." (MPSD 11 (emphasis in original).) In

short, JWR criticizes the order because it was based solely on the miner's transgression, rather than a comprehensive view of the mine's conditions. JWR also believes the order was improperly issued because it came after the miner had left the longwall conveyor pan.

JWR's contentions do not have a basis in undisputed material fact. The Secretary points to evidence supporting her view that Inspector Terpo based his imminent danger order on multiple factors, including the operation of the longwall equipment as well as concern for the other miners on the section. (Resp. MPSD at 3; MPSD Gov't Ex. 7 at 95:19–97:22, 110:6–9, 116:4–11.) A close reading of Inspector Terpo's deposition testimony also demonstrates that the precise timing of the issuance of his imminent danger order is not clear-cut. (MPSD Gov't Ex. 7 at 101:6–102:3, 107:14–108:2.) The miner's walk through the conveyor pan did not take long, and Inspector Terpo did not indicate precisely how his order fit into this chain of events. (*Id.*) The noisy environment in which Inspector Terpo initially issued his Order, which was orally, further muddies the analysis. (*Id.*) A hearing is necessary so I can conduct a proper credibility determination of the evidence.

JWR also asserts that the imminent danger order resulted from Inspector Terpo's impulsive reaction, as opposed to a reasonable investigation of the circumstances. (MPSD 12–14.) JWR bases its criticism on the fact that Inspector Terpo could not identify a violation at the time he issued the Order. (*Id.*) This argument fails as a matter of law. An imminent danger order need not involve the violation of a mandatory standard. *Cyprus Empire*, 12 FMSHRC at 918. The order merely needs to involve a practice or condition associated with the reasonable potential to cause death or serious injury within a short period of time. *Utah Power & Light*, 13 FMSHRC at 1622.

Finally, JWR argues that Inspector Terpo did not establish a sufficient level of imminent danger that could justify the Order. (MPSD 14–18.) The Commission has recognized that "[w]ithout considering the 'percentage of probability that an accident will happen,' the inspector must determine whether the condition presents an impending threat to life and limb." *Utah Power & Light*, 13 FMSHRC at 1622 (quoting S. Rep. No. 95-181, at 35 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3438). Inspector Terpo identified a number of ways a serious or fatal injury could have resulted from this condition. (MPSD Gov't Ex. 7 at 96:3–97:22.)

Significant issues of material fact remain with respect to Order No. 6698547 issued pursuant to section 107(a). I conclude that the record before me does not support summary decision of Order No. 6698547. Accordingly, JWR's Motion for Partial Summary Decision is **DENIED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

April 23, 2012

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant,	:	
v.	:	Docket No. SE 2010-581-R
	:	Order No. 6698547; 02/18/2010
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 01-01401
Respondent.	:	No. 7 Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2010-760
Petitioner,	:	A.C. No. 01-01401-215760
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent.	:	Mine: No. 7 Mine

ORDER GRANTING MOTION TO CONTINUE HEARING

ORDER SCHEDULING CONFERENCE CALL

This case is before upon the Notice of Contest of Jim Walter Resources, Inc. ("JWR"), and 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. It is set for hearing on May 1 and 2, 2012, pursuant to my January 19, 2012, Notice of Hearing and Order to File Prehearing Report. On April 5, 2012, JWR filed its Motion for Partial Summary Decision ("MPSD"). The Secretary filed her response to the MPSD on April 16. Also on April 16, JWR filed its Motion to Continue Hearing, indicating the Secretary's objection to the continuance. The next day, the Secretary's counsel informed my Law Clerk that one of her witnesses had training during the week of the hearing and stated that she would not oppose a continuance "if the Court is inclined to continue this case per Respondent's request." On April 20, 2012, I issued my Order Granting Motion to Amend and Order Denying the MPSD.

As support for its request to continue the hearing, JWR asserts that my decision on the MPSD could affect Citation No. 6698548 at issue in SE 2010-760 and as such, my decision on the MPSD should precede adjudication of the citation at the hearing. The parties' counsel have a history of resolving on my docket without hearing, and in light of the record in this case, I have determined that continuing the hearing date of this matter is in the best interests of justice.

JWR's Motion to Continue Hearing is hereby **GRANTED** and the hearing in this case is **CONTINUED** until a later date. Counsel for the parties is hereby **ORDERED** to participate in a conference call with my Law Clerk, Joshua Shaw, on **Tuesday, May 1, 2012**, at **10:30 a.m. ET** to discuss scheduling a new hearing on this case. They shall dial 1-866-867-4769 and enter passcode 847-269 to connect to the call.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

April 25, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-955
Petitioner	:	A.C. No. 15-18911-181323
	:	
v.	:	Docket No. KENT 2009-1426
	:	A.C. No. 15-18911-192304
	:	
CAM MINING, LLC,	:	Mine # 28
Respondent	:	

NOTICE OF RESCHEDULED HEARING

The hearing in these proceedings had been scheduled for May 1, 2012, in the vicinity of Pikeville, Kentucky. During an April 19, 2012, telephone conference, for the reasons discussed below, the parties were advised that the hearing would be moved to the Commission's Headquarters in Washington, D.C. After being informed of the change in hearing location, the Secretary requested a continuance for the purpose of providing additional time to complete travel arrangements. Good cause having been shown, the Secretary's request for continuance **IS GRANTED**. The parties have agreed that June 6, 2012, is a suitable revised hearing date.

These matters concern 46 violations for which the Secretary has proposed a total civil penalty of $44,996.00. During the course of several telephone conferences culminating in the April 19, 2012, conference, the parties advised that they have settled 44 of the 46 subject violations. The two citations that remain are 104(d)(2) Order No. 8222328 in Docket No. KENT 2009-1426 and 104(a) Citation 8222333 in Docket No. KENT 2009-955.

104(d)(2) Order No. 8222328 in Docket No. KENT 2009-1426, issued on February 10, 2009, concerns an alleged violation of 30 C.F.R. § 75.400 that prohibits accumulations of float coal dust on electrical equipment. The cited violation was initially attributed to a moderate degree of negligence. The citation was subsequently modified to a 104(d)(2) order that specified the negligence as high. The modification was based on the Respondent's history of previous violations of section 75.400. The modified 104(d) order states, in pertinent part, "[t]hese accumulations are evident through the box['s] inspection window and appear to be approximately 1/8 of an inch in depth and are deposited upon the energized components and the box['s] floor." The Secretary proposes a civil penalty of $6,224.00 for 104(d)(2) Order No. 8222328.

104(a) Citation 8222333 in Docket No. KENT 2009-955, issued on February 11, 2009, concerns an alleged violation of 30 C.F.R § 75.512-2 that requires weekly examinations of electrical equipment to ensure that electrical equipment is maintained in a safe condition. The cited violation was attributable to a moderate degree of negligence. The Secretary proposes a civil penalty of $585.00 for Citation No. 8222333. The Citation, in pertinent part, states:

> The examination record indicates that the examination performed on 2-9-09 revealed no hazardous conditions. However, on 2-10-09 an MSHA inspector observed accumulations of black float coal dust deposited on the inside, energized phase conductors and floor, which resulted in the issuance of a violation of 75.400 [104(d)(2) Order No. 8222328]. This condition was observed through the box['s] provided inspection window and would be obvious to any reasonably prudent person familiar with the requirements of this type of examination.

During the telephone conferences, I expressed my recognition of the parties' good faith efforts in reaching a settlement for the vast majority of the citations at issue in these proceedings. With regard to the subject accumulations, counsel for both parties agreed that the accumulations were observed through the window of an electrical box. The parties further agreed that the accumulations were neither objectively measured nor analyzed for combustible content.

With respect to the fact of the violations, counsel for the Respondent asserted that the cited 1/8 of an inch accumulations primarily consisted of inert rock dust. However, I urged the parties to resolve the issue of the fact of the violations based on Commission case law that affords broad discretion to mine inspectors in determining whether accumulations violate section 75.400. *See Old Ben Coal Company*, 2 FMSHRC 2806, 2808 (October 1980); *Amax Coal Co.*, 19 FMSHRC 846, 847, 849 (May 1997); *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 483 (Mar. 1997); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 19-20 (Jan. 1997) (Marks, concurring).

Turning to the issue of unwarrantable failure, the parties were requested to focus on whether the cited accumulations, only estimated to be between 1/16 and 1/8 of an inch in depth, were of sufficient magnitude to support an unwarrantable failure. In this regard, the parties were directed to consider in their settlement negotiations the indicia of an unwarrantable failure that include the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation 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 compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997); *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).

The various factors considered in determining whether a violation is unwarrantable must be viewed in the context of the factual circumstances in a particular case, and some factors may be entitled to more weight in a particular factual scenario. *See Consolidation Coal*, 23 FMSHRC 588, 593 (June 2001) (citations omitted). While the history of previous violations is relevant, a subsequent violation of section 75.400 manifest by accumulations of no more than 1/8 of an inch is not *per se* unwarrantable. Thus, the parties should consider in any settlement negotiations, or in preparation for a hearing, whether there are any additional aggravating factors, given the *de minimis* extent of the subject accumulations. In this regard, the cited accumulations were originally attributed to a moderate degree of negligence. So too, the failure of the electrical examiner to note the accumulations was also attributed to moderate negligence reflecting that the accumulations may not have been conspicuous.

Although there do not appear to be irreconcilable differences with regard to the fact of the violations, the parties apparently have been unable to reach an agreement with respect to unwarrantable failure. In the absence of settlement, these matters shall proceed to hearing. However, in view of the circumstances discussed above reflecting the parties' inability to reach a settlement, given the Commission's limited resources and unprecedented case load, the hearing in these matters shall be moved from Pikeville, Kentucky to the Commission's Headquarters. **IT IS ORDERED** that any settlement must be presented to me **in writing on or before May 22, 2012**. Any settlement thereafter must be presented on the record at the hearing. The hearing will commence **at 10:00 a.m. on June 6, 2012**, at the following location:

Federal Mine Safety and Health Review Commission
601 New Jersey Avenue, NW, Suite 9500
Backley Hearing Room, 9th Floor
Washington, DC 20001

Any person who plans to attend this hearing and requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must request them in advance (subject to the limitations set forth in § 2706.160(d)).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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Mark E. Heath, Esq., Spilman, Thomas, & Battle, PLLC, 300 Kanawha Blvd., East, P.O. Box 273, Charleston, WV 25321-0273

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9933

April 27, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2011-678 A.C. No. 44-07087-262629 A
v.	:	
STEPHEN M. REASOR, employed by BIG LAUREL MINING CORPORATION Respondent	:	Mine No 2

ORDER REGARDING SECRETARY'S REQUEST FOR CLARIFICATION OF ORDER ON MOTION TO DISMISS

On April 13, 2012, the Court issued its Order on Motion to Dismiss in this matter, finding that the Secretary acted within a reasonable time in issuing its notification of intent to propose a penalty against Mr. Reasor, that its proposed penalty was issued within a reasonable time, and that no prejudice was demonstrated by the passage of time involved. Now the Secretary has asked for clarification of the Court's Order, as to whether the "reasonable time" requirement is measured from the conclusion of the Agency's accident investigation or the conclusion of its section 110(c) investigation.

The Secretary's request for clarification is reasonable. At the outset, the Court believes that its prior Order clearly suggested that, and now expressly finds that, even if the "reasonable time" were to be measured from the time of the conclusion of the Agency's accident investigation, the Secretary acted within a reasonable time. However, now focusing on the proper starting point for measuring the reasonable time, the Court, for the reasons which follow, finds that the time begins to run *at the conclusion of the Agency's section 110(c) investigation.*

The language employed by section 110(c) does not offer any direct guidance about investigations or time periods, but it does note that individuals who violate a mandatory health or safety standard are subject to the same civil penalties as mine operators. In section 110(c) matters the Commission looks to section 105(a) of the Mine Act, applying the same "reasonable time" requirement for notifying a mine operator of a proposed civil penalty. Accordingly, the reasonable time notification aspect applies in both instances to a time "after the termination of such inspection or investigation." It would seem that, as there are distinct investigations for a section 104 matter and a 110(c) matter, the conclusion of any investigation associated with a section 110(c) matter is the only reasonable point in time to gauge the Secretary's action.

Decisions by Commission administrative law judges and the Commission itself support this conclusion. For example, in *Laurel Run Mining Co.,* 19 FMSHRC 437, 1997 WL 144994 (Feb. 1997), a section 110(c) action, the respondent made a similar claim that the Secretary had failed to act within a reasonable time in issuing its proposed penalty against Laurel Run's agent. There, the accident investigation was completed in October 1994 but the proposed penalty assessment was not made until some 21 months later, in July 1996. The judge stated that the operable time period in such cases is the "period between completion of MSHA's 110(c) investigation . . . and [the] notification [date] of the proposed penalties . . . ." *Id.* at * 441. Thus, applying that time measure, the judge determined that 12, not 21, months had elapsed. Applying that measure, the judge found that delay to be within the "reasonable time" period.[1]

In *Wayne Jones, Mike Sumpter et al,* 20 FMSHRC 1267, 1998 WL 993717, (Nov. 1998), another case alleging that civil penalties were not filed within a reasonable time, an Order and a determination to conduct a 110(c) investigation occurred during August 1996 but a special investigator was not assigned in the matter until February 1997. That investigative process took until October 1997 before it was referred to the Solicitor's Office and it was not until February 1998 that the individual respondents were notified of MSHA's intent to assess 110(c) penalties against them. The judge noted that, while section 104(a) of the Mine Act requires citations to be issued with reasonable promptness, there is no binding authority to *require* dismissal based on Secretarial delay in its investigation. *Id.* at *1270. Distinguishing the decision of another administrative law judge,[2] the judge in *Wayne Jones, Mike Sumpter et al* found that there were credible reasons for the delay, citing the Agency's heavy case load. Describing dismissal as a harsh remedy, the judge rejected the claim that passage of time itself demonstrated inevitable fading of memories, stating that "prejudice will not be incurred from passage of time alone." *Id.* at 1271. Implicitly, the judge was evaluating the "reasonable time" from the point in time when it was decided to perform, and then conclude, a special investigation, as that court referenced the

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[1] As an additional observation, it is also noteworthy, at least from this Court's perspective, the judge in *Laurel Run* noted that the respondents failed to show any prejudice from the delay and "[w]hether the passage of time [a]ffects the weight that should be afforded to particular testimony is a matter for the trier of fact. [As the] Secretary has the burden of proof in these matters . . . any alleged fading of memories would most probably inure to the benefit of the respondent[]." *Id.*

[2] In *Doyal Morgan, Employed by Asarco*, 20 FMSHRC 38, 1998 WL 4332, (Jan. 1998), another judge dealt with the same issue. There, the judge noted that the Commission addresses delayed penalty assessment issues in the same fashion whether they stem from section 110(a) or section 110(c) matters. That is, per the Commission's decision in *Steele Branch Mining,* 18 FMSHRC 6, 14 (January 1996), late penalty filings are permitted where the Secretary demonstrates adequate cause for the delay and the respondent is unable to show prejudice from it. However, under the facts presented, the judge found that the Solicitor had not justified the late filing.

time period when the Section 110(c) investigation was being conducted.[3] *Id.* at *1268, *1271.

In *Paiute Aggregates Inc.,* 24 FMSHRC 943, 2002 WL 31934297 (Oct. 2002), the same "reasonable time" issue was presented. As in *Laurel Run Mining Co.* (*supra*), the judge in *Paiute Aggregates* used as his time measure the date the date of the 110(c) investigation and its completion in evaluating the "reasonable time" issue. [4] *Id*. at *943-944. Also, in *CDK Contracting Company,* 25 FMSHRC 71, 2003 WL 21439207 (Feb. 2003), the same "reasonable time" issue was at hand. There the court was considering civil penalties against the mine, but the case is still instructive as the judge was measuring the time that elapsed *after* the termination of the accident investigation.[5]

Last, in *Sec'y v. Sedgman and David Gill, Employed by Sedgman*,[6] 28 FMSHRC 322, 2006 WL 1970212 (June 2006) ("*Sedgman and Gill*"), a majority of the Commission found that an 11 month delay in assessing the civil penalty was not unreasonable, "given the ongoing section 110(c) investigation." A fatality had occurred at the mine's preparation plant. There, the Secretary, following an accident investigation report, issued citations to Sedgman in early February 2002, with a proposed penalty for that in May 2002, and subsequently, a second proposed penalty arising out of the same matter was issued on December 31, 2002, a period of

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[3] It is recognized that the underlying Order and the decision to launch the 110(c) investigation occurred within a few weeks of each other, but that fact does not take away from the judge's determination that the measure of a reasonable time is connected with the separate 110(c) investigation.

[4] Citing the Commission's *Steele Branch Mining* decision, 18 FMSHRC 6, 14 (Jan. 1996), the judge in *Paiute Aggregates Inc.* noted that the reason for delay and whether delay prejudiced the operator were the factors identified by the Commission. In addition, the judge observed that the Commission took "official notice" that the Secretary then had an unusually high case load and that such constituted adequate reason for the delay. Further, the Commission expressed that the Mine Act's design precluded automatic dismissal of an untimely filed petition. The court found the nine month delay involved in *Paiute Aggregates* to be a reasonable time, and further, if it were assumed that some portion of that was not sufficiently prompt, adequate cause was demonstrated for such delay. There was no evidence that the Agency had made "deliberate choices" in its resource allocation producing chronic under-staffing. It would be fair to assume that the Commission would not want to become involved in MSHA's or the Solicitor's staffing decisions.

[5] Again, as a collateral observation, the Court here notes that the judge in *CDK Contracting Company* also observed that the "mere potential for prejudice is insufficient [and that] [d]ismissal of civil penalty proceedings because of a delay that was not prejudicial would clearly run counter to the concern for safe and healthful working conditions [which was the impetus] that led to the creation of the civil penalty program." *Id.* at * 73.

[6] *Sedgman* was a general contractor hired by Jim Walter Resources.

11 months after the February 2002 citation had been issued. The Commission's recounting of the facts noted that "[d]uring that time and beyond, MSHA conducted a special investigation that culminated on April 2, 2003, in charges being brought against Gill . . . under section 110(c) of the Act . . . [and] [o]n August 18, 2003, the Secretary proposed a penalty . . . against Gill." *Id.* at * 4. Thus, the Commission itself has recognized these are separate investigations which are not to be blurred, as a section 110(c) matter is distinct from one made under section 105(a). *Id.* at *14.

In the same case, the Commission noted that in *Twentymile Coal Co.,* 26 FMSHRC 666, (Aug. 2004), *rev'd on other grounds,* 411 F.3d 256 (D.C. Cir. 2005) ("*Twentymile I*"), the D.C. Circuit rejected the Commission's calculation for determining the reasonable time for notification of its proposed penalty by determining that the date of the issuance of the accident report was the measure, not the date the citation or order was issued, nor the date it was terminated. In opting for the accident report's issuance, the D.C. Circuit was deferring to the Secretary's interpretation, finding it to be reasonable. *Id.* at *13.

Accordingly, for the reasons set forth above, the Court finds that the measuring point for assessing the "reasonable time" for notification of a proposed penalty in a section 110(c) matter is upon the conclusion of MSHA's 110(c) investigation.

/s/ William B. Moran
William B. Moran

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April 27, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2011-680 A.C. No. 44-07087-262627 A
v.	:	
ROBERT J. SILCOX, employed by BIG LAUREL MINING CORPORATION, Respondent	:	Mine No 2

ORDER REGARDING SECRETARY'S REQUEST FOR CLARIFICATION OF ORDER ON MOTION TO DISMISS

On April 13, 2012, the Court issued its Order on Motion to Dismiss in this matter, finding that the Secretary acted within a reasonable time in issuing its notification of intent to propose a penalty against Mr. Reasor, that its proposed penalty was issued within a reasonable time, and that no prejudice was demonstrated by the passage of time involved. Now the Secretary has asked for clarification of the Court's Order, as to whether the "reasonable time" requirement is measured from the conclusion of the Agency's accident investigation or the conclusion of its section 110(c) investigation.

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[3] It is recognized that the underlying Order and the decision to launch the 110(c) investigation occurred within a few weeks of each other, but that fact does not take away from the judge's determination that the measure of a reasonable time is connected with the separate 110(c) investigation.

[4] Citing the Commission's *Steele Branch Mining* decision, 18 FMSHRC 6, 14 (Jan. 1996), the judge in *Paiute Aggregates Inc.* noted that the reason for delay and whether delay prejudiced the operator were the factors identified by the Commission. In addition, the judge observed that the Commission took "official notice" that the Secretary then had an unusually high case load and that such constituted adequate reason for the delay. Further, the Commission expressed that the Mine Act's design precluded automatic dismissal of an untimely filed petition. The court found the nine month delay involved in *Paiute Aggregates* to be a reasonable time, and further, if it were assumed that some portion of that was not sufficiently prompt, adequate cause was demonstrated for such delay. There was no evidence that the Agency had made "deliberate choices" in its resource allocation producing chronic under-staffing. It would be fair to assume that the Commission would not want to become involved in MSHA's or the Solicitor's staffing decisions.

[5] Again, as a collateral observation, the Court here notes that the judge in *CDK Contracting Company* also observed that the "mere potential for prejudice is insufficient [and that] [d]ismissal of civil penalty proceedings because of a delay that was not prejudicial would clearly run counter to the concern for safe and healthful working conditions [which was the impetus] that led to the creation of the civil penalty program." *Id.* at * 73.

[6] *Sedgman* was a general contractor hired by Jim Walter Resources.

February 2002, with a proposed penalty for that in May 2002, and subsequently, a second proposed penalty arising out of the same matter was issued on December 31, 2002, a period of 11 months after the February 2002 citation had been issued. The Commission's recounting of the facts noted that "[d]uring that time and beyond, MSHA conducted a special investigation that culminated on April 2, 2003, in charges being brought against Gill . . . under section 110(c) of the Act . . . [and] [o]n August 18, 2003, the Secretary proposed a penalty . . . against Gill." *Id.* at * 4. Thus, the Commission itself has recognized these are separate investigations which are not to be blurred, as a section 110(c) matter is distinct from one made under section 105(a). *Id.* at *14.

In the same case, the Commission noted that in *Twentymile Coal Co.,* 26 FMSHRC 666, (Aug. 2004), *rev'd on other grounds,* 411 F.3d 256 (D.C. Cir. 2005) ("*Twentymile I*"), the D.C. Circuit rejected the Commission's calculation for determining the reasonable time for notification of its proposed penalty by determining that the date of the issuance of the accident report was the measure, not the date the citation or order was issued, nor the date it was terminated. In opting for the accident report's issuance, the D.C. Circuit was deferring to the Secretary's interpretation, finding it to be reasonable. *Id.* at *13.

Accordingly, for the reasons set forth above, the Court finds that the measuring point for assessing the "reasonable time" for notification of a proposed penalty in a section 110(c) matter is upon the conclusion of MSHA's 110(c) investigation.

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

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