MAY 2012

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ADMINISTRATIVE LAW JUDGE ORDERS

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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

May 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-2481
v.	:	A.C. No. 46-09246-256849
WEST VIRGINIA MINE POWER, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 28, 2011, the Commission received from West Virginia Mine Power, Inc. ("WVMP") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

The record indicates that the proposed assessment was delivered on June 6, 2011, and became a final order of the Commission on July 6, 2011. MSHA mailed a delinquency notice on August 24, 2011, and received a payment check dated September 20, 2011, in the amount of $923. WVMP filed a motion to reopen on September 26, 2011. WVMP asserts that although MSHA records show that the assessment was signed for by M. Odell, WVMP has no record of receiving it since it was not delivered to the safety director. WVMP claims it has a meticulous process for handling assessment forms which are forwarded to the safety director.

The Commission sent WVMP a letter asking it to provide the affidavit of M. Odell, and explain what office procedures were implemented to prevent failures to timely contest in the future. In response, WVMP asserts that Miranda Odell forwarded the proposed assessment to Jim Kiser, the safety director of a different mine. Mr. Kiser cannot recall whether he delivered the assessment to his son, Jimmie Kiser, the safety director of the mine involved in this case. WVMP asserts that "Jimmie Kiser likewise cannot recall whether he received the 1000-179 Form," Ren. Mot. at 4, but Mr. Kiser's declaration states that he did not receive the assessment form. Ren. Mot. Ex. 3 at 2. WVMP states that Ms. Odell does not generally receive packages as part of her duties, and that she delivered the letter to Jim Kiser, since she did not know the individual to whom the letter was addressed, Mr. Grover McClung. WVMP fails to identify any new office procedures implemented to prevent such failures in the future.

The Secretary opposes the request to reopen and notes that the operator fails to establish exceptional circumstances that warrant reopening. The Secretary contends that there appears to be no monitoring or follow-up for receiving and processing proposed assessments to ensure that contests are timely filed. Moreover, the Secretary states that she did not oppose a previously-filed motion to reopen in which similarly inadequate or unreliable internal procedures were described by Mr. Kiser. In the previous case, the Secretary urged the operator to take penalty assessments seriously and cautioned that she might oppose future motions to reopen penalty assessments that were not contested in a timely manner.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of any procedure to monitor and reliably process received mail represents an inadequate or unreliable internal processing system. *See Double Bonus*, 32

FMSHRC at 1156; *Sloss Indus., Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987). We also note that the Secretary sent her previous cautionary non-opposition on March 18, 2011, while this proposed assessment was delivered on June 6, 2011. Therefore, the operator was on notice, and had more than two months to implement new office procedures for the timely processing of MSHA correspondence.

Having reviewed WVMP's requests and the Secretary's response, we conclude that WVMP has failed to establish good cause for reopening the proposed penalty assessment, and deny its motions with prejudice.

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-41-M
v.	:	A.C. No. 13-01999-260052
LECLAIRE INVESTMENTS, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 17, 2011, the Commission received from LeClaire Investments, Inc. ("LeClaire") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on July 12, 2011, and became a final order of the Commission on August 11, 2011. LeClaire asserts that it was not aware the assessment was not timely contested until it received MSHA's delinquency notice on September 30, 2011. LeClaire further states that it timely contested the assessment on July 21, 2011, and paid the uncontested penalties. The Secretary does not oppose the request to reopen, but notes that there is no record of MSHA receiving a contest of this proposed assessment. The record does show that MSHA received a timely payment for the uncontested penalties, by check dated August 4, 2011.

In considering an operator's request to reopen a final Commission order we find relevant the amount of time that has passed between the date the operator first learned the penalty was not timely contested and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co*., 31 FMSHRC 1313, 1316 (Nov. 2009). Here, LeClaire filed its motion to reopen on October 12, 2011, less than 30 days after receiving MSHA's delinquency notice, on September 30, 2011.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2012-1-M
v.	:	A.C. No. 44-02783-239667
LIMESTONE DUST CORPORATION	:	

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

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 3, 2011, the Commission received from Limestone Dust Corporation ("Limestone") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

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

The record indicates that the proposed assessment was delivered on December 7, 2010, and became a final order of the Commission on January 6, 2011. MSHA sent a delinquency notice on March 29, 2011, and referred the case to the U.S. Department of Treasury for collection on June 16, 2011. Limestone asserts that it requested, and engaged in, a "Special Pre-Citation Determination Conference" with MSHA. In an affidavit, Limestone's president states that he was unfamiliar with the contest process since Limestone had historically paid the fines as issued. Moreover, Limestone thought this conference was a new procedure which served as notice of its intent to contest. Limestone contacted counsel regarding this delinquency after receiving a letter from a collection agency on August 3, 2011.

The Secretary opposes the request to reopen and notes that Limestone had been receiving proposed assessments from MSHA for over 30 years, and has timely contested other proposed assessments before and after this assessment was received. The Secretary also states that MSHA records do not show that a conference was requested, and notes that Limestone did not provide the date on which this conference occurred. Moreover, the Secretary notes that requesting a conference does not alter the contest procedure. In addition, the Secretary states that Limestone did not explain its delay in requesting reopening.

In response to the Secretary's opposition, Limestone asserts that it had retained counsel for the other timely contested proposed assessments, since it was unfamiliar with the process. Moreover, Limestone submits a copy of the notice it received from MSHA's Southern District regarding a "Pilot Program For Health And Safety Conferences." The notice identified Joseph Bosley, the field office supervisor, as the primary conferencing official. Limestone asserts that it had a telephone call with Mr. Bosley around November 2010, after which Mr. Bosley notified Limestone that MSHA was unwilling to modify the citations. Limestone states that it had mistakenly believed that this conference call constituted a contest, due to the "Pilot Program" title of the notice. Limestone further asserts that it only asked its counsel to review this case in September 2011, after receiving the August 3, 2011, collection notice. Accordingly, Limestone states that its counsel filed the request to reopen less than one month after understanding it had become delinquent.

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

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

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

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

Chairman Jordan and Commissioner Cohen, dissenting:

Our colleagues grant relief in this case primarily because Limestone asserts that it mistakenly believed that its participation in a conference with MSHA field office staff constituted a contest of the assessed penalties. However, we would deny relief.

Limestone's claim that it believed that its conference with MSHA about pending citations served as its contest of the penalty assessment is not credible. Limestone requested a conference on October 14, 2010. The MSHA notice regarding the conference on which Limestone relied states that the "penalty assessment will be stayed waiting the outcome of the conference." This notice plainly informed Limestone that after the conference, a penalty assessment would be issued unless the conference resulted in a different outcome. Limestone's Response to the Secretary's Opposition states that following the conference, the MSHA representative notified Limestone that the citations would not be modified. Response at 2. Then, consistent with the notice, on November 30, 2010, MSHA issued a proposed assessment after the conference resulted in no change to the citations. Limestone failed to respond to this assessment.

On March 29, 2011, MSHA sent a delinquency notice to Limestone. Again, the operator failed to take any action to rectify the situation. Though Limestone retained counsel in April, 2011, to handle other MSHA litigation, it apparently did not make counsel aware of this case. Finally, over a month after it received an August 3, 2011 collection notice from the Treasury Department, it notified its counsel of its failure to contest the proposed penalty assessment. A continuing belief that attending a conference with MSHA in November 2010 served to contest the penalty ceased to be reasonable in light of MSHA's subsequent notifications.

Moreover, Limestone unduly delayed in filing its motion to reopen with the Commission. In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g.*, *Left Fork Mining Co., Inc.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the fact that Limestone failed to respond to the delinquency notice and waited approximately six months after its receipt to request reopening and two months after receipt of the collection notice to request reopening, without providing a credible explanation, supports our conclusion that the operator has not met its burden of establishing entitlement to extraordinary relief.

Consequently, having reviewed Limestone's request, we conclude that it has failed to establish good cause for reopening the proposed penalty assessment and would deny its motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 2, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2012-60
ADMINISTRATION (MSHA)	:	A.C. No. 44-06685-266531
	:	
v.	:	Docket No. VA 2012-61
	:	A.C. No. 44-06685-266541
BANNER BLUE COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 7, 2011, the Commission received from Banner Blue Coal Company ("Banner Blue") two motions made by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2012-60 and VA 2012-61, both captioned *Banner Blue Coal Company*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

The record indicates that the proposed assessments were delivered on September 20, 2011, and became final orders of the Commission on October 20, 2011. MSHA received the late contests and payment for the uncontested penalties which were mailed on October 24, 2011. Banner Blue asserts that it missed the deadline by four days as a result of its safety director attending the National Mine Rescue Competition and losing the necessary paperwork in the shuffle upon his return. Banner Blue further states that it has established a process for handling proposed penalty assessments. The Secretary does not oppose the request to reopen, but cautions that she may oppose future late contests.

In considering an operator's request to reopen a final Commission order we find relevant the amount of time that has passed between the date the operator first learned the penalty was not timely contested and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co*., 31 FMSHRC 1313, 1316 (Nov. 2009). Here, Banner Blue filed its motion to reopen on November 4, 2011, only four days after receiving MSHA's delinquency notice, which was mailed on October 31, 2011.

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

/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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May 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2011-1109
v.	:	A.C. No. 46-09172-242752
WEST VIRGINIA MINE POWER, INC.	:	

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

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 8, 2011, the Commission received from West Virginia Mine Power, Inc. ("WVMP") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on January 5, 2011, and became a final order of the Commission on February 4, 2011. MSHA received an untimely contest, post marked February 9, 2011. MSHA sent a delinquency letter, dated February 17, 2011, notifying the operator that the contest was filed five days after the assessment became a final order of the Commission. WVMP asserts that it completed its internal investigation and filed the contest form on February 8, 2011, only four days late. Moreover, WVMP notes that it filed its motion to reopen within two weeks of receiving MSHA's delinquency letter.

The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated February 17, 2011. The Secretary cautions she may oppose future motions to reopen that are not contested in a timely manner.

The Commission sent WVMP a letter asking it to explain why it failed to timely contest the proposed assessment, and what office procedures were implemented to prevent such failure in the future. In response, WVMP asserts that the contest form was lost in the shuffle as its safety director attempted to catch up on paperwork over the holidays, and was heavily involved in the process of preparing plans for a shaft-sinking project and a surface coal mine. Since missing the deadline, the safety director has made efforts to ensure the timely processing of contest forms. The safety director states that he segregates the contest forms on his desk, noting the applicable deadline, and that he has spoken with other employees to ensure that everyone understands the importance of timely filing the forms.

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

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

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

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

Chairman Jordan and Commissioner Cohen, dissenting:

During approximately the last three years, West Virginia Mine Power ("WVMP") has come to the Commission three times (in addition to its motion in this case), asking us to reopen penalty assessments that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). In each of these cases, WVMP missed a statutory deadline for contesting a proposed penalty assessment because of failed management procedures. *West Virginia Mine Power, Inc*., 31 FMSHRC 600 (June 2009); *West Virginia Mine Power*, *Inc*., 32 FMSHRC 104 (Feb. 2010); *West Virginia Mine Power*, *Inc*., Docket No. WEVA 2011-2481 (issued on this day). In one of these cases, the Commission noted that WVMP's lack of an effective system for receiving and processing MSHA assessments "appears to have been a chronic and longstanding problem." *West Virginia Mine Power*, *Inc*., 32 FMSHRC at 106. This record of missed deadlines in large part is why we would deny the relief requested in this matter.

WVMP states the contest form for the penalty assessment at issue here was lost while its safety director tried to catch up on paperwork over the holidays. It also claims that it filed the contest late because the safety director was involved with a shaft-sinking project and preparations for the operating plans for a surface coal mine. There is nothing extraordinary about these activities - they come with the territory, so to speak, of running a mine, and, given this operator's history of missed deadlines, do not convince us to award relief here. Furthermore, WVMP has previously asserted that it improved its procedures to ensure the timely processing of contest forms. 32 FMSHRC at 105.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315, (Nov. 2009); *Double Bonus Coal Co.,* 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res*., *LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of adequate procedure to monitor and reliably process received mail represents an inadequate or unreliable internal processing system. *Sloss Indus., Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987). The lack of an effective system for receiving and processing proposed assessments continues to be a chronic and long-standing problem for this operator. Its track record indicates it has failed to take reliable and effective steps to ensure that proposed penalty assessments will be timely contested.

Accordingly, having reviewed WVMP's request, we conclude that it has failed to establish good cause for reopening the proposed penalty assessment and would deny its motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 2, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2012-412
ADMINISTRATION (MSHA)	:	A.C. No. 46-03303-267747
	:	
	:	Docket No. WEVA 2012-413
v.	:	A.C. No. 46-03303-270479
	:	
MIKE DOVER CORPORATION	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 14, 2011, the Commission received from Mike Dover Corporation ("Dover") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] The Secretary does not oppose the requests to reopen.

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

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2012-412 and WEVA 2012-413, both captioned *Mike Dover Corporation*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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

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

/s/ 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 2, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 2012-32-M
	:	A.C. No. 28-00526-265918
U.S. SILICA COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 22, 2011, the Commission received from U.S. Silica Company ("Silica") a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on September 14, 2011, and became a final order of the Commission on October 14, 2011. MSHA received the late contest, faxed on October 18, 2011, and payment for the uncontested penalties by check dated October 21, 2011. MSHA sent a delinquency letter on October 21, 2011. Silica asserts that its EHS coordinator was told that the assessment was received on September 21, 2011, which caused him to believe he had until October 21, 2011 to conduct his review. Silica further states that the mine office procedure was changed to require that all MSHA documentation be date stamped in order to avoid future errors. The Secretary does not oppose the request to reopen, but cautions that she may oppose future late contests.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2012-65-M
v.	:	A.C. No. 36-00796-248435
WILKES BARRE MATERIALS, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 18, 2011, the Commission received from Wilkes Barre Materials, LLC ("Wilkes") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on March 8, 2011, and became a final order of the Commission on April 7, 2011. Wilkes asserts that it timely contested the assessment on March 29, 2011, and paid for the uncontested penalties. Wilkes further states that it contacted MSHA on July 1, 2011, after receiving a delinquency letter, dated May 23, 2011. The Secretary does not oppose the request to reopen, but notes that there is no record of MSHA receiving a contest of this proposed assessment. The record does show that MSHA received a timely payment for the uncontested penalties, by check dated March 29, 2011. The record also shows that MSHA received Wilkes' July 1, 2011, letter, but never responded to it.

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

/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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May 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-42-M
v.	:	A.C. No. 13-02134-260772
RIVER CITY STONE, DIVISION OF MATHY CONSTRUCTION COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 19, 2011, the Commission received from River City Stone, Division of Mathy Construction Company ("River City") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment became a final order of the Commission on August 18, 2011. River City asserts that its counsel timely contested the assessment on July 21, 2011, concurrently with another contested assessment, No. 000260807. The Secretary does not oppose the request to reopen. However, the Secretary notes that although it appears by the fax coversheet that River City's counsel intended to contest both cases, it only filed two copies of the contest form for A.C. No. 000260807.[1]

In considering an operator's request to reopen a final Commission order we find relevant the amount of time that has passed between the date the operator first learned the penalty was not timely contested and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009); *Highland Mining Co*., 31 FMSHRC 1313, 1316 (Nov. 2009). Here, River City filed its motion to reopen on October 18, 2011, less than 30 days after receiving MSHA's delinquency notice, which was mailed on October 3, 2011.

[1] River City's counsel submitted the contest and this motion under the operator name "Milestone Materials." According to the Mine ID No. 13-02134, the correct operator name is "River City Stone," as captioned above.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-283
v.	:	A.C. No. 15-17834-270397
	:	
FOOTHILLS CONTRACTING, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 9, 2011, the Commission received from Foothills Contracting, LLC ("Foothills") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on October 28, 2011, and became a final order of the Commission on November 28, 2011. Foothills asserts that it is a new company, diligently trying to maintain all rules and regulations. Foothills further states that it has addressed and corrected all the citation oversights, and will prevent them from occurring again in the future. The Secretary does not oppose the request to reopen, but cautions she may oppose future untimely contests.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2012-339
	:	A.C. No. 46-08932-268973
KINGSTON MINING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 5, 2011, the Commission received from Kingston Mining, Inc. ("Kingston") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on October 11, 2011, and became a final order of the Commission on November 10, 2011. MSHA received the late contest, postmarked November 11, 2011, and sent a delinquency letter on November 18, 2011. Kingston asserts that it date-stamped the assessment "October 13, 2011," due to a backlog as a result of the week-long National Mine Rescue Competition. Kingston further states that it believed the contest was filed on October 21, 2011, and only discovered its delinquency during a routine case assessment audit on November 11, 2011. The Secretary does not oppose the request to reopen based solely on the fact that it was only one day late. However, the Secretary cautions that she may oppose future late contests.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-43-M
v.	:	A.C. No. 37-00002-258885 RI5
MAINE DRILLING & BLASTING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 1, 2011, the Commission received from Maine Drilling and Blasting, Inc. ("Maine") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on June 28, 2011, and became a final order of the Commission on July 28, 2011. Maine asserts that it timely contested Citation No. 8645463, but MSHA assigned it a new assessment case number after the timely contest. The Secretary does not oppose the request to reopen, and notes that this citation was originally assessed in case No. 000256106, which was timely contested on June 13, 2011. However, this citation was reassessed in case No. 000258885, and issued on June 22, 2011. The Secretary did not receive a contest for the reassessed case, and mailed a delinquency notice on September 14, 2011.

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

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 10, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of REUBEN SHEMWELL	:	
v.	:	Docket No. KENT 2012-655-D
ARMSTRONG COAL COMPANY, INC.	:	
and	:	
ARMSTRONG FABRICATORS, INC.	:	

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 20, 2012, Administrative Law Judge Jerold Feldman issued an Order Granting Secretary's Motion for Summary Decision and Order Granting Amended Application for Temporary Reinstatement. In the order, the Judge granted temporary reinstatement to Reuben Shemwell pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815 (c)(2).[1] 33 FMSHRC ___, slip op. at 8, No. KENT

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if

(continued...)

2012-655-D (Apr. 20, 2012) (ALJ). Armstrong Coal Company, Inc. ("Armstrong Coal") and Armstrong Fabricators, Inc. ("Armstrong Fabricators") subsequently filed a timely petition for review of the Judge's temporary reinstatement order.[2] Armstrong Coal and Armstrong Fabricators also filed a motion to stay the temporary reinstatement order. For the reasons that follow, we grant the petition, deny the motion for stay, vacate that portion of the Judge's decision granting the Secretary's Motion for Summary Decision, and remand the matter to the Judge for further proceedings.

I.

Factual and Procedural Background

Armstrong Coal operates the Parkway Mine Surface Facilities in Muhlenberg County, Kentucky. Armstrong Fabricators performs services at the Parkway facility. During the relevant time, Reuben Shemwell was employed at the Parkway facility as a welder. Slip op. at 1-2.[3]

Mr. Shemwell's employment was terminated on September 14, 2011. The Secretary alleges that Shemwell's dismissal was motivated by Shemwell's complaints concerning the need for respirator protection from fumes that were generated during the welding process. The complaints resulted in respirators being purchased in April 2011. However, the operators assert that Shemwell was discharged for excessive personal cell phone use during working hours. Slip op. at 2.

On January 23, 2012, Mr. Shemwell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against Armstrong Coal. App. for Temp. Reinstatement, Ex. B. MSHA conducted a preliminary investigation of Shemwell's discrimination complaint and found that it was not frivolously brought. *Id.* at 2. On March 5, 2012, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring Armstrong Coal to temporarily reinstate Shemwell to his former position as a welder. *Id.* at 3.

---

[1](...continued)
the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

[2] Although the operators entitled the petition as a "Joint Petition for Discretionary Review," we treat it as a Petition for Review of a Temporary Reinstatement Order in view of the operators' compliance with the requirements of 29 C.F.R. § 2700.45(f).

[3] The record and the parties' submissions reflect that the factual and procedural background we set forth here are not in dispute.

On March 8, 2012, Armstrong Coal filed a Request for Hearing on the Secretary's Application for Temporary Reinstatement. On March 13, 2012, the Judge held a conference call with counsel of the parties. During the call, the Judge instructed the Secretary to file a Motion for Summary Decision on the issue of temporary reinstatement. Tr. 8; Mot. for Summary Dec. at 1 n.1.

On March 20, 2012, the Secretary filed a Motion for Summary Decision. The Secretary argued that Shemwell engaged in activity protected by section 105(c) of the Mine Act when he told management at Armstrong Coal that he needed a new respirator because of fumes that were generated during welding. Mot. for Summary Dec. at 4-5. She submits that Shemwell was terminated approximately five months after Armstrong Coal acted on Shemwell's complaints and purchased new respirators. *Id.* at 5. The Secretary asserted that the timing of the termination, in addition to other arguably unwarranted disciplinary actions leading up to the termination, showed that Shemwell's complaint was not frivolous. *Id.* at 5-6.

Armstrong Coal opposed the motion. Armstrong Coal argued in part that the standard for summary decision had not been satisfied because there were questions of material fact at issue. Opp'n at 5-6. Armstrong Coal asserted that there was a question of fact concerning which entity employed Shemwell. *Id.* at 6-8. It maintained that Shemwell was employed by Armstrong Fabricators rather than by Armstrong Coal. *Id.* It further asserted that Shemwell's complaint was filed 131 days after his termination, beyond the 60-day time-frame provided in section 105(c)(2) of the Mine Act. *Id.* at 8-10. Finally, Armstrong Coal contended that there was insufficient evidence in the record to establish that Shemwell's termination was discriminatorily motivated. *Id.* at 10-16. Accordingly, Armstrong Coal requested that the motion for summary decision be denied and that the matter be set for hearing. *Id.* at 17.

On March 28, 2012, the Judge held another conference call with counsel of the parties. During the call, the parties discussed amending the Application for Temporary Reinstatement to include Armstrong Fabricators as a party. Counsel for Armstrong Coal and Armstrong Fabricators indicated that Armstrong Fabricators would not oppose a motion to amend. Tr. 3.

On April 2, 2012, the Secretary filed a Motion to Amend the Application for Temporary Reinstatement to add Armstrong Fabricators as a party. Neither Armstrong Coal nor Armstrong Fabricators opposed the motion.

On April 20, 2012, the Judge issued an Order Granting Secretary's Motion for Summary Decision and Order Granting Amended Application for Temporary Reinstatement. The Judge granted the Secretary's motion to amend the application for temporary reinstatement to add Armstrong Fabricators as a party in addition to Armstrong Coal. Slip op. at 6. He reasoned that it was not his duty to resolve real party-in-interest issues at the preliminary stage of a temporary reinstatement proceeding. *Id.* The Judge concluded, however, that the Secretary's assertion that Armstrong Coal is a proper party to the proceeding, in addition to Armstrong Fabricators, was not frivolous. *Id.*

The Judge granted the Secretary's motion for summary decision. *Id.* at 8. The Judge excused the untimeliness of the filing of Shemwell's complaint with MSHA. *Id.* at 6-7. He noted evidence that Shemwell had engaged in protected activity by complaining about the respirators, and that Shemwell was discharged five months after new respirators were purchased. *Id.* at 7-8. The Judge concluded that the coincidence in timing between Shemwell's protected activity and the adverse action of discharge was sufficient under the "not frivolously brought" standard to reveal that the discharge was motivated in part by the protected activity. *Id.* Accordingly, the Judge ordered "Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc." to immediately reinstate Shemwell, no later than April 25, 2012, to the position he held prior to his termination or to a similar position at the same rate of pay and benefits, with the same or equivalent duties assigned to him. *Id.* at 9.

Armstrong Coal and Armstrong Fabricators filed a petition for review of the Judge's temporary reinstatement order and a motion to stay the Judge's reinstatement order. The Secretary opposed the petition and motion to stay.

II.

Disposition

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 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). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999).

We conclude that the Judge erred in granting the motion for summary decision. Commission Procedural Rule 45 provides in part that if a hearing on the application for temporary reinstatement is requested, "the hearing *shall* be held" within 10 calendar days of the request. 29 C.F.R. § 2700.45(c) (emphasis added). Here, although Armstrong Coal timely requested a hearing on March 8, the Judge did not provide it. Rather, he decided the matter on a motion for summary decision.

Rule 45 sets forth procedural protections that meet the "fundamental requirement of due process" because they give the operator the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) (citations omitted). Among other things, the operator will have the opportunity to cross-examine

any witnesses supporting the Application for Temporary Reinstatement. As part of those protections, a party is entitled to a hearing on an application for temporary reinstatement within 10 days of requesting one. 29 C.F.R. § 2700.45(c).

Even if the Commission's Procedural Rules permitted the filing and disposition of a motion for summary decision in a temporary reinstatement proceeding, such a motion would necessarily fail in the circumstances presented in this case. Rule 67 provides that a motion for summary decision may be granted in part if there is "no genuine issue as to any material fact." 29 C.F.R. § 2700.67(b)(1). As acknowledged by the Secretary, there is "uncertainty surrounding Armstrong Fabricators' operating status." S. Opp'n at 8 n.2. During the March 28, 2012 conference call between the parties' counsel and the Judge, counsel for Armstrong Coal and Armstrong Fabricators stated, "Mr. Shemwell's position was no longer available at Armstrong Fabricators because the shop where he worked has been idled and the staff laid off." Tr. 3. The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation. *KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009).

Accordingly, we vacate that part of the Judge's decision, granting the motion for summary decision, and remand for a hearing in accordance with the provisions of Rule 45.[4] In addition to other evidence relevant to a temporary reinstatement proceeding, the Judge is instructed to take evidence relevant to whether there was a layoff that would toll an operator's temporary reinstatement obligation.[5] Because the Judge originally determined that Shemwell should be temporarily reinstated no later than April 25, 2012, if the Judge determines after a hearing that Shemwell should be temporarily reinstated, such reinstatement should be retroactive to April 25, 2012.

We need not reach other issues identified by Armstrong Coal and Armstrong Fabricators in the petition filed before us. The issue regarding the timeliness of the filing of Shemwell's complaint with MSHA may be addressed and decided in the proceeding on the merits. *See, e.g., Sec'y of Labor on behalf of Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, 932 n.6

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[4] The Judge's granting of the Secretary's Motion to Amend the Application for Temporary Reinstatement stands.

[5] With regard to the Armstrong Fabricators' layoff, during the conference call with the Judge on March 28, 2012, counsel for the Secretary represented that "as a result of this [Shemwell] investigation . . . MSHA attempted to inspect the shop. Subsequently, . . . all the employees who worked at the shop were laid off." Tr. 3. If the layoffs occurred as a response to Shemwell's complaint or in an effort to avoid MSHA jurisdiction, this could affect the analysis under *KenAmerican.*

(Sept. 1998). Similarly, the issue of which operator is appropriately named as a party to the proceeding may be addressed and decided in the proceeding on the merits.[6] Finally, given that we have vacated the Judge's order granting summary decision, we deny the operators' motion to stay as moot.

III.

Conclusion

For the foregoing reasons, we grant the operators' petition, vacate the Judge's decision granting summary decision, deny the operators' motion to stay as moot, and remand for further proceedings consistent with this decision.

/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

[6] We do not suggest that the Judge erred in his determination that "Armstrong Coal Company, Inc., and/or Armstrong Fabricators, Inc." may be ordered to temporarily reinstate Shemwell.

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May 24, 2012

BIG RIDGE, INC.	:	Docket Nos. LAKE 2011-116-R
	:	LAKE 2011-117-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
PEABODY MIDWEST MINING, LLC	:	Docket Nos. LAKE 2011-118-R
	:	LAKE 2011-119-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
INDEPENDENCE COAL COMPANY, INC.	:	Docket Nos. WEVA 2011-402-R
	:	WEVA 2011-403-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
INMAN ENERGY CORPORATION	:	Docket Nos. WEVA 2011-398-R
	:	WEVA 2011-399-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

PROCESS ENERGY	:	Docket Nos. KENT 2011-255-R
	:	KENT 2011-256-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
SPARTAN MINING COMPANY	:	Docket Nos. WEVA 2011-540-R
	:	WEVA 2011-541-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
ROAD FORK DEVELOPMENT COMPANY	:	Docket Nos. KENT 2011-305-R
	:	KENT 2011-306-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
	:	
KNOX CREEK COAL CORPORATION	:	Docket Nos. VA 2011-386-R
	:	VA 2011-387-R
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

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

These cases involve two sets of consolidated contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act").[1] The Secretary of Labor ("Secretary") issued citations alleging violations of 30 C.F.R. § 50.41,[2] and failure to abate orders to Big Ridge, Inc., and Peabody Midwest Mining, LLC (jointly "Peabody" or "Peabody Petitioners") for refusal to turn over records containing medical and payroll information to inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary considered the records necessary to determine compliance with regulatory reporting requirements. The Secretary issued substantively similar citations and orders to Independence Coal Company, Inc., Inman Energy Corporation, Process Energy, Spartan Mining Company, Road Fork Development Company, and Knox Creek Coal Corporation (jointly "Massey" or " Massey Petitioners").[3]

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate the above-listed dockets, all involving similar issues. 29 C.F.R. § 2700.12.

[2] Section 50.41 states that:

> Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

30 C.F.R. § 50.41.

[3] Citation No. 6670852, issued to Peabody's Air Quality No. 1 Mine, provides in part:

> Mike Middlemas, Safety Manager, refused to permit an Authorized Representative of the Secretary of Labor to inspect and copy information to determine compliance with the reporting requirements related to accidents, injuries, or illnesses at the Air Quality (Mine ID 12-02010). The requested documents include medical records. Doctor slips, worker compensation filings, sick leave request or reports, emergency medical claims forms relating to accidents, injuries, or illnesses that occurred at the mine or may

(continued...)

Administrative Law Judge Kenneth Andrews, in two separate decisions, upheld the citations and orders upon finding that each of the operators had violated section 50.41 when they failed to cooperate with a 30 C.F.R. Part 50 audit by refusing to provide the requested information. 33 FMSHRC 1306, 1323 (May 2011) (ALJ); 33 FMSHRC 1387, 1404 (May 2011) (ALJ).[4] Peabody and Massey subsequently filed petitions for discretionary review challenging the judge's decisions, which the Commission granted.

On July 1, 2011, Peabody filed an Application for Temporary Relief from the failure to abate orders. On July 15, the Commission stayed enforcement of the orders until August 5, 2011. Shortly thereafter, various miners ("Intervenors") objecting to the Secretary's audit requests collectively filed, through counsel, an unopposed motion to intervene, which was granted by the Commission. On August 4, 2011, the Commission heard oral argument on the application for temporary relief. By order dated August 5, 2011, the Commission lifted the stay ordered on July 15 and ultimately denied Petitioners' application on the basis that the conditions for the extraordinary remedy of temporary relief pursuant to section 105(b)(2) of the Mine Act, 30 U.S.C. § 815(b)(2), had not been met. Unpublished Order dated Aug. 5, 2011.

---

[3](...continued)

> have resulted from work at the mine for the period currently being audited (07/01/2009 – 06/30/2010). MSHA considers this information relevant and necessary to determine compliance with the reporting requirements of 30 CFR, Part 50.

S. Ex. G-10. The citations and orders issued to the remaining operators are essentially the same with the exception of the specific mine details. *See* 33 FMSHRC 1306, 1310 (May 2011) (ALJ); 33 FMSHRC 1387, 1391-92 (May 2011) (ALJ); S. Exs. G-11, 13. The citations issued to Peabody were later modified, to include time sheets and payroll records. Exs. G-14-15.

[4] In both decisions, Judge Andrews stated that "[s]eparate hearings were held due to the distant location of these groups of mines, but for all major purposes, counsel treated them all as one large, related case." 33 FMSHRC at 1307 n.1; 33 FMSHRC at 1389 n.1.

The principal questions before us are: (1) whether the Secretary possesses the authority pursuant to section 103(h) of the Mine Act, 30 U.S.C. § 813(h),[5] and 30 C.F.R. § 50.41, to inspect and copy records, including personal medical information, not specifically required to be maintained by the Mine Act or its implementing regulations; and (2) whether the records sought by the Secretary in the subject proceedings are relevant and necessary to determine compliance with the reporting requirements of Part 50.

For the following reasons, we affirm the judge's decisions. We hold that, pursuant to the plain language of section 103(h) of the Mine Act and the regulatory language of section 50.41, the Secretary did not exceed her authority, and that the operators are required to make available the requested records even though they are not specifically required to be maintained by the Act. We conclude that the requested records and information are relevant and necessary to the Secretary's function of verifying operator compliance with Part 50 reporting requirements. We also hold that the request does not violate any right to privacy, the Fourth Amendment right to protection against warrantless searches, or the Fifth Amendment right to due process. Lastly, we conclude that the Secretary's request does not conflict with any other federal statutes or state law.[6]

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[5] Section 103(h) reads:

> In addition to such records as are specifically required by this chapter, 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 him to perform his functions under this chapter.

30 U.S.C. § 813(h).

[6] The penalty cases associated with Docket No. WEVA 2011-402-R for Independence Coal, and Docket No. VA 2011-386-R for Knox Creek Coal, were settled on March 7, 2012, as part of the global settlement agreement between MSHA and Alpha Natural Resources, Inc. The penalty cases are Docket Nos. WEVA 2011-811 for Independence Coal, and VA 2011-532 for Knox Creek Coal. It is well-established that the fact of violation cannot be contested once the proposed penalty has intentionally been paid. *See I O Coal Co.*, 31 FMSHRC 1346, 1354 (Dec. 2009); *Dacotah Cement*, 23 FMSHRC 31, 32 (Jan. 2001); *Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985). Therefore, the contest docket No. WEVA 2011-402-R and No. VA 2011-386-R, are now moot and are hereby dismissed.

Factual and Procedural Background

Big Ridge, Inc. operates the Willow Lake Portal Mine in Illinois, and Peabody Midwest operates the Air Quality # 1 Mine in Indiana. Peabody Tr. 52, 124, 131-32. Both mines are underground coal mines regulated by MSHA Coal District 8. Big Ridge and Peabody Midwest are subsidiaries of Peabody Energy Corporation. 33 FMSHRC at 1308.

Independence Coal operates the Justice No. 1 Mine, Inman Energy Corporation operates the Randolph Mine, and Spartan Mining Company operates the Road Fork No. 51 Mine, all located in West Virginia. *See* 33 FMSHRC at 1389-90. Knox Creek Coal Corporation operates the Coal Creek Prep Plant located in Virginia. *Id.* Process Energy operates Mine No. 1 and Road Fork Development Company operates the Love Branch South Mine, both located in Kentucky. *Id.* During the relevant time period, each of the six aforementioned companies was a subsidiary of Massey Energy Company. *Id*.

In October 2010, MSHA began a nationwide initiative to conduct 39 audits to verify operator compliance with Part 50 reporting requirements. 33 FMSHRC at 1308; 33 FMSHRC at 1390. In furtherance of that initiative, MSHA inspectors appeared at the Willow Lake and Peabody Air Quality #1 mines on more than one occasion, requesting that the operators furnish certain documents. 33 FMSHRC at 1308; Peabody Exs. A and D; S. Br. at 2. During the period between October 2010 and April 2011, MSHA made the same request to Massey regarding its six mines. 33 FMSHRC at 1390; S. Br. at 2.

In late October 2010, MSHA began issuing amended request letters to each of the mines which superseded the previous requests. 33 FMSHRC at 1308; 33 FMSHRC at 1390. The letters provided in pertinent part:

> Please have the following information and documentation available for review . . . . The documents should cover the period beginning July 1, 2009 through June 30, 2010.
>
> 1. All MSHA Form 7000-1 Accident Reports
>
> 2. All quarterly MSHA Form 7000-2 Employment and Production Reports
>
> 3. All payroll records and time sheets for all individuals working at your mine for the covered time period

4. The number of employees working at the mine for each quarter

5. All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

"In your possession" means within your mine's possession or within the control, custody, or possession of another entity or person from whom you have authority to obtain the required records. If any of the required records are in the exclusive possession of any other entity or person from who you do not have authority to obtain the required records, you must so certify and identify the entity or person who has exclusive possession.

33 FMSHRC at 1308-09; 33 FMSHRC at 1391.

All mines provided MSHA with the 7000-1 and 7000-2 forms and the number of employees. 33 FMSHRC at 1308-09; 33 FMSHRC at 1392; S. Br. at 3. However, Peabody's counsel responded by letters dated October 28 and 29, 2010, informing MSHA that Peabody would not provide MSHA with access to the information outlined in request numbers 3 and 5 due to privacy concerns. 33 FMSHRC at 1309. Counsel for Massey also responded and expressed concerns about the requests for medical records. 33 FMSHRC at 1391.[7] Both counsels indicated that they would welcome further discussion with MSHA, but conditioned such discussion on MSHA's cooperation in furnishing information regarding how the record demands could be narrowed to accommodate MSHA's legitimate audit concerns without jeopardizing privacy rights of employees, or revealing confidential business information. 33 FMSHRC at 1309; Massey PDR at 6.

Due to Peabody's and Massey's refusals, MSHA issued two citations to the Peabody petitioners and six citations to the Massey petitioners for failing to provide the requested information for the related mines in violation of section 50.41. 33 FMSHRC at 1309-10; 33 FMSHRC at 1392; S. Br. at 3. After the operators continued to refuse to furnish the information, MSHA issued orders pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), to each mine for failing to abate the violations. 33 FMSHRC at 1309-10; 33 FMSHRC at 1392; S. Br. at 3. Peabody and Massey timely contested the citations and orders. 33 FMSHRC at 1310;

[7] Since filing its PDR on June 22, 2011, Massey has submitted the requested information to MSHA. *See* Oral Arg. Tr. 47.

S. Br. at 3. The contests were expedited and proceeded to hearings before Judge Andrews on December 14 and 16, 2010. The Secretary agreed to postpone assessment of civil penalties until the judge issued his decisions. Peabody Tr. 186-89.

The judge affirmed the citations and orders in separate decisions issued on May 20 and 23, 2011. He found that section 103(h) of the Act and 30 C.F.R. § 50.41 are clear in their purpose and intent, and that each individually authorizes the Secretary to request information not specifically required to be maintained by the Act. 33 FMSHRC at 1320-21; 33 FMSHRC at 1401-02. The judge found support in the preamble to section 50.41, which specifically addresses the Secretary's need to access medical and employment records. 33 FMSHRC at 1321; 33 FMSHRC at 1402. In reaching his conclusion, the judge emphasized that "the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners." 33 FMSHRC at 1317; 33 FMSHRC at 1398. He found that, given the particular information flow regarding reportable incidents at the mines, there is a potential for relevant incidents or information to go unreported to the mines' safety managers. 33 FMSHRC at 1315-16; 33 FMSHRC at 1396-97. He also noted that if an operator possessed the sole power to control the flow of information to MSHA, there would be an incentive to under-report injury and illness information. 33 FMSHRC at 1316; 33 FMSHRC at 1397. The judge concluded that because legislative rulemaking had already taken place in 1977, no additional rulemaking was necessary to enable the Secretary to exercise this particular authority. 33 FMSHRC at 1322; 33 FMSHRC at 1403.

Although the judge acknowledged the highly sensitive nature of the disputed records, he found that the governmental interests of MSHA overrode the privacy concerns raised by the operators and its employees. 33 FMSHRC at 1320; 33 FMSHRC at 1401. The judge concluded that MSHA, as a public health agency, possesses the authority to obtain information to determine compliance with the Mine Act. 33 FMSHRC at 1321; 33 FMSHRC at 1402. He found that, when it is related to occupational safety and health, the disclosure of private medical information to MSHA is a reasonable exercise of government responsibility for the public welfare and does not violate any rights or liberties protected by the Constitution. 33 FMSHRC at 1320, 1322; 33 FMSHRC at 1401, 1403. Given that mining is a pervasively regulated industry, the judge concluded that under the clear language of section 103(h), neither Peabody nor Massey could have had a reasonable expectation of privacy in the disputed records. 33 FMSHRC at 1322; 33 FMSHRC at 1403.

The judge also distinguished the present case from *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) (ALJ), where the Secretary's request was considered by the judge to be a "wholesale warrantless search" of private company records. Judge Andrews found that unlike in *Sewell*, the Secretary requested that the companies produce the records themselves, that she limited the documents in time and scope, and that she is authorized by law to access the records. 33 FMSHRC at 1318-19, 1322; 33 FMSHRC at 1400, 1403. The judge, noting the limitations placed on the request, also rejected the Petitioners' argument that the request was unreasonable, overly broad, and burdensome and concluded that the Secretary appropriately limited the

requested records. 33 FMSHRC at 1322-23; 33 FMSHRC at 1403. The judge further determined that the safeguards put in place by MSHA to prevent disclosure of private information were adequate. 33 FMSHRC at 1321; 33 FMSHRC at 1402.

II.

Disposition

A. Whether the Secretary was authorized to demand production of records not required to be maintained by statute or regulation.

Petitioners and Intervenors argue that the Secretary may only require the production of documents that are required to be kept by statute or regulation. They assert that the plain language of section 103(h) of the Act and 30 C.F.R. § 50.41 does not grant the Secretary the broad authority to demand access to Petitioners' confidential records. Petitioners, citing *Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), maintain that the Secretary must first engage in notice-and-comment rulemaking to create such a duty before it can be enforced. Intervenors assert that it is unreasonable for MSHA to demand production of medical records because section 50.41 does not define MSHA's ability to access such records. Peabody argues that the Secretary's interpretation is owed no deference because this is a purely legal question and does not require consideration of regulatory expertise or policy.

The Secretary responds that the judge properly accepted her interpretation of sections 103(a) and (h) of the Act, as well as section 50.41 of the regulations. She submits that her interpretation (that she may inspect and copy records not required by law to be maintained) is further supported by the preambles of proposed and final rulemaking of section 50.41. The Secretary maintains that unlike in *Sewell*, which involved a request for files that contained both relevant and non-relevant personnel and medical information, the Secretary's present request is in the nature of a *subpoena duces tecum* requiring access to only specified information. She contends that because section 50.41 plainly authorizes her request, and because section 50.41 was promulgated pursuant to notice-and-comment rulemaking, the argument that her request was not reasonable because she did not go through notice-and-comment rulemaking fails. The Secretary argues that Petitioners' interpretation would erroneously limit her authority to access only records, reports, and information specifically required to be maintained by the Act, which would hinder her ability to perform her functions as required by Congress. She states that their interpretation would also render Congress' use of the term "information" superfluous, because if Congress had intended to require operators to provide only documents they were required to maintain, it would have used the term "such records" instead of the more encompassing term "such information" in section 103(h). She asserts that Petitioners' interpretation is inconsistent with the legislative history of section 103(h) because Congress intentionally deleted from the text of the final bill the rulemaking requirement that had appeared in several drafts of the legislation. She argues that even if the language is not plain, her reasonable interpretation is due deference.

1. 30 U.S.C. § 813

In considering the question of statutory construction, our first inquiry is "whether Congress has directly spoken to the precise question at issue." *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). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the "plain meaning" of the statutory language and Congress' intention regarding a specific question at issue, we employ the "traditional tools of statutory construction," including an examination of the statute's text, legislative history, and structure, as well as its purpose. *Id.; Local Union 1261, UMWA*, 917 F.2d at 44; *Coal Emp't Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

At the outset, we note that the Secretary has broad authority to conduct inspections and investigations under section 103(a) of the Act. Section 103(a) provides in part that an authorized representative of the Secretary shall conduct inspections and investigations in order to obtain, utilize, and disseminate "information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments" originating in the mines. 30 U.S.C. § 813(a). It also authorizes such inspections and investigations to determine "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under the subchapter or other requirement of this chapter." *Id.* This language makes clear that the Secretary is authorized to verify operator compliance with the Act and MSHA regulations. The Secretary's audit initiative falls squarely within this function, as it is an important tool in carrying out the duty to determine that operators are providing complete and accurate reports regarding all accidents, injuries, and illnesses occurring at our nation's mines.

The plain language of section 103(h) provides a broad Congressional grant of authority to the Secretary to carry out this audit initiative. Section 103(h) states in pertinent part:

> (h) Records and reports; compilation and publication; availability
>
> *In addition to such records as are specifically required* by this chapter, 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 him to perform his functions under this chapter.

30 U.S.C. § 813(h) (emphasis added). The language of section 103(h) does not limit the Secretary's access only to records that are specifically required to be maintained or prescribed by regulation, but instead gives her authority to request whatever information she deems relevant and necessary. Congress gave clear instructions that "information" that is *not* specifically

required to be maintained by the Act shall, nonetheless, be provided to the Secretary to enable her to perform her functions, as long as the request is reasonable. This language effectively expands, rather than restricts, the Secretary's right of access. *See also United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 575 (3rd Cir. 1980) (because a regulation gives NIOSH authority to examine "other related records," which it reasonably regards as records related to the purpose of the investigation, the court would not limit NIOSH's examination of employee medical records to records which must be retained by specific provision of the statute or regulations). As the judge in this case determined, section 103(h) creates "a legitimate basis for enforcement of reporting requirements even without the Part 50 rules." 33 FMSHRC at 1320; 33 FMSHRC at 1401, *citing Am. Mining*, 995 F.2d at 1109.

In addition, the text of section 103(h) is consistent with, and reinforced by, other sections of the Act. For instance, sections 108(a)(1)(E) and (F) state that "the Secretary may institute a civil action for relief . . . whenever such operator or his agent . . . refuses to furnish any information or report requested by the Secretary . . . in furtherance of the provisions of this Act, or refuses to permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of this Act." 30 U.S.C. §§ 818(a)(1)(E), (F). Like section 103(h), sections 108(a)(1)(E) and (F) require that operators provide information to the Secretary without limiting this mandate to information an operator is legally required to maintain.

The legislative history is also instructive. According to the Joint Explanatory Statement included in the Conference Report of the Mine Act, with regard to section 103(h), ". . . the House amendment . . . authorized the Secretary to require records, reports, and other information not otherwise specified by the Act. The conference substitute conforms to the House amendment." S. Rep. No. 95-461, at 47 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1325 (1978). Thus in resolving issues regarding the scope of the Secretary's authority to require records from operators, Congress chose the House approach, which broadly authorized the Secretary to obtain records and other information not otherwise specified by the Act. Significantly, Congress rejected earlier proposed versions of this section, which had limited the Secretary's access to operators' records to those specific records which the Secretary had "prescribe[d] by regulation." S. 717, 95th Cong., at 20, *reprinted in Leg. Hist*. at 129; H.R. 4287, 95th Cong., at 20, *reprinted in Leg. Hist*. at 207.

Courts of appeals have recognized the broad scope of section 103(h). In *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457 (D.C. Cir. 1994), the court affirmed the Commission's decision that MSHA could reasonably require the reporting of an accident involving a miner's personal automobile on mine property before the start of the work shift. The court stated, "[t]he Mine Act grants a broad delegation to the Secretary . . . 'to perform [her] functions under this chapter.' 30 U.S.C. § 813(h)." *Id*. at 461.

Hence, given the plain meaning of section 103, particularly read in the context of other sections and the legislative history, we conclude that the Secretary did not exceed her statutory authority by demanding the information outlined in numbers 3 and 5 of her request.

2. 30 C.F.R. § 50.41

In considering the Secretary's authority under the Part 50 regulations, we recognize that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written, unless the regulator clearly intended the words to have a different meaning, or unless such a meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)); *Alan Lee Good,* 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997).

The purpose of Part 50 is "to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to accidents, injuries, and illnesses occurring or originating in mines." 30 C.F.R. § 50.1. Consequently, operators are required to report to MSHA every accident, injury, and illness on a 7000-1 form. 30 C.F.R. § 50.20(a). They are also required to report the average number of employees working and the total employee-hours worked during the quarter on a 7000-2 form. 30 C.F.R. § 50.30 & 30-1(g). MSHA is tasked with using the information to develop rates of injury occurrence or incident rates ("IR"). 30 C.F.R. § 50.1. In particular, MSHA determines national incidence rates, averages, and severity rates, which can be compared to the rates at a particular mine. 33 FMSHRC at 1317. The IR is calculated by the total number of occupational injuries, illnesses, and accidents reported in a calendar quarter, multiplied by a constant 200,000, and divided by the total number of employee-hours worked during the quarter. 30 C.F.R. § 50.1; *see Energy West Mining Co.*, 15 FMSHRC 587, 591 (Apr. 1993); *Consol. Coal Co.*, 14 FMSHRC 956, 959 (June 1992). These incident rates provide a general picture of the safety record of a mine operator. *Energy West*, 15 FMSHRC at 591.

The text of section 50.41 reinforces the Secretary's authority, as well as the operator's responsibility, in that it spells out the role each must play in determining compliance with Part 50. As noted above, it provides that:

> Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

30 C.F.R. § 50.41.

Thus, section 50.41 requires that operators provide MSHA with access to "information" related to accidents, injuries, or illnesses occurring at their mines. The only limitation on the Secretary's authority is that the information must be "relevant and necessary" to a determination of Part 50 compliance. Like section 103(h) of the Act, section 50.41 of MSHA's regulations lacks any language restricting the Secretary's access to any particular documents.

The preambles to the proposed rule and final rule for section 50.41 provide strong support for the Secretary's broad right of access, as they discuss the very documents requested by the Secretary in this case. The preamble to the proposed rule explains the scope of authority of the Mining Enforcement and Safety Administration ("MESA") (the predecessor to MSHA) to request certain information, as well as the importance of operator cooperation:

> Section 50.41 requires operators to allow MESA to inspect or copy any information the agency thinks may be relevant and necessary for verification of reports or for determination of compliance with Part 50. In effect, it allows MESA to copy company medical records, employment records, and other company information.
>
> MESA believes that this provision is necessary if it is to be able to develop epidemiologic data essential to development of effective health standards. It is also necessary if MESA is to be able to discover instances of intentional violation of statutory or regulatory requirements. It will allow MESA to control the data flow, rather than depend upon operator filtered records.

42 Fed. Reg. 55568, 55569 (Oct. 17, 1977). The preamble to the final rule further states:

> Without inspection of records beyond those required to be kept it is impossible to verify the required records. The Secretary's power to acquire information related to h[er] functions under the Coal Act and the Metal Act is not limited to any particular records. Section 111(b) of the Coal Act and § 13 of the Metal Act explicitly authorize analysis of other information related to h[er] functions, and only the Secretary, subsequent to inspection and copying, can determine relevance. This is particularly important in development of an epidemiologic data base, where information not reported on a Part 50 form can help identify disease related agents or practices.

42 Fed. Reg. 65534, 65535 (Dec. 30, 1977).

The preamble to the proposed rule plainly illustrates that the Secretary intended section 50.41 to provide access to operator medical records when necessary to determine compliance, develop epidemiologic data, and uncover instances of intentional violations of the Act. It confirms that the term "any information" includes company medical records, employment records, and any other company information the Secretary deems relevant and necessary. *See* 42 Fed. Reg. at 55569. The preamble to the final rule explains that barring the Secretary from access to "records beyond those required to be kept" would make it impossible to verify the required records. 42 Fed. Reg. at 65535. It also plainly states that the "Secretary's power to acquire information related to h[er] functions under the . . . Act . . . *is not limited to any particular records*." *Id.* (emphasis added).

Consistent with the judge's determination, we conclude that 30 C.F.R. § 50.41 plainly requires that operators provide the Secretary with access to the disputed records and information for the purpose of verifying operator compliance with Part 50.

In addition, because section 50.41 was promulgated more than 30 years ago pursuant to notice-and-comment rulemaking, and section 50.41 grants the Secretary access to the disputed records, we reject Petitioners' argument that additional notice-and-comment rulemaking is necessary to enforce section 103(h). The very concerns raised by Petitioners here (including, as discussed below, the privacy concerns) were discussed in the preambles and, therefore, considered by the agency in making a reasoned determination on the applicability of the statute and regulations to the records discussed therein.[8]

3. Commission Case Law

Petitioners assert that the decisions in *Sewell Coal*, 1 FMSHRC at 869-72, and *Peabody Coal Co.*, 6 FMSHRC 183, 186 n.5 (Feb. 1984), support their claim that the Secretary cannot require the production of documents which the statute does not require them to maintain.

Our conclusion that the Secretary did not exceed her authority under section 103 of the Mine Act or section 50.41 of her regulations by requiring the operators to disclose the disputed information is consistent with relevant precedent. In *BHP Copper, Inc*., 21 FMSHRC 758, 759 (July 1999), an operator refused the Secretary's request to provide an injured miner's telephone

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[8] Petitioners also argue that MSHA must undertake additional notice-and-comment rulemaking because its current position is inconsistent with an interpretation of Part 50 contained in a letter authored by a Department of Labor official. In 1987, former Associate Solicitor of Labor for Mine Safety, Edward P. Clair, responded to an inquiry regarding MSHA's authority to inspect payroll and personal files containing medical information during Part 50 audits. Joint App. for Temp. Relief Ex A.14. In the letter, Mr. Clair stated that "MSHA has a right of access to any information required to be maintained by the Mine Act or the implementing regulations in Part 50 . . . includ[ing] . . . information on accidents which the Mine Act and Part 50 require the operator to investigate and compile a report on." *Id*. at 2 (emphasis added).

The language in the Clair letter cannot trump the plain language of both section 103(a) of the Mine Act and 30 C.F.R. § 50.41. *See* Pet. Br. at 19. Moreover, Mr. Clair further explained that in Part 50 audits, MSHA "routinely seeks access to information related to accidents and injuries which the Agency believes is relevant and necessary to verification of compliance with Part 50." Joint App. for Temp. Relief Ex A.14 at 2-3. In any event, Petitioners' argument relies on their interpretation of statements in a letter written more than 20 years ago which have been explicitly renounced by the Secretary in her current litigation before the Commission. S. Br. at 20. The Secretary clearly is permitted to reconsider her views regarding the interpretation of the Mine Act. *See Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 793 (D.C. Cir. 2009).

number and address after a serious accident. The Commission concluded that BHP's refusal to disclose the employee's address and telephone number violated section 103(a) of the Mine Act. *Id*. at 769. While noting that its holding was fact-specific and did not address the disclosure of other information not at issue in that case, *id*. at 767 n.15, the Commission stated that nothing in section 103(a) or any other section of the Mine Act limits the Secretary's investigative powers to accessing only information required to be maintained by regulation. *Id.* at 766.

While *BHP Copper* supports our holding, the cases Petitioners have cited are clearly distinguishable. *Sewell* is an unreviewed ALJ decision and therefore not a binding precedent. In any event, we agree with Judge Andrews that its reasoning is inapposite, because the Secretary's request here is not a "wholesale warrantless search." *See* 33 FMSHRC at 1318-19, 1322; 33 FMSHRC at 1400; *see also Sewell Coal*, 1 FMSHRC at 872. The request before us in this case is limited in time and scope, narrowly tailored to the Secretary's functions under the Act, and does not involve MSHA representatives personally rummaging through Petitioners' file cabinets or computer systems. Moreover, the 1984 *Peabody* decision, relied upon by Petitioners, is of little relevance to the issue before us because that case involved the disclosure of records the operator was required to maintain, and the Commission simply noted that the case, therefore, did not present the situation faced in *Sewell*. 6 FMSHRC at 186 n.5.

Based on the foregoing, we hold that pursuant to sections 103(a) and (h) of the Act and 30 C.F.R. § 50.41, operators are required to provide the Secretary with access to records not specifically required to be maintained by the Mine Act or regulations promulgated under the Act, as long as they are relevant and necessary to a determination of operator compliance with Part 50 reporting requirements. Because the statutory and regulatory provisions are clear, we do not need to reach the Secretary's deference argument.[9]

B. Whether the requested records and information are relevant and necessary.

We conclude that the records and information requested by the Secretary in these cases are "relevant and necessary" for her to carry out her responsibilities to audit compliance with the Mine Act within the meaning of 30 C.F.R. § 50.41. As Judge Andrews stated, " . . . the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners." 33 FMSHRC at 1317. Former Chief Judge Merlin described the importance of accurate reporting in *Consolidation Coal Co.*, 9 FMSHRC 727, 733-34 (Apr. 1987) (ALJ):

> . . . Part 50 is the cornerstone of enforcement under the Act. Since Part 50 statistics provide the basis for planning, training and

[9] Even if the statutory and regulatory language were not clear, we would find the Secretary's interpretation to be reasonable. The requested documents are necessary to verify operator compliance with the Act, which is crucial in carrying out the objective to greatly decrease dangerous conditions at mines.

> inspection activities, accurate reporting is essential. Moreover, failure to accurately report could have extremely dangerous consequences by concealing problem areas in a mine which should be investigated by MSHA inspectors. In short, without proper compliance by the operator under Part 50, the Secretary could not know what is going on in the mines and, deprived of such information, [she] would be unable to decide how best to meet [her] enforcement responsibilities.

In *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1364 (Dec. 2000), the Commission stated that "one of the purposes of the reporting requirements under 30 C.F.R. Part 50 is to allow MSHA 'to identify those aspects of mining which require intensified attention with respect to health and safety regulation.' 42 Fed. Reg. 55,568, 55,568 (1977)."[10]

In her effort to perform the function of verifying operator compliance with Part 50, the Secretary seeks the medical records, payroll, and time sheet information upon which the operators relied to complete the 7000-1 and 7000-2 forms covering the period from July 1, 2009, through June 30, 2010. The payroll and time sheet records are used to verify the total number of employees and the total hours worked, as reported on the 7000-2 forms. 33 FMSHRC at 1317; 33 FMSHRC at 1397. The various documents containing medical information – including medical records, doctors' slips, worker's compensation filings, sick leave requests, drug testing information, emergency medical transportation records, and medical claim forms – are used to verify that the operators have been properly and accurately reporting on the 7000-1 forms all accidents, and work-related injuries or illnesses at the mines over the course of one year. 33 FMSHRC at 1317; 33 FMSHRC at 1397-98; S. Ex. G-1.

More specifically, the medical records contain important information about the cause, severity, duration, and treatment of occupational injuries and illnesses. S. Ex. G-1. They can help MSHA determine if an operator properly designated a workplace injury as one resulting in permanent total or partial disability, days away from work, and days of restricted work activity. *Id*. The doctors' slips contain information about the severity of an injury, treatment, and expected date that an injured miner would be expected to return to work or return to full duty. *Id*. The workers compensation documents, containing information concerning workplace injuries and illnesses, will be cross-referenced with the information reported on the 7000-1 forms. *Id*. A sick leave request details an employee's absence and can indicate whether a previously unreported workplace injury occurred. *Id*. The drug testing documents are related and limited to tests taken after a workplace injury or accident has occurred. *Id*. Emergency medical transportation documents will be cross-referenced with 7000-1 forms because they identify employees who required medical assistance due to workplace injuries. *Id*. Lastly, the medical

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[10] *Pero* was a discrimination case involving an employee in an operator's human resources department who challenged the company's practice of falsifying work place injury and illness information on MSHA's 7000-1 forms. *Pero*, 22 FMSHRC at 1361-62.

claims help identify previously unreported workplace accidents, injuries, or illnesses, and assist in establishing whether an illness fits the regulatory definition of "occupational illness." *Id*. Based on the clear correlation between the records sought and the completed Part 50 forms provided by the operators, we conclude that the requested records are relevant to MSHA's audit initiative.

The necessity for MSHA to collect such information is illustrated by the process in which reportable information is transmitted to the safety departments and maintained by the mine operators. 33 FMSHRC at 1315-17; 33 FMSHRC at 1396-97. Company safety officials testified that although they are responsible for completing and submitting the 7000-1 and 7000-2 forms to MSHA, they do not have direct access to the information upon which they are reporting. *Id*. at 1315. They must first be informed of a reportable incident, which is generally done by the foreman, either verbally or by a foreman's accident report. 33 FMSHRC at 1315; 33 FMSHRC at 1396. They may have access to the initial medical treatment information, but this information is then turned over to and maintained by either the human resources department ("HR") or a third party. 33 FMSHRC at 1314-17; 33 FMSHRC at 1396-97; Peabody Tr. 78; Massey Tr. 95-96.[11]

If MSHA were denied the ability to audit mine operator records, it would be forced to rely solely on the information provided by the company safety officials. MSHA would not be able to verify the accuracy of the reports. This is contrary to the preamble to 30 C.F.R. § 50.41, which specified that in carrying out its mission of verifying operators' reports of accidents, injuries, and occupational illnesses, MESA (now MSHA) must "control the data flow, rather than depend upon operator filtered records." 42 Fed. Reg. at 55569.

Thus, company safety officials responsible for completing the Part 50 forms must rely on other mine employees to provide them with all pertinent information on reportable incidents at the mine. These safety officials lack direct and critical access to the actual information needed to report on these forms, and thereby lack the ability even to verify for themselves the accuracy

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[11] The operators' safety departments may follow up with the supervisor, foreman or employee to assist in completing the 7000-1 form, but the safety departments do not have access to the various medical files maintained by HR. 33 FMSHRC at 1315-17; 33 FMSHRC at 1396-97; Peabody Tr. 78. In some instances, time sheets, payroll records, worker compensation records and medical documents are within the exclusive possession and control of HR. Peabody Tr. 53, 78. It is Peabody's practice that these records may not be accessed by personnel outside of HR, including the safety department. 33 FMSHRC at 1315; Peabody Tr. at 54-56. Although the records are not necessarily off limits to Massey's safety department, Massey's HR Manager testified that he had never received a call from a safety director inquiring about the absence of a particular miner. 33 FMSHRC at 1397. There was also no evidence at either hearing suggesting that HR would take the initiative to inform the safety department of a miner's absence related to a work place injury or illness, making it less likely that the safety officials would be fully informed of all reportable information. *See* 33 FMSHRC at 1315-16; 33 FMSHRC at 1397.

of the information they are reporting. The potential for incidents to go unreported or misreported is a genuine and justifiable concern for MSHA. Flawed incident reporting will result in an inaccurate and misleading understanding of the true safety conditions at a particular mine.

We agree with Judge Andrews' insightful observation concerning the incentive to under-report injury and occupational illness to MSHA:

> If the total number of reportable incidents is under-reported, a mine, obviously, will appear to be safer than it actually is. If the incidence rate and severity measure are artificially low, an unsafe mine may be able to avoid enhanced MSHA scrutiny. Further, an elevated severity measure is one criterion in the initial screening for establishing a "pattern of significant and substantial violations." 30 C.F.R. § 104.2(b)(3), Ex. G-4. Once this pattern has been established, the mine may be subjected to enhanced penalties and possible forced shutdowns. 30 C.F.R. § 104.4. If given the power to solely control the information flow between itself and MSHA, an operator possesses incentives to constrict that flow and under-report incidents at the mine.

33 FMSHRC at 1316. Peabody asserts that the judge's statement represents a prejudicial error, claiming that it was error to assume mine operators under-report accidents, illnesses, and injuries. Peabody Br. at 31. We are not suggesting that all operators, or even a majority of operators, under-report accidents, injuries, and occupational illnesses. However, just as there is a need for the Internal Revenue Services to audit tax returns, there is a need to review the underlying information that serves as the basis for the 7000-1 forms submitted by mine operators.[12]

[12] Commissioner Cohen notes that the concern is borne out by events that occurred subsequent to the filing of the PDRs in these cases. As stated, *supra*, footnote 7, Massey has submitted the information requested for the compliance audit to MSHA. *See* Oral Arg. Tr. 47. Two of the Massey mines involved in this case – the Randolph Mine operated by Inman Energy and the Justice No. 1 Mine operated by Independence Coal Co. – were found by MSHA to have failed to report, or inaccurately reported, a total of 24 injuries, resulting in 1,125 lost days of work. *Peabody Energy Challenges ALJ Decision to Turn Over Documents*, 18 Mine Safety and Health News, Sept. 12, 2011, at 481. In a separate case involving a different company, Commission ALJ Thomas P. McCarthy concluded that an operator "made a conscious decision to refrain from reporting" a reportable roof fall "based on a calculated risk that it would not get caught." *Pine Ridge Coal Co., LLC*, 33 FMSHRC 987, 1024 (Apr. 2011) (ALJ). Operators which make a practice of under-reporting, as Judge Andrews noted, avoid enhanced MSHA scrutiny. Thus, they gain a competitive advantage over operators which follow the law.

Petitioners suggest that MSHA could verify the information by interviewing individual miners. Massey PDR at 14; 33 FMSHRC at 1316; 33 FMSHRC at 1397. We disagree. Although MSHA may conduct interviews in addition to inspecting operator records, this approach alone would be insufficient to verify operator compliance.[13] Miners may be reluctant to share personal information with MSHA officials and/or reluctant or fearful to cooperate with inspectors conducting compliance audits of their employers. Such an undertaking would be cumbersome and time consuming and would likely yield insufficient information. One of the types of possible under reporting is the non-reporting of injuries and occupational diseases. If an injury or occupational disease simply is not reported by an operator, MSHA would not be able to conduct an interview because it would not know of the existence of the injured or sick miner.[14]

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[13] MSHA's General Inspection Procedures Handbook states that during a Part 50 audit, "the operator's accident, injury, illness, employment, and hours worked documentation should be reviewed and compared against data reported to MSHA to verify that the information reported to the Agency is correct. . . . In addition, inspectors should verify compliance by using other sources including interviews with mine management, miners' representatives, and miners. In some cases, examination and comparison of state workers' compensation records to MSHA reports may be appropriate." Metal Nonmetal General Inspection Procedures Handbook, No. PH09-IV-1 at 43 (Oct. 29, 2009).

[14] Commissioner Cohen adds that the potential for the under-reporting of occupational illnesses is particularly troublesome. As noted in the legislative history of the Black Lung Benefits Act of 1972, hundreds of thousands of American coal miners have been afflicted with, and died as a result of black lung disease. S. Rep. No. 92-743, at 2-3 (1972), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part II, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 1947-48 (1975). As early as the 1870s, American and British physicians were documenting numerous cases of coal miners' lung diseases. ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER, 1-21 (1998). The United Mine Workers of America was calling attention to the respiratory diseases of coal miners from its founding in the 1890s. *Id.* at 34-39. But the mining industry denied the existence of any significant disease caused by the inhalation of respirable coal dust. *Id.* at 39-40, 43-54. The mining industry continued to maintain that inhalation of coal mine dust is innocuous, or causative of very little disease, and successfully prevented effective regulation of respirable dust in the mines, until the 1969 Coal Act. *Id.* at 58-86, 98-102, 108-111, 115-16, 171-75. In 2010, after 41 years of experience with the respirable dust standards enacted in the 1969 Coal Act, MSHA issued a proposed rule which would, *inter alia*, reduce respirable dust standards in the nation's coal mines. 75 Fed. Reg. 64412 (Oct. 19, 2010). In the preamble to the proposed rule, MSHA surveyed the recent medical literature, and concluded:

> The extent of knowledge on how coal dust causes adverse pulmonary effects has evolved greatly in the 31 [sic] years since the Coal Act was signed into law. Though exposures have been

(continued...)

We conclude that, in order to determine whether an accident, injury or illness has been properly reported, it is necessary for MSHA to consult the relevant medical and employment records pertinent to that incident.

The requested records are limited in time – "the period of July 1, 2009 through June 30, 2010" – and scope – "relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine" – and narrowly tailored to carrying out a specific function of the Secretary under the Mine Act. *See* S. Ex. G-7. Accordingly, we conclude that not only is the Secretary's request "relevant and necessary," but it is reasonable and neither overly broad nor burdensome. Under the circumstances, we thus find it unreasonable to expect the Secretary, whose duty it is to ensure compliance with the Act, to rely solely on the representations made by company officials when carrying out the important duty of verifying company reporting.[15]

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[14](...continued)

> reduced, this review of the literature indicates that miners are still suffering unacceptable levels of disease. Under the existing standards, miners are still at increased risk of developing adverse effects such as pulmonary function deficits, obstructive and restrictive diseases including chronic bronchitis, COPD, emphysema, and simple [coal workers pneumoconiosis] and [progressive massive fibrosis] from a working lifetime exposure to respirable coal mine dust.

Id. at 64468-69. The finding of miners suffering "unacceptable levels of disease" 41 years after the passage of the Coal Act is borne out by the results of the autopsies performed on the 29 miners killed in the Upper Big Branch Mine explosion on April 5, 2010. According to MSHA's Report of Investigation of this explosion, "most of the victims had evidence of varying degrees of black lung in the form of CWP, emphysema and fibrosis. . . . The incidence of disease found in these miners clearly demonstrates that dust control practices at UBB and other mines where these miners worked did not provide adequate protection against black lung." MSHA, Report of Investigation, Fatal Underground Mine Explosion April 5, 2010, at 147-48 (Dec. 6, 2011). In light of the continued prevalence of black lung disease, it is certainly reasonable for MSHA to be concerned about under-reporting of occupational illnesses on the 7000-1 form.

[15] We also disagree with Peabody's argument that the 15 minute abatement time set by MSHA in the subject citations was objectively unreasonable. At the hearing, Peabody's senior HR manager and its safety manager both testified that if Peabody had been given additional time to produce the records, they still would not have complied with the request. Peabody Tr. 90-91, 120. Thus, regardless of the abatement time, the outcome would have been the same. Based upon the testimony of the company officials, it is apparent that from the outset Peabody intended to challenge the legality of the Secretary's informational request. *Id*. Under the circumstances, we do not find the 15 minute abatement time unreasonable.

C. Whether Petitioners' constitutional challenges have merit.

1. Right to privacy

The Intervenors, a group of miners, argue that they as individuals possess a strong and legally protected personal privacy interest in maintaining the confidentiality of their medical records. They maintain that their personal privacy interests are not lost merely because mine operators have no reasonable expectation of privacy in a mine's working areas. Petitioners further assert that MSHA's procedures for safeguarding the records obtained are inadequate and that the judge's contrary findings are erroneous.

Courts have yet to establish with certainty whether the Constitution confers to individuals a right to privacy regarding disclosure of their private information. *See Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (suggesting that such a right exists)*; Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 456 (1977) (acknowledging the existence of a right to informational privacy)*; Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S.Ct. 746, 751 (Jan. 2011) ("NASA") (recognizing, without deciding, that there may exist an informational right to privacy); *but see AFGE, AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing grave doubts as to the existence of a constitutional right to informational privacy, and stating that the Supreme Court has yet to resolve the issue). However, in recognizing that such a right may exist, courts have held that the right must yield to informational requests by the government when the
requests are reasonably related to a proper governmental interest and there are safeguards in place to protect from disclosure of information. *See Whalen,* 429 U.S. at 597-98; *NASA*, 131 S.Ct. at 759, 761; *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 621 (1989).

The challenged portions of the Secretary's audit contain reasonable requests for accident, injury, and illness-related information that further MSHA's interest in regulating and ensuring the health and safety of the nation's miners. Lending additional support is the preamble to the final rule, which specifically addresses the privacy concerns surrounding the Secretary's authority to access sensitive information:

> Some parties objected to § 50.41, asserting that it invades employees' privacy rights respecting medical data and improperly authorizes inspection and copying of records not specifically required to be maintained, including trade secrets and other internal company information. Many feared disclosure of any information copied.
>
> The patient-physician confidentiality privilege is not absolute. Where disclosure of patient data is related to a valid purpose, disclosure has been held not to be violative of privacy rights.

42 Fed. Reg. at 65535. Thus, the issue of privacy protection for medical data was raised and considered by MSHA's predecessor agency when promulgating section 50.41. It was ultimately decided that, under the circumstances, disclosure would not violate miners' privacy rights. We agree.

The courts have recognized that the privacy interests of employees in their medical records may need to yield to the public interest being furthered by governmental agencies responsible for protecting employee health. As Commissioner Duffy points out in his dissent, slip op. at 32-33, n.1, "[t]here can be no question that [employees'] medical records [fall] well within the ambit of materials entitled to privacy protection" (citing *United States v. Westinghouse*, 638 F.2d at 577). The *Westinghouse* court went on to say that "even material which is subject to protection must be produced or disclosed upon a showing of proper governmental interest." *Id.* The court in *Whalen* further stated that:

> *[D]isclosures of private medical information to* doctors, to hospital personnel, to insurance companies, and to *public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.* Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Whalen, 429 U.S. at 602 (emphasis added) (footnote omitted).

Although we recognize the Intervenor miners' sensitivity to the release of their records without their consent, the Secretary's clearly articulated need for this information to carry out her important functions under section 103 of the Mine Act and the Part 50 regulations, as well as her commitment to safeguard the information, must prevail against the claimed individual privacy interests. Thus, the governmental interest in regulating occupational safety and health in a notoriously dangerous industry outweighs the privacy interests of any individual miner and plainly justifies MSHA's audit requests.

In addition, MSHA has put in place certain protocols to safeguard the miners' personal information.[16] The protocols include the secure transport of personal information, filing procedures, locked storage, limited access to authorized users, access control system, and the destruction and disposal of information pursuant to the General Record Schedule NC1-433-85-1, or court order. S. Ex. G-5. We find that the protocols are adequate and must be viewed in light of the agency's attempt to meet valid, good-faith concerns about securing personal information.[17]

In summary, the preamble to section 50.41, the statutory and regulatory limitations placed on the Secretary's request, MSHA's clear need for the information, and the safeguards established to protect the information, are compelling. Therefore, as the ALJ found, 33 FMSHRC at 1320-21, to the extent that any such privacy right exists, we conclude that the Secretary's records request, narrowly tailored to further MSHA's compelling governmental interest, does not violate that right.

2. Fourth Amendment arguments

Petitioners and Intervenors submit that the Fourth Amendment's protection against warrantless searches provides employers with a reasonable expectation of privacy in records that are not required to be maintained by law, and provides employees with an expectation of privacy in their personal medical records. The Secretary, citing *RSM, Inc. v. Buckles*, 254 F.3d 61, 69 (4th Cir. 2001), responds that her request in this case is in the nature of a subpoena duces tecum, thus satisfying Fourth Amendment requirements that it be sufficiently limited in scope, relevant

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[16] Because MSHA will not store and retrieve the requested information by individual miner names, it is not considered to be held in a "system of records" under the Privacy Act. S. Supp. Br. at 18-19. *See* 5 U.S.C. § 552a(a)(5); *see also Henke v. Dep't of Commerce*, 83 F.3d 1453, 1460 n.12 (D.C. Cir. 1996); *Baker v. Dep't of the Navy*, 814 F.2d 1381, 1384 (9th Cir. 1987); *Shannon v. Gen. Elec. Co.*, 812 F. Supp. 308, 321 (N.D.N.Y. 1993); *Krieger v. DOJ*, 529 F. Supp. 2d 29, 44-46 (D.D.C. 2008); *Crumpton v. U.S.*, 843 F. Supp. 751, 755-56 (D.D.C. 1994), *aff'd on other grounds sub nom. Crumpton v. Stone*, 59 F.3d 1400 (D.C. Cir. 1995). Consequently, MSHA is not required to adhere to the Privacy Act's confidentiality protocols.

[17] The Commission was very concerned about the protection of miners' privacy in this case and requested special briefing on specified privacy issues. Order, July 15, 2011. At oral argument, Commissioners engaged in extensive dialogue with the Secretary's counsel concerning privacy issues and requested additional information, which the Secretary subsequently provided. Oral Arg. Tr. 51-53, 68-75; Letters from Samuel Lord to Michael McCord, August 5 and 11, 2011. Although Commissioner Duffy, in his dissent, takes issue with what he characterizes as the Secretary's "on the fly" attempts to address the miners' privacy rights, slip op. at 43, the fact remains that sufficient privacy protections now exist and were in place prior to the Secretary gaining access to the records. In addition, the operators were not assessed penalties during the formation of the safety protocols. Under the circumstances, the tardiness of the protections is insufficient to invalidate the audit initiative.

in purpose, and specific in directive so that compliance will not be unreasonable. She further argues that, in the event her request is deemed a warrantless inspection, it satisfies the three-prong test for such inspections set forth in *Donovan v. Dewey*, 452 U.S. 594, 599 (1977).

The threshold question in deciding this issue is whether the operators and miners have a reasonable expectation of privacy concerning the records requested by MSHA. As the Supreme Court noted in *Oliver v. United States*, 466 U.S. 170, 177 (1984):

> Since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." . . . The Amendment does not protect the merely subjective expectation of privacy, but only "those expectation[s] that society is prepared to recognize as 'reasonable'."

Consequently, "[w]e must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *United States v. Miller*, 425 U.S. 435, 442 (1976).[18]

In *Donovan*, the Supreme Court made clear that the mining industry is pervasively regulated and that warrantless nonconsensual mine inspections conducted by the Secretary under the Mine Act are fully consistent with the Fourth Amendment. 452 U.S. at 605. Because of this pervasive regulation, mine operators have an extremely low expectation of privacy with regard to their mines and records related to mine safety and health. This lowered expectation is reinforced by the language of section 103(h), which expressly states that "[i]n addition to such records as are specifically required by this chapter, every operator . . . shall . . . provide such information, as the Secretary . . . may reasonably require from time to time to enable [her] to perform [her] functions." Additionally, in 30 C.F.R. § 50.41, the Secretary required each operator to allow MSHA to inspect and copy information related to accidents, injuries, or illnesses which are "relevant and necessary" for verifying investigation reports or determining compliance with reporting requirements. As a result of this pervasive regulation, mine operators are fully aware that the Secretary is authorized to require access to such information without obtaining an administrative search warrant.

Moreover, while there are limits on the government's authority in this area, they are well respected by MSHA's narrowly focused, clearly explained, and limited request for information in this case. In *BHP*, the Commission "recognize[d], as did the Court in *Donovan*, that the bounds of the Secretary's authority are not without limits," but emphasized that "section 103

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[18] The Supreme Court's recent decision in *United States v. Jones*, 132 S.Ct. 945, 2012 WL 171117 (2012), does not change the expectation of privacy analysis in a case like the present one.

provides the 'certainty and regularity of its application' that is a substitute for a warrant." 21 FMSHRC at 767, quoting 452 U.S. at 603. In *BHP,* we relied in particular on section 103(a) as a limit to the Secretary's investigatory authority, and noted the Court's statement in *Donovan* that "[t]he discretion of Government officials to determine what facilities to search and what violations to search for is . . . directly curtailed by the regulatory scheme." *Id*., quoting 452 U.S. at 605. Of course, this "regulatory scheme" includes 30 C.F.R. § 50.41. As noted earlier, *supra,* at 14, we agree with the judge that this request is clearly distinguishable from the *Sewell* case, in that no inspector is seeking authority to rummage through the operators' files. 33 FMSHRC at 1318. Accordingly, we conclude that the mine operators had no legitimate expectation of privacy with regard to the documents in question and that the Secretary's actions comported with the Fourth Amendment.

We disagree with the arguments of Commissioner Duffy, our dissenting colleague, who maintains that the Secretary's audit violated the Fourth Amendment. Commissioner Duffy concedes that under *Donovan* the mining industry is pervasively regulated so that operators have a low expectation of privacy. Slip op. at 36. Nevertheless, citing *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), he contends that the Secretary can conduct warrantless searches for documents related to mine accidents, injuries, or illnesses only if those documents are "required to be generated and maintained by the enabling statute or regulations duly promulgated pursuant to that statute." Slip op. at 32, 37. He further contends that the Secretary must undertake additional rulemaking to specifically identify the documents that she is entitled to have access to in order to carry out her functions under the Act. *Id.* at 41. He asserts that the term "may reasonably require from to time to time" in section 103(h) of the Mine Act must mean to require by means of a duly promulgated rule. *Id*.

First, our colleague's reliance on *Biswell* and *Colonnade* is misplaced. These cases involved statutes that explicitly limited the government's inspection authority to records "required to be kept." *See Biswell*, 406 U.S. 311; *Colonnade Catering*, 397 U.S. at 73 n.1. The Court did not address the question of the government's inspection authority regarding records *not* legally required to be retained, and thus the cases do not stand for the proposition that a warrantless right of access is necessarily limited to records specifically required to be maintained by statute or regulation. Because the Mine Act grants the Secretary authority to inspect "records" and "information," "[*i]n addition to* such records as are specifically required" to be kept, *see* 30 U.S.C. § 813(h) (emphasis added), *Biswell and Colonnade* are inapposite, as the statutory basis for the search here is broader than in the two cases decided by the Court.

Furthermore, because reliance on these cases forms the foundation of his theory that a statutory or regulatory requirement that records be maintained is the only justification for an exception to the general warrant requirement, Commissioner Duffy's argument that additional

rulemaking is necessary in order to cure this alleged constitutional problem fails as well.[19] *Biswell* and *Colonnade* do not support his contention that the language in section 103(h) that an operator must provide such information as the Secretary "may reasonably require from time to time" means information the Secretary "requires by means of a rule," slip op. at 41. This is because, as we previously noted, in both *Biswell* and *Colonnade*, the information the government wished to acquire was already required to be maintained by statute, and the Court never explicitly stated that this was a prerequisite to the inspections at issue. In any event, courts generally have held that use of the phrase "from time to time" refers to discretionary actions of an agency, *American Canoe Ass'n v. EPA*, 30 F.Supp.2d 908, 923 (E.D.Va. 1998), *citing Natural Res. Defense Council v. Thomas*, 885 F.2d 1067, 1075 (2d Cir. 1989); *Natural Res. Defense Council v. EPA*, 770 F.Supp. 1093, 1105 (E.D.Va. 1991), *aff'd*, 16 F.3d 1395 (4th Cir. 1993), which would therefore not require a rule.

Because the 1977 rulemaking directly addressed the Secretary's authority and need to gain access to certain kinds of information not required to be generated or maintained under the statute, mine operators were clearly placed on notice that the Secretary could seek backup documents and other information "necessary and relevant" to verification and compliance determinations. Operators had no reasonable expectation of privacy with regard to that information. No additional rulemaking was necessary, and the Secretary's audit did not violate the Fourth Amendment.

The dissent's reliance on Sixth Circuit case law in this area, slip op. at 38-39, is misplaced. *Marshall v. Nolichuckey Sand,* 606 F.2d 693 (6th Cir. 1979), was, as our colleague acknowledges, decided prior to the Supreme Court's ruling in *Donovan*.[20] Consequently, that court's approval of warrantless inspections limited only to the "active workings" of coal mines,

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[19] Our colleague argues that the language of the preamble is not binding on mine operators and thus cannot be relied upon by the Secretary to create a right to obtain information. Slip op. 40, n.4. However, the preamble did not itself create a right to obtain information, but rather explained how the Secretary intended to interpret and implement the regulatory language. *See Sec'y of Labor v. Cannelton Indus., Inc.,* 867 F. 2d 1432, 1438 (D.C. Cir. 1989) (preamble to Secretary's regulation used by court to explain the regulation); *Wyoming Outdoor Council v. United States Forest Serv.,* 165 F.3d 43, 53 (D.C. Cir. 1999) ("the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules"). As such, it served to put mine operators on notice that the statute and section 50.41 gave the Secretary broad authority to seek "relevant and necessary" information. This is yet another reason why mine operators should have had no reasonable expectation of privacy with regard to such information.

[20] Although the dissent states that the Court in *Donovan* cited to *Nolichuckey Sand* approvingly, slip op. at 38, the Court merely noted that it was one of three cases in which Courts of Appeals had upheld the warrantless inspection provisions of the Mine Act as they applied to quarry operations. 452 U.S. 598 n.5.

and its assertion that a warrant is required for the inspection of offices and other areas, was superceded by *Donovan*, which upheld warrantless inspections by MSHA with no such qualification. 452 U.S. at 606. The *Donovan* court relied on the broad authority provided by section 103(a) which requires "inspections of each underground coal or other mine *in its entirety* at least four times a year, and of each surface coal or other mine *in its entirety* at least two times a year." 30 U.S.C. § 813(a) (emphasis added.).

The *Nolichuckey Sand* court's assertion was based on *United States v. Consolidation Coal Co*., 560 F.2d 214, 217 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942 (1978), *judgment reinstated*, 579 F.2d 1011 (1978) ("*Consol"*). *Consol* in turn relied on a district court decision, *Youghiogheny and Ohio Coal Co. v. Morton*, 364 F.Supp 45 (S.D. Ohio 1973). However, *Youghiogheny* never mentioned "active workings," in upholding warrantless searches of coal mines. *Id*. at 52.[21] In Judge Wiseman's concurring opinion in *United States v. Blue Diamond Coal Co.*, 667 F.2d 510, 521 (6th Cir. 1981), also relied on by our colleague, the court determined that suppression of certain records seized from the mine office was not appropriate, and noted that: "in light of *Donovan* and today's decision, it is apparent that certain dicta in [*Consol*] no longer reflect[s] accurately the current state of the law." Morever, even the *Consol* court acknowledged that the mine offices involved were "part of coal mine premises within the meaning of the Act," and that it was "reasonable to assume that mine operators have a reduced expectation of privacy in their business offices than less highly scrutinized enterprises." 560 F.2d at 219, 220.[22]

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[21] The phrase "active workings" is found in Title II of the Mine Act, which contains requirements pertaining to respirable dust. For instance, section 202(a) requires operators to take samples of "the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed." 30 U.S.C. § 842(a). Section 202(g) instructs the Secretary to make frequent spot inspections of "the active workings of coal mines for the purpose of obtaining compliance with the provisions of this title." 30 U.S.C. § 842(g).

[22] Commissioner Duffy further asserts that the revised request for records could presumably require operators to turn over records held by its agents, i.e., doctors, clinics, insurers, etc., from whom they have authority to obtain the required documents. Slip op. at 42, n.5. However, neither party has presented any facts that would necessitate the Commission's consideration of this issue, and we reject any invitation to do so based on a record devoid of evidence on this question.

We also conclude that the miners do not have a reasonable expectation of privacy with regard to the documents sought by the Secretary in these audits. The Supreme Court in *Miller* held that a bank depositor had no protected Fourth Amendment interest in his bank records, such as checks and deposit slips, that were business records of the banks and not the depositor's private papers. The Court's decision stated unequivocally that:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 443. As in *Miller*, the records in this case are maintained by third parties (the mine operators) for their own business purposes and among their own business records.

Miller emphasized that courts generally recognize that the Fourth Amendment does not prohibit the collection of information revealed to a third party and conveyed by him or her to government authorities. *Id.* Generally, following *Miller*, an individual only has a Fourth Amendment expectation of privacy in documents that he or she owns or possesses. This includes medical records demanded by the government. *See, e.g., Young v. Murphy*, 90 F.3d 1225, 1236 (7th Cir. 1996) (holding that patient failed to establish a Fourth Amendment claim to investigators' examination of his nursing home records); *Webb v. Goldstein*, 117 F. Supp. 2d. 289, 295-96 (E.D.N.Y. 2000) (holding that parolee had no privacy interest in his prison medical records); *Romano v. City of New York*, 2009 WL 1941912 (E.D.N.Y. (2009)) (holding that plaintiff had no protected Fourth Amendment interest in his medical records allegedly seized at the office of his medical practitioner, as he could state no interest in the property seized at premises not under his control).[23]

Moreover, as the government agency responsible for protecting the *health* and *safety* of the nation's miners, MSHA's request for the miners' medical records can hardly be described as an "inquiry that *unnecessarily* touch[es] upon intimate areas of [a miner's] personal affairs," as asserted by the dissent, slip op. at 44, *citing Miller*, 425 U.S. at 444 n.6 (emphasis added). *See also Westinghouse*, 638 F.2d at 580. This is particularly so when the records, limited to work-related injuries and illnesses, provide an accurate picture of the health and safety conditions the miners are subject to while in the mines. Accordingly, we conclude that the Secretary's audit request does not violate the operators' or intervenors' Fourth Amendment rights.

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[23] These cases refute the dissent's view, slip op. at 44-45, that the court's holding in *Miller* does not apply to medical records.

3. Fifth Amendment arguments

Intervenors further assert that the Secretary's failure to fully consider the privacy issues when promulgating 30 C.F.R. § 50.41 was arbitrary and capricious and violates their Fifth Amendment right to due process.

The Due Process Clause of the Fifth Amendment guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." The fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. *Capital Cement Corp.,* 21 FMSHRC 883, 887 (1999) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The timing and manner of the hearing depend upon the "appropriate accommodation of the competing interests involved." *Id.* (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citations omitted)).

We find the Intervenors' due process argument unavailing.[24] The general public, including miners, had the opportunity to challenge the promulgation of section 50.41 during the notice-and-comment proceeding over 30 years ago. The parties also retain the right, as they have done here, to challenge the Secretary's application of the rule in each instance where it is applied. All parties involved in this proceeding, including Intervenors, have had a meaningful opportunity to protect their rights and interests by fully presenting their case before the Commission through oral argument and briefs. We find no violation of the right to due process protected by the Fifth Amendment.

D. Whether other federal statutes or state laws bar disclosure of the records and information.

Petitioners state that the Secretary's authority to require them to produce the disputed records is further limited by other federal and state statutes, including the Americans with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), the Genetic Information Non-Discrimination Act of 2008 ("GINA"), the Illinois AIDS Confidentiality Act, and by Illinois' and Indiana's recognition of a common law tort for the invasion of the right to privacy.

We conclude that none of the aforementioned federal statutes impedes the Secretary's authority to request the disputed information. Specifically, under the ADA, any information obtained about an employee's medical condition, as a result of an employer's requirement that an

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[24] We also disagree with the dissent's assertion that the criteria and scope of the request is based more on "the level of curiosity of the various auditors" as opposed to an industry-wide system for records generation or retention. Slip op. at 47. The record shows that all of the operators selected to take part in the audit received identical requests and were asked to produce the same records. There is no issue here of a varying "level of curiosity" on the part of the auditors.

employee submit to a medical examination or as a result of the employer conducting voluntary examinations, must be treated as a confidential medical record and collected and maintained on separate forms and in separate medical files. 42 U.S.C. § 12112(d)(3)(B), (4)(C); 29 C.F.R. §§ 1630.14(b)(1), (c)(1), (d)(1). Although there are exceptions to the confidentiality requirement, Petitioners correctly maintain that MSHA does not fall within any of the three enumerated exceptions found at 29 C.F.R. § 1630.14. However, section 1630.15(e) provides that "[i]t may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation . . . . " 29 C.F.R. § 1630.15(e). Thus, because the disputed information is required to be released to the Secretary pursuant to section 103(h) of the Mine Act and 30 C.F.R. § 50.41, and is necessary to ensure compliance with the Act, we do not see the ADA as a roadblock. *See also* EEOC *Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. Pt. 1630 App. 1630.15(e) (2000); *accord Bay v. Cassens Transport Co.*, 212 F.3d 969, 974 (7th Cir. 2000) ("The ADA does not override health and safety requirements established under other Federal laws") (citation omitted).

Similarly, the FMLA, 29 U.S.C. § 2601 et seq., requires that all medical information obtained by employers pursuant to its provisions must be maintained in strict accordance with the ADA's Title I confidentiality provisions found at 29 C.F.R. § 1630.14(b). *See* 29 C.F.R. § 825.500(g). However, disclosure is required to provide relevant information upon request by government officials investigating compliance with the FMLA or other pertinent law. *See* 29 C.F.R. § 825.500(g)(3). Because MSHA inspectors are government officials investigating compliance with "[an]other pertinent law," i.e., the Mine Act, disclosure of the disputed records does not violate the FMLA.

Subject to some exceptions, GINA requires that employers treat and maintain an individual's genetic information as a confidential medical record under section 102(d)(3)(B) of the ADA. 42 U.S.C. § 2000ff-5(a). Although the exceptions outlined in section § 2000ff-5(b) of GINA do not apply to MSHA, covered entities under the Health Insurance Portability and Accountability Act ("HIPAA") that already possess a right of access pursuant to 45 C.F.R. § 164.512(b)(1)(i), are specifically exempted by GINA's disclosure prohibition. 42 U.S.C. § 2000ff-5(c). Because MSHA is a covered entity under HIPAA, it is permitted access to miners' medical information under GINA. *See* 45 C.F.R. § 164.512(b)(1)(i). Furthermore, section 1635.11(a)(5) of GINA's regulations state that "[t]his part does not–[l]imit the statutory or regulatory authority of . . . the Mine Safety and Health Administration to promulgate or enforce workplace safety and health laws and regulations." 29 C.F.R. § 1635.11(a)(5).

In addition, state law is insufficient to prevent operator compliance with the Secretary's audit initiative. Section 506 of the Mine Act provides that states may have concurrent jurisdiction with MSHA and that state law is not superseded by the Act "except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard." 30 U.S.C. § 955(a).

IV.

Conclusion

For the reasons set forth herein, we conclude that the judge correctly ruled that Petitioners violated 30 C.F.R. § 50.41 by refusing to permit the Secretary access to the related payroll and medical information requested as part of the Part 50 audit. Accordingly, the citations and orders are affirmed.[25]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

[25] Docket Nos. WEVA 2011-402-R and VA 2011-386-R are dismissed as moot for the reasons stated herein.

Commissioner Duffy, dissenting:

These proceedings raise in stark relief and taut contention a number of fundamentally worthy interests and values. For example, it is the Secretary's responsibility to see to it that all reportable accidents, injuries, and illnesses are correctly recorded and those records maintained and made available to her so that she can evaluate the effectiveness of her enforcement program and determine whether current safety and health standards are adequate to protect miners. Likewise, operators have a right to know with certainty what is required of them in meeting their obligations under the Mine Act and in meeting their fiduciary duties to their employees with respect to the collection, maintenance, and release of sensitive personal information. Lastly, and most importantly, miners have a right to confidentiality and security with respect to their intimate health information. Each of these interests needs to be taken into account in arriving at a balance that fosters the purposes of the Mine Act while accommodating fundamental rights of privacy and due process.

The Secretary's actions in these cases fall woefully short of achieving that balance, and for that reason I would reverse the judge's decisions and vacate the citations and orders at issue. I reach this conclusion with respect to broader considerations of law and public policy arising from MSHA's auditing initiative which precipitated these enforcement actions, and with respect to the deficiencies inherent in the issuance of the particular citations and orders before us. In short, for the reasons articulated below, the Secretary's actions are wrong in both a general and particular sense.

As for the general deficiencies of the auditing initiative, it must be rejected as illegitimate because it cannot be reconciled with fundamental and manifest constitutional principles relating to privacy and due process. Supreme Court jurisprudence respecting the scope and legitimacy of warrantless access to private records demands that such records must first be required to be generated and maintained pursuant to enabling legislation or implementing regulations. Neither of those predicates obtains in these circumstances as the Secretary readily admits. Consequently, the Secretary is not authorized to demand records that have not been required to be maintained, either by the Mine Act or the regulations set forth in 30 C.F.R. Part 50.

Even if I were to grant the Secretary the benefit of the doubt as to the legitimacy of her auditing initiative, I would nevertheless reverse the judge and vacate all of the citations and orders issued as being void *ab initio*. The enforcement actions here are invalid because the Secretary issued the citations and orders in the midst of muddled and contradictory signals as to what records were required to be surrendered, and, more fatally, without first having adopted a responsible and constitutionally valid protocol for safeguarding the privacy rights of the miners at these particular mines.[1] Indeed, such a protocol was not finalized and made public until the

[1] In reviewing these cases I am proceeding under the presumption that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal (continued...)

very eve of the hearings in these cases and was still undergoing public explanation and clarification during and after oral argument before this Commission. Slip op. at 22 n.17. Therefore, regardless of the merits of the Secretary's newly derived policy asserting her right of access to records not required to be generated and maintained by the Act or the regulations, that policy was incomplete, confusing, and inherently deficient when the demands for records were made and the enforcement actions were taken at these particular mines.

Since I conclude that the enforcement actions in these cases must be vacated on the grounds that the auditing policy and the means by which it was specifically carried out against these operators were both constitutionally deficient, it is necessary to set forth the background necessary to those conclusions. I stress at the outset that the constitutional infirmities I find with respect to the auditing initiative affect both the operators and the miners who have taken issue with the program in these proceedings. The miners have a personal and proprietary interest in the medical records to which the Secretary seeks access that matches if not exceeds that of the operators. Therefore, the following discussion encompasses the constitutional implications of the auditing initiative for both the operators and the miners.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describe the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

Fourth Amendment protections against warrantless searches have been extended beyond private residences to commercial premises. *New York v. Burger,* 482 U.S. 691, 699-700 (1987). For example, warrantless inspections conducted by the Occupational Safety and Health Administration ("OSHA") have been held unreasonable in the absence of the employer's consent. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313-15 (1978). The protection against unreasonable searches has been extended to the inspection of records whereby, as a general proposition, such inspections must be in accordance with a formal subpoena, which itself is subject to judicial review as to its reasonableness before sanctions for noncompliance can be imposed. *See v. Seattle*, 387 U.S. 541 (1967):

> Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit

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[1](...continued)
nature, are well within the ambit of materials entitled to privacy protection." *United States v. Westinghouse*, 638 F.2d 570, 577 (3rd Cir. 1980).

> inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records . . .
>
> . . . The agency has the right to conduct all reasonable inspections of such documents *which are contemplated by statute,* but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

Id. at 543-45 (emphasis added).

As a general proposition, then, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Accordingly, notwithstanding the unequivocal demands placed on the policing power by the Fourth Amendment, the Supreme Court has carved out careful exceptions when it comes to particular industries. Thus, the Court has allowed warrantless administrative inspections of certain establishments on the grounds that they have been pervasively regulated to the extent that their expectations of privacy have been reduced and that the nature of their activities has persuaded Congress that requiring a warrant would frustrate a substantial governmental purpose, such as frequent and unannounced inspections. *See, e.g., United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcoholic beverage industry).

However, lest we lose sight of the principles undergirding the Supreme Court's limited departure from its general intolerance for nonconsensual, warrantless entry onto commercial premises, the Court in both *Biswell* and *Colonnade* was careful to point out that access to records during a warrantless physical inspection of the premises is limited to those records specifically required to be maintained by statute and regulation. In *Biswell*, the statute at issue

> authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any *records or documents required to be kept* . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at such premises."

406 U. S. at 311-12 (quoting 18 U.S.C. § 923(g)) (emphasis added) (alteration in original). In *Colonnade*, the authorizing statute provided:

> The Secretary or his delegate may enter during business hours the premises . . . of any dealer for the purpose of inspecting or examining any *records or other documents required to be kept* . . . under this chapter or regulations issued pursuant thereto . . .

397 U.S. at 73 n.1 (quoting 26 U.S.C. § 5146(b)) (emphasis added).

These caveats were necessary to reconcile those rare instances where warrantless physical inspections of selected commercial premises would be tolerable notwithstanding the restrictive principles adopted for the vast majority of enterprises in *See v. Seattle*, *supra*. Thus, the Supreme Court has established that in order to justify an exception to the general prohibition against warrantless access to records and the requirement for a subpoena to compel the surrender of such records, there must first be a statutory or regulatory requirement that the records be generated and maintained. That law or regulation, by its specificity as to which documents must be generated and maintained, serves as a necessary and acceptable substitute for the specificity of a subpoena.[2]

In contradistinction to the experience of general industry under the OSHA statute, the Mine Act has been interpreted by the Supreme Court to permit warrantless nonconsensual searches of mines, both coal and noncoal, and both surface and underground. *Donovan v. Dewey*, 452 U.S. 594 (1981). The Court distinguished circumstances under the Mine Act from those under the OSHA statute by finding a substantial federal interest that would be significantly frustrated by a warrant requirement. *Id*. at 602-03. The Court further held that a warrant is not required for MSHA inspections because the mining industry's long history of pervasive regulation has lowered the expectation of privacy among mine operators. *Id*. at 603-04.

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[2] In support of her auditing initiative, the Secretary cites access to records cases arising under the OSHA statute (S. Br. at 28), but those cases actually underscore the principle that, absent a warrant, the Secretary has no absolute right of access to documents not required to be maintained by statute or regulation. In *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1241 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981), access to medical records was predicated on a regulation that required employers to monitor the lead content in employees' blood and to maintain those monitoring records for inspection by authorized representatives of OSHA and the National Institute for Occupation Safely and Health ("NIOSH"). In *General Motors Corp. v. NIOSH*, 636 F.2d 163, 166 (6th Cir. 1980), *cert. denied*, 454 U.S. 877 (1981), access to records was sought by means of a subpoena duces tecum that was made subject to district and circuit court review. The Mine Act does not grant the Secretary similar subpoena powers except in conjunction with public hearings called to investigate mine accidents. *See* 30 U.S.C. § 813(b).

In distinguishing the relative expectations of privacy as between mine operators and those employers governed by the OSHA statute, the Court determined that the Mine Act "in terms of the certainty and regularity" of its inspection program (four yearly inspections of underground mines and two yearly inspections of surface mines), as opposed to OSHA's random and unpredictable inspection program, "provides a constitutionally adequate substitute for a warrant" so that the mine operator "cannot help but be aware that he 'will be subject to effective inspection.'" *Id*. at 603 (quoting *Biswell*, 406 U.S. at 316). The Court went on to explain, however, that such "awareness" was owing to the specificity of the regulatory program, including its regulatory requirements:

> [T]he standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of federal regulations. Indeed, the Act requires that the Secretary inform mine operators of all standards proposed pursuant to the Act. Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act establishes a predictable and guided federal regulatory presence. Like the gun dealer in *Biswell*, the operator of a mine "is not left to wonder about the purposes of the inspector or the limits of his task."

Id. at 604 (quoting *Biswell*, 406 U.S. at 316) (citation omitted).

The Supreme Court's decision in *Donovan* as it applies to the physical inspection of a minesite resonates strongly with the legislative history of the Mine Act. In explaining the breadth of an MSHA inspector's right of entry "to, upon, or through" any mine, the Senate Committee Report states:

> Section [103(a)] authorizes the Secretary . . . to enter upon, or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant. . . . . Safety conditions in the mining industry have been pervasively regulated by Federal and State law. . . . . The Committee notes that despite the progress made in improving the working conditions of the nation's miners . . . mining continues to be one of the most hazardous occupations. Indeed, in view of the notorious ease with which many safety and health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut the Act's objectives.

S. Rep. No. 95-181, at 27 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 615 (1978).

With respect, therefore, to the right of entry for purposes of conducting a physical inspection of a mine and its facilities, Congress and the Supreme Court have most decidedly circumscribed the Fourth Amendment rights of mine operators on the grounds of longstanding and pervasive federal oversight of mining and the need to exercise an element of surprise to assure that hazards are discovered and corrected. That unbridled right of access does not, however, extend to any and all records in a mine operator's possession.

Donovan did not specifically address access to records, but since it is a direct outgrowth of the Supreme Court's decisions in *Biswell* and *Colonnade*, it must be assumed that, insofar as access to records is concerned, the restrictions placed upon those agencies charged with enforcing laws relating to firearms (*Biswell*) and liquor (*Colonnade*) must also apply here to MSHA: the access is limited to those records that are required to be generated and maintained by the enabling statute or regulations duly promulgated pursuant to that statute. It should also be stressed that the urgency that may attend a physical inspection of a mine in search of safety and health hazards in no way attends the audits sought to be conducted here, particularly since the Secretary admits that she has no reason to believe that these operators have misreported or doctored their accident, injury, and illness experience as reflected in those records actually required to be maintained under the Act and Part 50. Peabody Tr. 25. Therefore, just as *Biswell* and *Colonnade* restricted a warrantless right of access only to records required to be maintained by statute or regulation, so also their progeny, *Donovan,* must be construed to limit MSHA's access to records required to be maintained by the Act or Title 30.

Unlike my colleagues, I view *Donovan* as inextricably linked to *Biswell* and *Colonnade*, such that their principles regarding access to records apply to the Secretary in her enforcement of the Mine Act. *Biswell* and *Colonnade* provide the basis for the Court's rationale for ultimately distinguishing the Mine Act from the OSHA statute and for reaching different conclusions on warrantless access at minesites versus general industry work sites. My colleagues argue that section 103(h) of the Mine Act is broader than the record-keeping statutes at issue in *Colonnade* and *Biswell*. Slip op. at 25. However, that, by itself, does not answer the question of whether the Secretary's designation of miners' medical records as subject to her section 103(h) authority permits the Secretary to demand the production of those records without a warrant. In *Donovan*, the Supreme Court explained that a warrant was not required in *Biswell* because the authorizing legislation "provided a sufficiently comprehensive *and predictable* inspection scheme." *Donovan*, 452 U.S. at 600 (emphasis added) (citing *Biswell*, 406 U.S. at 316). With regard to the element of "predictability," the Court in *Biswell* allowed for warrantless inspections of gun dealerships because, due to the specificity of the statute at issue, "[t]he dealer is not left to wonder about the purposes of *the inspector or the limits of his task*." 406 U.S. at 316 (emphasis added).

In contrast, as the Court explained in *Donovan,* in *Barlow's* it invalidated OSHA's warrantless inspections, despite their being authorized by the OSHA statute, because the OSHA statute "does not provide any standards to guide inspectors either in their selection of establishments to be searched or *in the exercise of their authority to search*." *Donovan*, 452 U.S. at 601 (emphasis added). The Court concluded that a statute that "simply provides that such

searches must be performed 'at reasonable times, and within reasonable limits and in a reasonable manner'" did not comport with the principles embodied in the Fourth Amendment. *Id*. As the Court highlighted in *Barlow's* and other cases, a warrant may be necessary to protect against the "unbridled discretion [of] executive and administrative officers" so as to assure that "reasonable legislative or administrative standards for conducting an . . . . inspection are satisfied with respect to a particular [establishment]." *Barlow's*, 436 U.S. at 320-23; *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967).

Two Sixth Circuit decisions, one issued prior to *Donovan* and one issued after, provide compelling authority for concluding that the inspection regime under the Mine Act necessarily falls within the rubric of *Biswell* and *Colonnade* and for the proposition that only records required to be maintained by the Mine Act or by duly promulgated regulations can be made subject to warrantless inspection. In *Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir. 1979), a decision cited favorably by the Supreme Court in *Donovan*, the Sixth Circuit explained why the decision in *Barlow's* did not preclude warrantless searches of mines: "On the contrary, Justice White made it clear that requiring a warrant for OSHA inspection does not doom warrantless search provisions in other regulatory statutes. 'The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute.'" *Id.* at 696 (quoting *Barlow's*, 436 U.S at 321). Among the privacy guarantees the Sixth Circuit identified in the Mine Act, was the fact that the Mine Act "permits warrantless inspections only of the 'active workings' of coal mines. A warrant is required for the inspection of offices and other areas where the operator has a general expectation of privacy." *Id*. (citing *United States v. Consol. Coal Co.*, 560 F.2d 214, 217 (6th Cir. 1977), *vacated and remanded*, 436 U.S. 942, *judgment reinstated*, 579 F.2d 1011 (1978)).

In the post-*Donovan* case, *United States v. Blue Diamond Coal Co.,* 667 F.2d 510 (6th Cir. 1982), the mine operator sought to suppress in a criminal proceeding documents that had been seized by the government during an investigation of the Scotia Coal Mine disaster. The documents in question were mine examination records that were required to be maintained by regulation and were located on a table in the mine office where mine inspectors had always had ready access to them. *Id*. The Sixth Circuit denied the request to suppress the evidence on the grounds that the inspector entered the mine office during reasonable hours and went only to areas where the records were maintained for purposes of government inspection. *Id*.

In a concurring opinion, Judge Wiseman (District Judge, sitting by designation) more thoroughly distinguished the case at hand from the Court's decision in *Consolidation Coal*:

> The agents in *Consolidation Coal* sought "evidentiary indicia of compliance" with section 202 of the Act, 30 U.S.C. § 842. Section 842(a) required the transmittal of dust samples to the monitoring agency, but it did not require operators to make records of any sort available for inspection on the premises. This necessarily means that the items seized in *Consolidation Coal* were not records maintained in compliance with the Act, and thus the defendant

> retained a significant expectation of privacy as to their contents. On the other hand, all the books seized in the instant case were maintained for public inspection, as required by statute. 30 U.S.C. § 863(d)(1), (f), (g), (w). Consequently, defendants in the instant case had no expectation of privacy in regard to the contents of the records seized. . . .
>
> Although Consolidation Coal Co. was engaged in a closely regulated business, the searches in that case required warrants because the governmental action impinged upon privacy interests that the company still retained, despite its pervasive regulation. *Consolidation Coal* is fully consistent with *Marshall v. Barlow's, Inc.*, as this Court found in its response to the Supreme Court's remand for reconsideration in light of that case. It is also consistent with the Supreme Court's *Donovan* decision. The entries in the instant case required no warrant, however, because defendants had no general expectation of privacy in either the premises entered or the records sought.
>
> Warrants are necessary to check the "unbridled discretion" of government agents as to when, where, and whom to search. That discretion was sufficiently limited in this case, because the agents were only authorized to search for records maintained for MESA[3] inspection in areas freely accessible to MESA agents and other members of the public.

Id. at 522 (citations and footnote omitted).

Here, the Secretary's rejection of a rulemaking proceeding in favor of an ad hoc approach to obtaining miner medical records removes her chosen regulatory scheme from the ambit of *Donovan* to that of *Barlow's*. Consequently, a warrant is required before she can make the individual demands for miner medical records that she seeks, or, more efficiently, she must set forth requirements for the generation, maintenance, and release of such records through notice and comment rulemaking.

Although section 103(h) of the Mine Act does not require that the records being sought in these cases be maintained by mine operators (a fact the Secretary clearly acknowledges), it does authorize the Secretary to impose such a requirement:

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[3] MESA, the Mine Enforcement and Safety Administration, was MSHA's predecessor agency under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1972).

> 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 him to perform his functions under this Act.

30 U.S.C. § 813(h) (emphasis added).

Notwithstanding the Secretary's arguments to the contrary (S. Br. at 22-23), 30 C.F.R. § 50.41 does not serve to implement the authority of section 103(h) of the Act in a manner that passes constitutional muster, given the dictates of *See*, *Biswell*, *Colonnade*, and *Donovan*, *supra*. To purport that Section 50.41 requires mine operators to provide private medical records to the Secretary, without first requiring that those records be generated and maintained, is inimical to the principles governing access to records, even at those premises that the Supreme Court has held to be subject to warrantless physical inspections. Furthermore, in light of the fundamental doctrine that statutes and regulations must be interpreted so as to avoid a conflict with the Constitution, it would be impermissible to find that 30 C.F.R. § 50.41 by its terms can eliminate the predicate requirement that records sought by the Secretary must first be required to be generated and maintained by mine operators pursuant to a specific provision of the Mine Act or the regulations. *See, e.g.*, *Chamber of Commerce v. Federal Election Commission*, 69 F.3d 600, 604-05 (D.C. Cir. 1995), where the court denied that *Chevron* deference was warranted when the FEC's definition of a key term in the enabling legislation was possibly violative of the First Amendment: "We are obliged to construe the statute to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress."[4]

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[4] The Secretary's reliance upon language in the Preamble to Part 50 that asserts her right to inspect and copy documents that she determines to be relevant to the task of verifying those reports operators are required to maintain is also misplaced and has an even more attenuated relationship to the authority granted to the Secretary in section 103(h) of the Mine Act than does §50.41. *See* S. Br. at 16-17. A preamble cannot impose an obligation on mine operators that is not set forth in the regulation it purports to summarize. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-39 (D.C. Cir. 1986):

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent proceedings. . . . A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . .
>
> A general statement of policy, on the other hand, does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed.

(continued...)

Taking *Biswell* and *Colonnade* at their clear prescriptive force, the Secretary may not as a constitutional matter, seek to implement the authority of section 103(h) by fiat. She must do so by means of notice-and-comment rulemaking— the only legitimate way of assuring that a proper rationale has been adopted that justifies the exception to the rule prohibiting warrantless access to records that are inherently private and sensitive. Thus, the term "may reasonably require from time to time" has to mean "require" by means of a duly promulgated rule, not by a demand by the inspector in the field. It cannot be read to legitimize demands for the release of records that can change from one inspection to the next, one mine to the next, or one MSHA district to the next. Indeed the arbitrariness of the auditing initiative is fully demonstrated by the history of these particular cases.

On October 19, 2010, when the Secretary first notified the Peabody Petitioners of her need for records beyond those required to be generated and maintained under the Act and under Part 50, the request, broad and ill-defined, included a demand for the surrender of:

> Medical records in your possession for all persons employed for the period of July 1, 2009 through June 30, 2010, as listed below:
>
> > Worker compensation filings, FMLA releases and records, sick leave records, tests including drug tests, studies, medical reports, medical histories, treatment notes, fact sheets, transfer records, EMT or ER notes, ambulance reports, explanation of benefits (EOB), UB 92s, HICFs, nursing notes, chest x-rays.

Peabody Hearing, Ex. C-A.

The request was so broad as to include all medical records whether or not they were related to accidents, injuries, and illnesses that arose from events or conditions at the mine.

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[4](...continued)
Id. at 537 (quoting *Pacific Gas & Elec. Co. v. FPC*, 506 F2d 33, 38 (D.C. Cir. 1974)) (alteration in original). My colleagues assert that the preamble does not "create a right to obtain information," slip op. at 25 n.19, yet they also acknowledge that only the preamble comes close to specifying some of "the very documents requested by the Secretary in this case." *Id*. at 12.

Thereafter, on October 28, 2010, in response to the operator's objection to the breadth of the first request, the Secretary revised her request and demanded:

> All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

Id., Ex. C-D.

While the revised request is somewhat more focused than the first request, it is still subject to broad interpretation, particularly with regard to the phrase "or may have resulted from work at the mine." There are no criteria for determining whether or not an illness or condition such as hearing loss, dermatitis, or back pain should be attributed to activities or conditions at the minesite, or rather to activities or conditions away from the minesite. Likewise, the request, insofar as it refers to "all individuals working at your mine," rather than to "all individuals employed by you," would seem to hold the operator accountable for the medical records of employees of independent contractors who have no employment relationship with the operator. Moreover, since the request seems to have originated with those MSHA employees charged with conducting the audits at issue, there is no assurance that future requests won't gravitate toward the open-ended and amorphous form of the original request quoted above.[5]

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[5] The revised request for records also included records held by third parties, presumably doctors, clinics, and insurers, from whom the operators have authority to obtain the records or, if such authority does not exist, the identity of those third parties. However, MSHA's authority to inspect stops at the mine gate so it is inconceivable that the agency could demand production of records from these third party agents. Nor can the provisions of Part 50 be stretched and manipulated to authorize a requirement that mine operators secure the records from those third party agents. Moreover, since Part 50 does not require that operators maintain at the minesite the records at issue here, the Secretary's auditing initiative is self-defeating. Operators can simply avoid having to comply with the inspectors' demands by making sure that the records in question are not stored at their minesites. Recently, in *Mining and Property Specialists*, 35 FMSHRC 2961, 2962 (Dec. 2011), the Secretary stated that a requirement that records be maintained at a minesite cannot be met by storing those records at a central headquarters for several local mines because the headquarters is not a "mine" for purposes of the Act, thus precluding the Secretary's right of access. The converse is also true: if a regulation does not require that files be maintained at a minesite, the Secretary cannot demand that they be accessible to her nonconsensual warrantless demand if they are kept at a location not subject to her right of entry. The solution to the Secretary's dilemma is obvious: promulgate a rule that requires the records that she seeks to

(continued...)

The Secretary attempts to assure the Commission that it can trust that her requests will be reasonable, but also asserts in the preamble to Part 50, 42 Fed. Reg. 65535 (Dec. 30, 1977), and in her arguments throughout this litigation, that only she can determine the relevance of the information she seeks. Moreover, while she pays lip service to the operators' and the miners' rights to judicial review of her demands for warrantless access to documents not required to be maintained by the Mine Act or Part 50, I find that to be undermined by her concomitant argument that she is owed great deference on the matters of reasonableness and relevance. *See* S. Br. at 15. Under such circumstances, judicial review becomes something of an empty exercise with a predetermined outcome.

Moreover, it has not been established with the level of assurance that matters of confidentiality require that the Secretary has taken all steps to ensure that the inherent privacy rights of miners have been protected and that she has adequately responded to their concerns. In fits and starts, the MSHA auditing initiative has been massaged as this litigation has proceeded in an attempt to address – on the fly – the miners' privacy rights. However, when constitutional issues are implicated in a regulatory scheme, *ad hoc*, seat-of-the-pants adjustments and assertions of deference owed to the regulator's good intentions are not enough.

The fact remains that at the time these citations and orders were issued, the Secretary had no policy in place that specifically and comprehensively addressed the collection of the miners' personal medical information, the limitations on access by MSHA personnel and others to that information, the means by which the information would be stored, the length of time the information would be retained by MSHA, the uses to which the information would be put, the sanctions that would be imposed for the unauthorized disclosure of the information, and the procedures by which miners would be notified as to the release of the information and their opportunity to have input into how the information would be utilized.

The Secretary should not be allowed to attempt to remedy these glaring deficiencies *post hoc* simply for the sake of administrative convenience or to salvage the citations and orders at issue. When fundamental constitutional rights are placed in potential jeopardy by the Secretary's ill-defined and shape-shifting initiative, it is not legally permissible to allow her a procedural "mulligan." A protocol for protecting the miners' interests in their personal and confidential records is required and, by the dictates of the Supreme Court's pronouncements outlined above, that protocol must take the form of a regulation promulgated through notice-and-comment rulemaking. The Secretary's failure to adopt that course before resorting to the enforcement actions taken here provides sufficient grounds for vacating these particular citations and orders as void *ab initio*, notwithstanding the broader illegitimacy of the auditing initiative.[6]

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[5](...continued)
be maintained at the minesite.

[6] Despite my colleagues views to the contrary, slip op. at 22 n.17, I respectfully insist that the Secretary's post hoc attempt to cobble together a protocol for addressing the miners' (continued...)

The miners cite the case of *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), for the proposition that a mere administrative demand, however well intentioned, for confidential records held by a third party that intrudes upon the reasonable expectations of privacy of individuals may well impinge upon the Fourth Amendment rights of those individuals. Interv. Br. at 13. I find that argument compelling in the circumstances presented here. *Warshak* dealt with personal and business e-mail communications; here we are dealing with much more intimate information, the unauthorized disclosure of which could be embarrassing, even devastating.

My colleagues cite *United States v. Miller*, 425 U.S. 435 (1976), as grounds for rejecting the miners' assertion of a right to privacy regarding their medical records. Slip op. at 27. That reliance is unavailing. *Miller* involved business documents such as cancelled checks and deposit slips that were voluntarily generated and provided to a bank by an individual under criminal investigation. *Id*. at 442 ("All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."). Furthermore, the Court in *Miller* set forth a crucial caveat that the majority ignores: "We are not confronted with a situation in which the Government, 'through unreviewed executive discretion,' has made a wide-ranging inquiry that unnecessarily 'touch[es] upon intimate areas of an individual's personal affairs.'" *Id*. at 444 n.6 (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). That caveat provided the rationale by which the court in *Warshak*, *supra*, distinguished its own holding from *Miller:*

> But *Miller* is distinguishable. First, *Miller* involved simple business records, as opposed to the potentially unlimited variety of "confidential communications" at issue here. Second, the bank depositor in *Miller* conveyed information to the bank so that the bank could put the information to use "in the ordinary course of business."

631 F.3d at 288. The personal medical records of these miners most certainly qualify as "intimate areas of an individual's personal affairs" – even more so than the e-mails at issue in *Warshak* – and as such are fully deserving of Fourth Amendment protection. Moreover, the

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[6](...continued)
fundamental and compelling privacy concerns is inadequate. *Compare* S. Ex. G-5 *with* 29 CFR 1910.1020 (Rules of Agency Practice and Procedure Concerning OSHA Access to Medical Records). Indeed, the Secretary was still fine-tuning her efforts even during and after oral argument in this case. Moreover, even if one were to accept that the Secretary's failure to have the protocols in place when these citations and orders were issued is mere "tardiness" and not grounds for invalidating the audit initiative, *id.*, that does not gainsay the conclusion that the *citations themselves* are illegitimate for having been issued without benefit of the protocols, however insufficient and unvetted they might be.

miners do not voluntarily elect to invest the operators with the authority to keep the medical records. They are automatically created as a condition of employment and for the attendant purpose of securing insurance coverage.

There is no question that mine operators must make available to MSHA inspectors those records specifically required to be generated and maintained by the Act or by duly promulgated regulations set forth in Title 30 of the Code of Federal Regulations.[7] For example, in 1987, the Associate Solicitor of Labor for Mine Safety and Health, Edward Clair, issued an opinion letter stating, "[I]t is our position that MSHA has a right of access to any information required to be maintained by the Mine Act or the implementing regulations in Part 50," basing his opinion on the "key factor" that authorized access depends upon "whether the information is required to be maintained under the Mine Act or implementing regulations." Peabody Hearing, Ex. C-I.

Likewise, this Commission and the courts have upheld MSHA's right to inspect reports required to be maintained by the Mine Act. *Peabody Coal Co.* 6 FMSHRC 183 (Feb. 1984) (operator's accident investigation report); *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973) (concluding that "maps, books, and records which are maintained for and in compliance with the Mine Safety Act" must be produced upon an inspector's demand).

The seminal judicial pronouncement on MSHA's right of access to records not required to be generated or maintained by the Act or the regulations was former Chief Administrative Law Judge Broderick's decision in *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) (ALJ). In that decision the judge held that MSHA inspectors were not authorized to inspect "records not specifically required to be kept by law." *Id.* at 871. Of fundamental importance to Judge Broderick (and what must be of fundamental importance in these proceedings as well) was the "cardinal rule" of statutory construction that required him to interpret the Act "so as to avoid conflict with the Constitution." *Id.*

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[7] In that sense, MSHA Form 7000-1--Mine Accident, Injury and Illness Report, required by 30 CFR § 50.20 – not the audit initiative – corresponds to the selected prescription drug forms required to be generated, maintained, and submitted to the New York Public Health Department in *Whalen v. Roe*, 429 U.S. 589 (1977), cited by the majority at 21-22, supra. Both records were subjected to extensive public comment and input through, respectively, calculated legislative and rulemaking processes. In the case of *Whalen*, the statute challenged as violative of privacy rights was "manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States." *Id.* at 597. That procedurally careful provenance, respectful of the privacy rights at stake, provided the basis for the Supreme Court's acceptance of an otherwise intrusive injection of the state into the doctor-patient relationship. That attention is missing here and renders the audit initiative incompatible with *Whalen*.

The Secretary discounts the influence that should be accorded *Sewell* by arguing that it is an unreviewed decision. For purposes of sound authority, if the decision is correct, and it is, it makes no difference whether it was reviewed or not. Indeed, even while noting that *Sewell* was an unreviewed decision, the Commission majority in *BHP Copper, Inc.*, 21 FMSHRC 758 (July 1999), gave Chief Judge Broderick's decision wide berth by taking pains to distinguish the request for a miner's telephone number during an accident investigation in *BHP* from an inspector's attempt to access medical records in *Sewell* (*id*. at 767 n.15,) and ultimately based its decision on the Secretary's duty to investigate accidents under section 103(a) of the Mine Act, not her right of access to records under section 103(h). *Id*. at. 765 n.12; *see also Peabody*, 6 FMSHRC at 186 n.5 ("Because this case involved only a request for records specifically required by the Act to be maintained, it does not present the situation faced in *Sewell* . . . . There the inspector sought to personally review accident, injury and illness and medical and compensation records at the mine. Those records were contained in individual personnel files which also contained other data not required to be maintained by the Mine Act.").

Moreover, the Secretary can point to no cases since *Sewell* was issued more than three decades ago where she has taken enforcement action to compel surrender of medical records not required to be generated and maintained by the Act or Part 50. That would seem to underscore the continuing potence of the Chief Judge's logic in *Sewell*.

The judge below and the Secretary on appeal attempt to distinguish *Sewell* from the present case by noting that in *Sewell* the inspector sought to inspect the records himself, whereas here the inspectors simply asked the operators to inspect the records and turn over those documents referred to in the demand letters. 33 FMSHRC at 1318; 33 FMSHRC at 1400; S. Br. at 19. The practical effect of both approaches is the same— the Secretary is able to secure nonconsensual, warrantless access to private records not required to be maintained by the Mine Act or Part 50. It is a distinction without a difference. More importantly, from the perspective of the miners whose confidential records are at stake, it doesn't matter whether the "rummager" is the inspector or the mine operator's agent acting on orders from the inspector. In the absence of a regulatory standard governing the maintenance and release of these medical records, the infringement on miners' expectations of privacy is the same— particularly in circumstances where the operator's agent is apprised of the potential for civil penalties of up to $7500 per day for failure to comply with the inspector's demand. *See* 30 C.F.R. § 100.5(c).[8]

[8] The conclusion reached by the court in *Warshak*, *supra*, where the government was found to violate the Fourth Amendment when, without a warrant, it compelled an internet service provider ("ISP") to turn over e-mails from one of its subscribers, is directly on point here: "It only stands to reason that, if government agents compel an ISP to surrender the contents of a subscriber's emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception." 631 F.3d at 286.

In addition to the conflicts with Fourth Amendment principles, the auditing initiative is also violative of the due process rights of operators and the miners employed at mines made subject to the audits.

Section 103(h) of the Mine Act and Part 50 of Title 30 are of universal application to all mines— from underground coal mines employing 500 miners to mom and pop gravel quarries employing five miners. Operators, regardless of size, status, or location, are entitled to be regulated by binding norms that apply equally to all operations. Moreover, those binding norms must, by the dictates of the Mine Act and the Administrative Procedures Act, be specifically and unambiguously set forth in regulations adopted in consequence of public notice and comment.[9] The demands made in these cases, ostensibly in contemplation of imposing pattern of violation sanctions (Oral Arg. Tr. 46), lack that universality and specificity. For example, there is nothing to prevent a demand for the prior one year's medical records at one mine in one MSHA district versus a demand for the prior two years' medical records at a different mine in a different MSHA district. The criteria and scope of the requests seem to be dependent more upon the level of curiosity of the various auditors than by any standard, industry-wide system for records generation and retention. There is no predictability, no notice of what can be required to be maintained and released.

Section 103(h) refers to "every operator of a coal or other mine" as having the responsibility to provide information to the Secretary, but the auditing initiative does not apply to all operators. It could only be applicable across the board if all operators were required to generate and maintain the medical and employment records being sought. By imposing the obligation to turn over records not specifically required to be maintained by regulation, the auditing initiative effectuates disparate treatment of those operators and the miners they employ who by fiat are brought within the ambit of the auditing initiative. Since the Secretary is not alleging that the operators in these proceedings were suspected of under reporting accidents, injuries, or illnesses in those documents that are specifically required to be maintained by the standards set forth in Part 50, the disparate treatment here cannot be justified as having been imposed for good cause, an essential component in determining whether a warrantless search of records is justified in general terms. *See v. Seattle, supra.*

Once a mine is randomly subjected to an audit of the kind contemplated in these cases, it can be assumed that the records would have to be maintained and made available prospectively, notwithstanding the lack of a regulatory mandate to do so, in order to avoid criminal sanctions under section 110(f) of the Mine Act, 30 U.S.C. § 820(f), or other laws applicable to the maintenance of records in contemplation of potential litigation. This disparate treatment as between mines inside and outside the MSHA auditing initiative raises additional due process concerns that have not been taken into account by the Secretary in imposing this initiative on a

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[9] *See American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("[C]learly some agency creation of a duty is a necessary predicate to any enforcement against an operator for failure to keep records.").

random basis with the potential for vacillating requirements from mine to mine and request to request. Furthermore, without formal standards setting forth the types of records that may be demanded and the time periods for which the demand can be made, the auditing initiative will continue to be an arbitrary moving target which this Commission and its judges will be continuously asked to review for "reasonableness."

To be sure, the Secretary has made a strong case justifying her need to inspect these types of records in order to verify the accuracy of records that are explicitly required by the regulations, and to determine whether accident, injury, and illness statistics at a given mine are so appreciably high that they should be factored into a decision to impose the severe sanction of a pattern of violation notice. However, Congress and its standard-setting surrogates, the regulatory agencies, must tailor their statutes and regulations to the immutable patterns provided by the Constitution. We cannot stretch and trim the Constitution to fit the current fashion. Regulatory strategies, no matter how well intentioned, must not serve to contort those inherent rights and privileges intrinsic to a constitutionally protected society.

I cannot emphasize enough that I agree in principle with my colleagues that the Secretary can have access to the private medical records of miners that she seeks here, but she cannot gain that access by fiat. The auditing initiative, in order to avoid conflict with fundamental constitutional principles, must be subjected to the protections and the safeguards that only public notice-and-comment proceedings can provide. The requirement for rulemaking does not place an undue burden on the Secretary. Indeed she is currently engaged in developing rules for imposing pattern of violations sanctions on mine operators pursuant to the authority of section 104(e) of the Act. 30 U.S.C. § 824(e); 76 Fed. Reg. 5719 (Feb. 2, 2011). Since the auditing initiative is apparently intended to provide data to aid in the decision on whether to impose the pattern of violations sanction, it is only appropriate that this crucial component be added to the agenda of the rulemaking proceeding. The Fourth Amendment permits no other way.

We pride ourselves on being a government of laws and not of men. Accordingly, no matter how attractive and efficient a regulatory initiative may be in the abstract, if it implicates fundamental rights of privacy and due process, if it imposes new obligations not found in current regulations, and if it constitutes a radical departure from decades of prior practice and policy, it must be promulgated subject to the full scrutiny and input of those who must live with and under it.

Accordingly, I would reverse the judge and vacate all citations and orders issued in these cases.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 30, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-210-M
v.	:	A.C. No. 25-01010-229138
OVERTON SAND & GRAVEL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 6, 2012, the Commission received from Overton Sand and Gravel Company ("Overton") a motion for reconsideration seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

On November 29, 2010, the Commission received from Overton a motion to reopen a penalty assessment that had become a final order of the Commission on September 24, 2010. Despite being informed by the Mine Safety and Health Administration ("MSHA") that it must contest the assessment to schedule a conference, Overton erroneously believed that its letter requesting a conference preserved its rights. Overton also stated that it missed the initial penalty assessment because its personnel coordinator was transferred from the Overton office in August and the remaining personnel failed to forward the MSHA mail because they were instructed to look for mail from the Rocky Mount MSHA District office.

On June 29, 2011, the Commission issued an Order denying without prejudice Overton's motion to reopen, because it failed to provide a sufficient basis for the Commission to reopen the penalty assessment. 33 FMSHRC 1156 (June 2011). In particular, we noted that Overton had failed to explain the circumstances surrounding the transfer of its personnel coordinator, including exactly when the transfer occurred and the specific impact the transfer had on Overton's ability to timely contest the proposed assessment. The Order stated that Overton was required to file any amended or renewed request to reopen within 30 days, or the matter would be dismissed with prejudice, regardless of the merits. The Order further stated that any renewed request to reopen would be required to include a full description of the facts supporting Overton's claim and to establish good cause for failing to timely contest the proposed assessment.

In its motion for reconsideration, Overton asserts that its counsel never received the Commission's Order. Overton's counsel states that she became aware of the Order on August 30, 2011, after reading about it in a mine safety publication. Counsel contacted Overton's personnel coordinator, who indicated he would discuss it with management. On January 5, 2012, Overton's safety director contacted its counsel and it was discovered that the personnel coordinator never shared the information about the Commission's Order with management.

The Secretary of Labor opposes the motion for reconsideration because it does not provide the detailed explanation required by the Order. The Secretary did not receive the Order, and therefore she does not question Overton's claim that it did not learn of the Order until August 30, 2011. However, the Secretary notes that after learning of the Order, the operator waited for more than four months before filing a motion for reconsideration. The Secretary further asserts that the operator's inadequate internal procedures are not an adequate explanation for delay.

The Commission has made it clear that where a failure results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of any procedure for reliable communication between counsel and management represents an inadequate or unreliable

internal processing system. Moreover, Overton's motion for reconsideration failed to answer the Commission's questions, as required by the Order, and establish good cause for failing to timely contest the proposed assessment.

Having reviewed Overton's request and the Secretary's response, we conclude that Overton has failed to establish good cause for reopening the proposed penalty assessment, and deny its motion to reopen with prejudice. We hereby deny Overton's motion for reconsideration. Accordingly, this case is dismissed.

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 30, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-23-M
v.	:	A.C. No. 40-00083-259278
ROGERS GROUP, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 3, 2011, the Commission received from Rogers Group, Inc. ("Rogers") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on July 5, 2011, and became a final order of the Commission on August 4, 2011. Rogers asserts that its new safety manager was still learning the many facets of his job responsibilities and mistakenly failed to file the notice of contest. The Secretary does not oppose the request to reopen, and notes that MSHA received a timely payment for the uncontested penalties, by check dated July 21, 2011.

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

/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
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May 30, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-344
v.	:	A.C. No. 46-08758-256835
RHINO EASTERN, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 8, 2011, the Commission received from Rhino Eastern, LLC ("Rhino") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on June 7, 2011, and became a final order of the Commission on July 7, 2011. Rhino asserts that its safety director timely contested the assessment on June 30, 2011, and paid for the uncontested penalties. The Secretary does not oppose the request to reopen, but notes that there is no record of MSHA receiving a contest of this proposed assessment. The record does show that MSHA received a timely payment for the uncontested penalties, by check dated June 9, 2011.

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

/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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9980 / FAX: 202-434-9949

May 1, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of CHARLES HINES,	:	Docket No. SE 2012-344-DM
Complainant,	:	SE MD 12-05
	:	
v.	:	
	:	Raleigh-Durham Quarry
MARTIN MARIETTA MATERIALS, INC.,	:	Mine ID 31-01941
Respondent.	:	

ORDER APPROVING TEMPORARY REINSTATEMENT AGREEMENT

Before: Judge Barbour

This temporary reinstatement proceeding arises under Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). On March 20, 2012 the court received the Secretary's Application for Temporary Reinstatement of the complaining miner, Charles Hines. On March 26, 2012 this case was assigned to me by Chief Judge Robert Lesnick. A conference call was promptly held setting a hearing for April 03, 2012 in Raleigh, North Carolina. On March 30, 2012 the parties reported the Secretary of Labor, Charles Hines, and Martin Marietta Materials Inc., ("MMM") had agreed to the temporary economic reinstatement of Hines. On April 25, 2012 the parties filed a joint motion to grant temporary economic reinstatement, signed by the parties and Hines. As stated in the joint motion, the terms of the temporary economic reinstatement agreement are as follows:

1. The Parties have agreed and Hines has also agreed[,] in settlement of this Temporary Reinstatement proceeding[,] to an economic reinstatement of Hines to full pay and benefits at the current rate - without disruption of his seniority from his original hire date - for his position as a haul truck driver consistent with his work schedule and average time on the job during the twelve months preceding his termination from employment.

2. By agreeing to temporary economic reinstatement of Hines until such time as a final order is entered on the merits of the discrimination complaint filed in these proceedings, MMM does not concede in any way the merits of Hines' claims and nothing herein shall be construed as an admission of liability by MMM. MMM reserves the right to argue that Hines' temporary reinstatement should terminate on an

earlier date if the Review Commission holding in *Sec'y of Labor v. North Fork Coal Co.*, 33 FMSHRC 27 (Rev. Comm., Jan. 2011), is overturned by the Sixth Circuit Court of Appeals, or *Sec'y of Labor v. Vulcan Construction Materials*, 2011 WL 3223842 (Rev. Comm., July 2011), is overturned by the Seventh Circuit Court of Appeals. By entering into this agreement, MMM does not waive its right to present evidence that any physical reinstatement is an inappropriate remedy regardless of the outcome of the case.

3. Hines' temporary reinstatement will be conducted as follows:

    a. **Work Assignment:** Hines will not report for duty at the Mine during the pendency of the temporary reinstatement referenced above. Instead, Hines is free to pursue any and all other employment opportunities other than with Respondent.

    b. **Gross Pay:** Hines will receive the same gross pay per pay period that he was receiving at the time of his December 13, 2011 termination from which all payroll deductions previously taken from his gross pay will be withheld per pay period and all benefits to which he was entitled will be reinstated effective from the date of the signatures of this agreement.

    c. **401K Plan:** If, prior to his December 13, 2011 termination, Hines was contributing to MMM's 401K plan, those contributions will continue in the same amount and at the same intervals as existed on December 13, 2011. If applicable, MMM shall make the same automatic contributions to Hines' 401k plan account from the date of signatures to this agreement that it made prior to Hines' termination on December 13, 2011.

    d. **Health Insurance:** If Hines received health insurance through MMM prior to his termination on December 13, 2011, Hines will receive the same health insurance benefits during the temporary reinstatement period that he received prior to his termination on December 13, 2011, effective from the date of signature to this agreement. Any and all deductibles that Hines paid during 2011 under the coverage set forth in this paragraph prior to his termination on December 13, 2011, shall remain in effect from the date of signatures to this agreement.

    e. **Life Insurance and Accidental Death or Dismemberment Insurance:** If Hines received life insurance or accidental death or dismemberment insurance through MMM prior to his termination on December 13, 2011, Hines will receive the same life insurance or accidental death or dismemberment insurance that he received prior to his termination on December 13, 2011, effective from the date of signatures to this agreement. Any and all deductibles that are associated with these insurance policies that existed prior

to his termination on December 13, 2011, shall remain in effect effective from the date of signatures to this agreement.

f. **Other Benefits:** Any and all other economic employment benefits, bonuses, or compensation that Hines received prior to his termination on December 13, 2011, shall remain in effect during the temporary reinstatement period. The parties agree that Hines' physical presence is not required at the Mine, and the parties agree that economic reinstatement is functionally distinguishable from physical reinstatement. Therefore, any benefits, economic or otherwise, not expressly authorized in other provisions of this Agreement, which might inure to the benefit of Hines if he were physically reinstated at the Mine, and which would be related solely to his physical presence at the Mine, are not due to Hines under the terms of this Agreement.

WHEREFORE, the Joint Motion to Grant Temporary Economic Reinstatement is **GRANTED**.

It is further **ORDERED** that the Secretary initiate a conference call May 23, 2012 at 11:30 a.m. e.s.t. to notify the court of her determination regarding whether discrimination occurred in violation of the Mine Act.

/s/ David F. Barbour
David F. Barbour
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
(202) 434-9950

May 3, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION ("MSHA"), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2009-402 A.C. No. 15-17587-166968-01
v.	:	
OHIO COUNTY COAL CO., Respondent.	:	Mine: Freedom Mine

DECISION

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee for Petitioner

Jeffrey K. Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky for Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

On January 26, 2009, the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), filed a Petition For Assessment of Civil Penalty ("Petition") against Ohio County Coal Company ("Respondent"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), as amended, 30 U.S.C. §§ 815 and 820. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission, dated December 1, 2010, the case was assigned to the undersigned for adjudication.

The Petition alleges twenty violations. However, on or about July 29, 2011, the parties filed a Joint Motion to Approve Partial Settlement, specifically their amicable resolution of 17 of the 20 alleged violations. The Joint Motion was granted and the Partial Settlement approved by Order dated January 4, 2012.

[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

The three remaining alleged violations are those identified by citations numbers 8489154, 8489163 and 8489493, for which the Secretary seeks penalties totaling $2,214.00. Citation 8489154 alleges a violation of 30 C.F.R. § 75.220(a) pertaining to roof control plans, specifically unsupported top with a loose roof bolt and fallen draw rock. Citation 8489163 alleges a violation of 30 C.F.R. § 75.211(d) pertaining to roof testing and scaling, specifically the lack of a pry bar on a roof bolting machine. Citation 8489493 alleges a violation of 30 C.F.R. § 75.604(b) pertaining to permanent splicing of cables, specifically a ground monitor wire protruding from a splice of trailing cable attached to a roof bolter machine and which failed to make the cable "effectively insulated and sealed so as to exclude moisture." Respondent disputes both liability and the penalty assessed for Citation 8489163 (the pry bar). Respondent acknowledges liability but disputes the penalty amount for Citation 8489154 (the loose roof bolt) and Citation 8489493 (the cable splice).

A hearing was held on the three disputed violations in Evansville, Indiana on July 27, 2011.[2] The Secretary introduced the testimony of two witnesses at hearing: Jeffery Winders and Anthony Fazzolare. The Respondent offered evidence from four witnesses: Walter Wood, Robert Bosch, Wyatt Oates and Dennis Travis. Seven exhibits offered by the Secretary (nos. 11, 16, 18, 26, 27, 29, and 30) and two exhibits offered by the Respondent (nos. 1 and 2) were admitted into evidence. The Secretary and Respondent filed their Post-Hearing Briefs on September 23, 2011 and October 11, 2011, respectively (hereinafter cited as Secretary's ("S's") Brief and Respondent's ("R's") Brief). With the latter filing, the record closed.

Burden of Proof

"The Mine Act imposes on the Secretary, in a civil penalty proceeding, the burden of proving the violation alleged by a preponderance of the evidence." *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989), *citing Kenny Richards*, 3 FMSHRC 8, 12 n.7 (January 1981).

I. Stipulations

Before the hearing, the parties filed the following stipulations:

1. Ohio County Coal Company, LLC is subject to the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 *et seq*.[3]

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[2] During the hearing, evidence on the three Citations was taken separately and sequentially. Citation herein to the hearing transcript will be as follows: "Tr. __."

[3] The Regulations promulgated to implement the Act are set forth in Chapter I of at Title 30 of the Code of Regulations (30 C.F.R. § 1.1 *et seq*.). The violations at issue here fall under Part 75 of the Regulations (30 C.F.R. § 75.1 *et seq*..), which part "sets forth safety standards compliance with which is *mandatory* in each underground coal mine subject to the Federal Mine (continued...)

2. Ohio County Coal Company, LLC has an affect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

3. Ohio County Coal Company, 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.

4. Ohio County Coal Company, LLC operates the Freedom Mine, I.D. No. 15-17587.

5. The Freedom Mine produced 1,357,111 tons of coal in 2007, and had 386,263 hours worked in 2007.

6. A reasonable penalty will not affect Ohio County Coal Company, LLC's ability to remain in business.

II. Citation 8489154 – Loose Roof Bolt

Citation 8489154 alleges a safety violation of 30 C.F.R. § 75.220(a) pertaining to roof control plans, specifically an unsupported top with a loose roof bolt and fallen draw rock at XC 137 on the number 7 supply road in the Freedom Mine at 8.45 a.m. on September 4, 2008. Secretary's ("S's") Ex. 11. For this citation, the Secretary proposes assessment of a penalty in the amount of $634.00. *Id*.

A. Regulatory Provisions

Rule 30 C.F.R. § 75.220(a), entitled "Roof control plan," states as follows:

> (1) 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.

(2) The proposed roof control plan and any revisions to the plan shall be submitted, in writing, to the District Manager. When revisions to a roof control plan are proposed, only the revised pages need to be submitted unless otherwise specified by the District Manager.

30 C.F.R. § 75.220(a).

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[3](...continued)
Safety and Health Act of 1977." 30 C.F.R. § 75.1 (italics added).

B. Summary of Evidence

At the hearing, the Secretary offered the testimony of MSHA Inspector Anthony Fazzolare in support of the occurrence of the violation and assessment of the proposed penalty. Inspector Fazzolare testified that he conducted an inspection at Respondent's Freedom Mine on September 4, 2008. Tr. 59. During the inspection, he observed a loose roof bolt, where draw rock had fallen down, on the No. 7 supply road. Tr. 62. The mine was required to have a roof control plan and a standard roof control plan would require the bolt to be replaced, Mr. Fazzolare stated. Tr. 62. Thus, he issued a citation for violation of the roof control plan, per 30 C.F.R. § 75.220(a).[4] Tr. 59, S's Ex. 11.

Additionally, Inspector Fazzolare opined that the violation was "significant and substantial" due to the reasonable likelihood that falling rock could hurt someone and cause lost work days or restricted duty. Tr. 74, S's Ex. 11. He stated he marked the violation as "reasonably likely to cause an injury," due to the amount of draw rock in the area. Tr. 71. In addition, he noted that the roof bolt plate was hanging loose and thus could not control or support the draw rock. *Id*. Inspector Fazzolare determined that two persons could be affected, as that is the number of miners typically riding in a mantrip. *Id*. He characterized the degree of negligence as "moderate," reasoning that since this was on a main haul road, all the miners would pass by and must have noticed the loose bolt, but this was mitigated because it was still early in the shift so that "[t]hey may not have got word on top yet." Tr. 73-74.

In regard to this violation set forth in Citation 8489154, Respondent has indicated that it "does not dispute that the condition constitutes a violation of Section 220(a) because the roof control plan does require loose roof bolts to be replaced, and one bolt was loose." R's Brief at 13. However, Respondent disputes the amount of the penalty.

In regard to the penalty, Respondent first argues against the credibility of Inspector Fazzolare. In support thereof, Respondent points to the inspector's admitted lack of specific memory of these events at the time of hearing and his need to rely on his contemporaneous notes (Tr. 105-106) in regard thereto. Further, Respondent points out the fact that the inspector has no photos nor drawings of the cited area (Tr. 83), and there appeared to be discrepancies regarding the timing of events surrounding issuance of this citation such that, Respondent asserts, Mr. Fazzolare either spent an insufficient amount of time to accurately assess the situation or was inaccurate in recording the various times surrounding this event. R's Brief at 10, citing Tr. 81-83, 91-94.

[4] On direct exam, Inspector Fazzolare clarified that he was not concerned about the potential of a complete collapse of the permanent roof at this mine; rather his concern for draw rock applied to "the immediate roof, the first 6 inches to a foot" in depth of the ceiling surface. Tr. 70.

However, Respondent's primary challenge to the proposed penalty amount focuses on the location of the loose roof bolt, depicted in Respondent's ("R's") Exhibit 1. In particular, the loose bolt was in the row of bolts closest to, and approximately three feet from, the left rib when facing inby. Tr. 72. Draw rock had fallen to the floor there. R's Ex. 1; Tr. 68, 94. The fallen draw rock was located almost exclusively between the loose bolt and the mine rib or wall. R's Ex. 1; Tr. 94-95. The loose bolt was otherwise surrounded by rows of four or five bolts approximately 4.5 feet apart, and all the other bolts in this 20 foot wide passageway (the "Number 7 Supply Road") were intact and secure. Tr. 60, 68, 83-84, 95, 110. The citation document itself states that "unsupported top in this area measured 9.4 feet by 8 feet." S's Ex. 11. The inspector's direct testimony clarified "[t]hat's 9.4 feet going inby, and outby from rib to the next good bolt, 8 feet." Tr. 77. On cross examination, Inspector Fazzolare opined that "three fourths the distance" of the road width was safe for travel (Tr. 95), apparently based on the fact that three of the four roof bolts going across the road were intact.

During this inspection, Inspector Fazzolare was accompanied by Respondent's Mine Foreman Wyatt Oates, with 40 years of mining experience, including working on roof support. Tr. 171-173. Mr. Oates testified for Respondent that he specifically remembered these events "[p]retty well," that he visually inspected the roof then, and in his opinion, the rest of the roof top looked secure and did not pose any danger of coming down. Tr. 172-173. Mr. Oates stated that he disagreed with characterizing this single loose pin as "significant and substantial," since the roof there was "not a real scaly area," only one rock had fallen loose, and the condition was easily rectified by replacing the bolt. Tr. 174. The testimony of Inspector Fazzolare directly supports the credibility of Witness Oates, as Mr. Fazzolare stated of Foreman Oates, "I trusted his word. He never lied to me in the past," and Mr. Fazzolare said he had no reason to believe Mr. Oates would lie. Tr. 96.

Respondent disputes that this citation was "significant and substantial" because the condition was not reasonably likely to cause a serious injury. Respondent's primary argument here is that, because the compromised area with the loose roof bolt and fallen draw rock next to the wall or rib constituted only a minor fraction of the width of the roadway, miners passing by could easily avoid that portion of the passageway. This easy avoidance alone means that serious injury was unlikely, Respondent asserts. R's Brief at 14. Further, the coal seam or mine roof at this location was 48 to 52 inches high, "so any piece of draw rock was not going to fall very far, nor cause significant personal damage." R's Brief at 14; Tr. 71. Additionally, Respondent points out, the inspector indicated a lower level of concern, because he did not order miners to stay out of the Number 7 Supply Road until the condition was abated. R's Brief at 11 and 13; Tr.184-185. Furthermore, Respondent brought out, on cross examination of Inspector Fazzolare, by reference to MSHA's Assessed Violation History Report for Respondent's Freedom Mine for the preceding two years**,** that of six prior section 75.220(a) roof control citations issued to the Freedom Mine, none were designated significant and substantial. S's Ex. 30; Tr. 97-98.

Respondent argues that the negligence level for this citation should be rated "low," rather than "moderate." The central focus of the parties' arguments concerns estimation of the amount of time that the errant condition existed. The inspector estimated this time based on rock dust he

observed on the bolt plate. Tr. 67, 89-90. He reasoned that it amounted to "[a]t least one shift rock dust." *Id*. Both Mr. Oates and Respondent's employee Dennis Travis testified that the dust could have accumulated on the bolt plate prior to the fall of the draw rock, because the roof surface is uneven so that even when a bolt is tight against the roof, "they're not sealed completely." Tr. 190-195. Furthermore, the mine employs a very high pressure dusting machine that forces dust everywhere, including into small cracks and crevices. *Id*.

Respondent further asserts that an estimate of the amount of time the roof bolt was loose can be based on the timing of other known events. A pre-shift examination was conducted between 4:00 am and 7:00 am and no roof hazards were reported. Tr. 88-89 and 185. At approximately 7:20 am, 30 miners traveled through the area to start their work shift and none of them reported this loose bolt or fallen draw rock. Tr. 73 and 184. Thus, Respondent asserts the cited condition did not exist for very long before the citation was issued at 8:45 am. R's Brief at 11-12.

C. Findings of Fact

Based on the testimony of the witnesses, including evaluation of their credibility upon personal observations at the hearing, and on the exhibits introduced into evidence, the undersigned makes the following findings of fact:

-- On September 4, 2008, at 8:45 am, on the No. 7 supply road, there was a loose roof bolt, closest to the left rib when facing inby, with fallen draw rock beneath it.

-- The existence of the loose roof bolt was not in accordance with the mine's approved roof control plan.

-- Such condition likely existed for less than one full shift, and probably less than two hours.

-- The remainder of the surrounding roof was secured by tight roof bolts, was not in a condition that required scaling, and provided adequate room of approximately 12 to 18 feet for safe passage of the miners.

-- By 2:00 pm, the time set in the citation by the inspector to terminate the condition, Respondent had replaced the loose roof bolt without the need for scaling to remove any further loose draw rock.

D. Conclusions of Law

1. Liability

The undersigned finds that Respondent, as admitted, is subject to and liable for violating 30 C.F.R. § 75.220(a) by having a loose roof bolt, inconsistent with its approved roof control plan.

2. Penalty

To find liability and impose penalties, an actual injury need not have occurred. The MSHA code requires precautionary measures to prevent, or reduce the likelihood of, potential injuries. In assessing civil monetary penalties, section 110(i) of the Federal Mine Safety and Health Act requires the Commission and its judges to consider the following factors:

1. the operator's history of previous violations,
2. the appropriateness of the penalty relative to the size of the operator's business,
3. whether the operator was negligent,
4. the effect of the penalty on the operator's ability to continue in business,
5. the gravity of the violation, and
6. the operator's good faith efforts to achieve compliance after notification of a violation.

30 U.S.C. § 820(i).[5] Furthermore, analysis of each of those statutory factors must be presented in the judge's findings of facts and conclusions of law. 29 C.F.R. § 2700.30(a); *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-294 (Mar. 1983); *Cantera Green*, 22 FMSHRC 616, 620-621 (May 2000).

Gravity of Violation; Significant and Substantial ("S&S")

General Standards

The Secretary's penalty assessment rule at 30 C.F.R. Part 100 (which is not binding on the Commission and its judges, *Id*.) divides analysis of a violation's "gravity" into three components: (1) the likelihood of occurrence of the event against which the standard is directed, (2) the severity of the illness or injury if that event occurs, and (3) the number of persons potentially affected. 30 C.F.R. § 100.3(e). Additionally, sections 104(d) and (e) of the Act describe a "violation of any mandatory health and safety standard . . . [that] while the conditions created by such a violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). These violations are often referred to as "S&S." That statutory language was first interpreted by the Commission in the seminal case of *Cement Division, National Gypsum Co.*, 3 FMSHRC 822 (April 1981):

> a violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

[5] These same penalty factors are enumerated and elaborated on in MSHA's penalty assessment regulations at 30 C.F.R. § 100.3.

National Gypsum Co., 3 FMSHRC at 825. In turn, "hazard" (undefined by the Act) was construed to "denote a measure of danger to safety or health." 3 FMSHRC at 827. The Commission subsequently elaborated on this standard in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984):

> 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. As a practical matter, the last two elements will often be combined in a single showing.

6 FMSHRC at 3-4.

Parties' Arguments

The Secretary cites a couple cases in support of her position that this particular violation was significant and substantial: *Knox Creek Coal Corp.*, 2010 WL 5619977 (Dec. 2010) and *Cross Mountain Coal*, 16 FMSHRC 1857 (Aug. 1994). S's Brief at 14. While it is true that certain violations were held to be significant and substantial in those cited cases, the undersigned agrees with Respondent that the facts of those cases are quite different, and more hazardous, than in the instant case. R's Brief at 14-15. The decision in the *Knox Creek Coal* case indicates that the bolt head and plate were completely missing, at least potentially compromising the structural integrity of the "'beam' created in the roof's upper strata" such that "it was reasonably likely [parts of] the upper strata of the roof would have given way and fallen on miners working or traveling below." 2010 WL 5619977. That was a far riskier situation than the one described in the instant Freedom Mine. The same can be said of the facts in *Cross Mountain Coal*. Although that case involved violations of the mine's roof control plan and thus 30 C.F.R. § 75.220(a), it did not involve a loose roof bolt. Rather, the mine operator removed multiple roof support pillars without installing required wooden support posts, despite encountering draw rock. 16 FMSHRC 1857, 1885. "[I]t is common knowledge that pillar removal is one of the most dangerous operations in mining." *Id*. at 1884.

Further, while the testimony of Inspector Fazzolare that rock falling from the mine roof can seriously injure a miner is certainly credible, Respondent has presented a number of valid reasons why it was unlikely that draw rock would fall on miners in this instance. Those reasons include that there was only one loose roof bolt, which was closest to the wall, with draw rock laying beneath it, and otherwise there was plenty of room for miners to travel past the location of the loose bolt under roof that was well supported by plenty of secure neighboring bolts and was not particularly scaly. Further, that all six prior such citations at this mine in the preceding two years were non-S&S tends to indicate that, as Respondent puts it, "the overall integrity of the mine's roof was intact and that a single loose bolt would not be likely to cause injury." R's Brief

at 15. Therefore, based upon the evidence of record, the undersigned thus concludes that this particular violation was not "significant and substantial."

Although the extent to which Respondent's mine roof was unsupported was relatively minor and the undersigned concludes that this violation is not S&S, due to the high likelihood of avoidance of injury, that does not mean the gravity is nil. Proper support of underground mine roof is obviously important. If draw rock were to fall from the roof onto a miner, the potential injury could be serious. Further, as proffered by Inspector Fazzalore, if injury were to occur, it is reasonable that two miners riding on a single mantrip could be injured. Thus, the undersigned considers the gravity of this violation to be "moderate."

Degree of Negligence

The Secretary contends that this violation involves a "moderate" degree of negligence. On one hand, Inspector Fazzolare asserted that the operator knew or should have known of the condition, because it was located on a main supply road. On the other hand, he noted that he issued this citation early in the shift, so the problem may not have been communicated to the surface at that time. Tr. 73-74. Respondent argues for a "low" negligence assessment. A substantial amount of testimony on both sides focused on the accumulation of dust on the roof bolt plate (an unquantified amount) in attempting to estimate how long the condition may have existed. Upon consideration of all the evidence presented, testimonial and documentary, the undersigned finds the Secretary's evidence rather speculative and Respondent's more persuasive. Thus, the degree of negligence shall be lowered from "moderate" to "low."

Other Penalty Factors

Having addressed gravity and negligence, we turn to the other penalty factors enumerated in section 110(i) of the Act. Respondent stipulated that a reasonable penalty will not affect the operator's ability to continue in business. Based on that stipulation, and the stipulation regarding the tonnage of coal produced by this mine, the assessed penalty is appropriate relative to the size of the operator's business. The penalty assessment form attached to the Secretary's Petition (Form 1000-179) indicates that this operator had relatively few previous violations of this type in the preceding 15 months. That penalty assessment form also indicates that, consistent with section 110(i) of the Act and 30 C.F.R. § 100.3(f), the Secretary awarded Respondent the standard 10% reduction for Respondent's good faith abatement of the violation within the time set by the inspector in the citation.

Penalty Amount

Having reduced the degree of negligence and the likelihood of injury occurrence, and thus found this violation non-S&S, the undersigned finds the appropriate penalty to be assessed for this violation is $101.

III. Citation 8489163 – Missing Pry Bar

Citation 8489163 alleges a safety violation of 30 C.F.R. § 75.211(d) pertaining to roof testing and scaling, specifically the lack of a pry bar on Fletcher Roof Bolter, No. 11, located in MMU 002-0 in Freedom Mine at 12:10 p.m. on September 8, 2008. S's Ex. 18. For this citation, the Secretary proposes a penalty of $634.00.

A. Regulatory Provisions

Rule 30 C.F.R. § 75.211(d), entitled "Roof testing and scaling," states as follows:

> A bar for taking down loose material shall be available in the working place or on all face equipment except haulage equipment. Bars provided for taking down loose material shall be of a length and design that will allow the removal of loose material from a position that will not expose the person performing this work to injury from falling material.

30 C.F.R. § 75.211(d). In addition, Rule 30 C.F.R. §75.2 defines "working place" as "the area of a coal mine inby the last open crosscut."

B. Summary of Evidence

The Secretary's witness on this citation was again MSHA Inspector Anthony Fazzolare, who conducted an E01 inspection of the Freedom Mine on September 8, 2008.[6] Tr. 108. At hearing, Mr. Fazzolare testified that during the inspection he observed that the No. 11 Fletcher Roof Bolter did not have a pry bar with which to scale draw rock from the roof. Tr. 109. Respondent does not dispute this fact. Inspector Fazzolare also testified that he observed fallen rock on the mine floor, estimating the area of that fallen rock to be 20 feet by 20 feet, which is the entire width of the entry. Tr. 109-10. The inspector stated he observed that the roof bolter operators were getting ready to bolt the mine roof where draw rock was present. Tr. 132. He was concerned, he said, about the risk of draw rock falling from the roof onto workers in the area, if the ceiling of the mine had not first been properly scaled with a pry bar to safely remove loose roof rock. Tr. 132. Given that some rock had already fallen, the inspector felt that a pry bar was needed "right then at that specific time." Tr. 116.

Respondent offered the testimony of Wyatt Oates, the mine foreman, who accompanied Inspector Fazzolare during this inspection. Mr. Oates testified that the roof bolter machine was in the No. 6 entry when Inspector Fazzolare asked the operator of the roof bolter machine to see the pry bar assigned to that machine. Tr. 175. The operator looked on the machine, but could not find the pry bar, then realized he had left it behind in the No. 8 entry, where moments before it had been used to pry up the lid of the roof bolter machine. Tr. 175-176. The operator then

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[6] For the definition of an "EO1" inspection, see footnote 6 below.

retrieved the pry bar in approximately "three or four minutes" from an estimated distance of approximately 100 to 150 feet away. Tr. 176-177. On cross examination, Mr. Fazzolare acknowledged that "[a] pry bar was available within five minutes after I issued the citation." Tr. 127. The citation document itself states that the violation occurred at 12:10 pm and was abated at 12:15 pm. S's Ex. 16; *see also,* Tr. 112 and 114.

Additionally, Respondent offered testimony by Mr. Oates that there were also five other pry bars nearby: one on another roof bolter machine in the same section, one each on two continuous minor machines in the same section (one approximately 100-150 feet away), and two more in "the shack" approximately 250-300 feet away. Tr. 176-177.[7]

C. Findings of Fact

Based on the testimony and exhibits introduced into evidence at hearing, the undersigned makes the following findings of fact:

-- There was no pry bar on the cited roof bolter machine.

-- A pry bar was obtained and brought to the roof bolter machine within five minutes of issuance of the citation.

-- Five other pry bars where also located within 500 feet of the roof bolter machine.

-- The Secretary has failed to prove by a preponderance of the evidence that a pry bar was not "available in the working place" as alleged in this citation. In particular, the Secretary did not persuasively establish the parameters of the "working place" in which the roof bolter machine was sited and that no pry bars were located within such parameters. Moreover, the preponderance of evidence which was adduced at hearing, including the fact that five pry bars were nearby and a pry bar was obtained and brought to the site within 5 minutes, suggests that, in fact, a pry bar was most likely in the "working place," .

D. Conclusions of Law

1. Liability

Respondent's Post-Hearing Brief asserts that this citation should be vacated and cites two prior cases directly on point in which this type of alleged violation was dismissed: *Jim Walter Resources, Inc.*, 31 FMSHRC 1208 (Oct. 2009) (ALJ) and *Basin Resources Inc.*, 19 FMSHRC 1035 (June 1997) (ALJ).

Like the instant case at bar, *Jim Walter Resources* also involved a citation for violation of 30 CFR § 75.211(d). In that case, it was a continuous miner machine that lacked a pry bar. In

[7] Inspector Fazzolare referred to this shack as "the dinner hole." Tr. 125.

analyzing the regulatory provision, the judge emphasized the disjunctive "or" in the rule and noted that "to establish a violation, the Secretary must establish that a bar was neither available in the working place, nor on all face equipment." *Id*. (emphasis in original). He further emphasized that the rule requires a pry bar to be "available in" rather than "located in" the working place. *Id*. Given that (as in the current case) a pry bar was retrieved within five minutes, the judge held that Respondent was in compliance with the regulatory requirement and he dismissed the citation.

Similarly, *Basin Resources* involved a citation for violation of 30 CFR § 75.211(d), and in that case, a bar was obtained in about ten minutes. In dismissing this citation, the judge applied reasoning quite similar to that in *Jim Walter Resources*, stating:

> The safety standard provides that a scaling bar must be made available in the working place. It does not require that the bar be in any particular location within the working place.

19 FMSHRC at 1042 (emphasis added).

The undersigned can see some validity to the Secretary's argument that "available in the workplace" does not mean "available near the workplace." However, the Secretary has proffered no prior rulings which adopted that interpretation of this regulation. Therefore, consistent with the two prior cases cited by Respondent, the undersigned finds that Respondent did not violate the cited regulation. At least one pry bar (and possibly five others in the vicinity) was "available in the working place." Accordingly, citation 8489163 is hereby **Dismissed.**

IV. Citation 8489493 – Improper Electrical Cable Splice

Citation 8489493 alleges a safety violation of 30 C.F.R. § 75.604(b) pertaining to permanent splicing of cables, specifically that on September 5, 2008 at 11:22 a.m. a ground monitor wire was seen protruding from a splice of trailing cable attached to the #402 roof bolter machine and thus the cable, allegedly, was not "effectively insulated and sealed so as to exclude moisture." S's Ex. 16. For this citation, the Secretary proposes a penalty of $946.00.

A. Regulatory Provision

Rule 30 C.F.R. § 75.604(b), entitled "Permanent splicing of trailing cables," states as follows:

> When permanent splices in trailing cables are made, they shall be ... [e]ffectively insulated and sealed so as to exclude moisture.

30 C.F.R. § 75.604(b).

B. Summary of Evidence

The Secretary's only witness on this violation was MSHA Inspector Jeffrey Winders, who conducted an "E01" inspection of the Freedom Mine on September 5, 2008.[8] Tr. 14. At the time Mr. Winders issued this citation, he had been an MSHA inspector for 13 months. Tr. 26-27. Mr. Winders is not an electrician and has never held any electrical certifications. Tr. 27-28. However, Mr. Winders had attended a two week electrical training class at the MSHA training academy. Tr. 28.

Mr. Winders testified that the roof bolting machine was in operation when the citation was issued. Tr. 53. He observed that an improper splice on the trailing power cable was quite visible, as the main cable was black and the protruding ground wire was yellow. Tr. 18. The splice was found on the mine floor about 30 feet behind the roof bolter machine. Tr. 18. The roof bolter machine uses 480 volts. Tr. 15.

The structure of this cable was described as follows: The cable has a hard outer jacket and soft inner insulation. Tr. 15. The outer jacket is a hard, protective rubber from 1/8" to 1/4" thick. Tr. 52. The inner insulation is merely soft rubber intended to separate and prevent contact among the electrical conductors. It is not particularly protective and can be damaged more easily than the outer jacket. Tr. 16, 52.

According to Inspector Winders, there are many ways in which a splice can undergo damage as it rubs on the ground, the reel, the bolter machine, other equipment, or falling rock. Tr. 19-20. Electricity could be unintentionally transferred from a damaged splice if contacted by a miner directly handling the cable, or if the splice contacted the metal frame of the roof bolting machine or through contact on the cable reel, thereby causing harmful electric shock. Tr. 22.

Mr. Winders testified that water is used in this mine to allay dust on the continuous miner machine and on the mine floor, and the roof bolter machine follows immediately behind the continuous miner machine. Tr. 19. He further testified, on cross and redirect examination, that "water [is] used in the mining process," for example, the roof bolter machines are typically washed with water, and that due to the use of water on both types of machines, it is not unusual for the mine floor to be wet or muddy. Tr. 28, 41-42. However, Mr. Winders did acknowledge during cross examination that his citation did not indicate the contemporaneous presence of any water or mud. Tr. 28-29.

As Respondent emphasizes, Inspector Winders acknowledged in his testimony that the particular wire protruding from the splice was a ground check wire that did not carry any live electric current, and all the wires that did carry live electric current were properly insulated and undamaged. Tr. 35, 37 and 50; R's Brief at 3.

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[8] Witness Winders explained that an "EO1" inspection is a mandatory quarterly complete inspection of the mine. Tr. 14.

Respondent presented the testimony of Walter H. Wood, the company's Maintenance Director. Mr. Wood holds electrical worker certifications in Kentucky and Illinois, requiring at least one year of experience working with electrical equipment and passage of State Board exams. Tr. 137. He has maintained his electrical certification since he was 19 years old and has worked in coal mine maintenance for 32 years. *Id.*

Mr. Wood testified that, as the Maintenance Director, he probably purchased the roof bolter machine and specified the cable for it. Tr. 138. During his testimony at the hearing, Mr. Wood drew a diagram of a cross-section of this cable, which became Respondent's Exhibit 2. This cable is a Number 2 AmeriCable, rated for 2,000 volts, and had a conductor GGC certification. Tr. 138. Mr. Wood explained that the protruding ground check wire was actually "not used at all," i.e., served no useful purpose on this particular cable, because the Freedom Mine employs a wireless ground check system that uses radio frequency signals instead. Tr. 144–146. Mr. Wood testified that, therefore, this ground check wire is "disconnected at each end. It's what we call spared off. It's just dead-ended. And when we make a splice, a lot of times we don't even put it back together because it's of no value." Tr. 145.

This cable system was further described by Mr. Wood. This protruding ground check wire had the same protective insulation, rated for 2,000 volts, as did the current carrying wires. Tr. 145-146. Further, Mr. Wood explained that the cable system was designed so that a leak of electricity would return to a ground wire in order to prevent injury, and the electricity would not flow though the ground check wire. Tr. 147-148. Importantly, the overall electric cable system has "a circuit breaker that has multiple protection devices," including "first and foremost, ... this tone-type [radio frequency] ground check monitor" and also "a ground fault, or what we call an imbalanced phase protection." Tr. 146-147. If this "intricate system," which is tested weekly for proper function, senses any electrical imbalance which indicates a leak of electricity, it will automatically "be tripped" to "[s]hut the power" "so that the cable is no longer energized." Tr. 146-147. In other words, it completely stops the flow of all electric current in order to prevent injury. On cross examination, Mr. Wood did acknowledge that less than one quarter amp can be fatal and that the cited cable is rated for 800 amps. Tr. 152.

Mr. Robert Bosch is the Operations Manager at the Freedom Underground Mine. Tr. 156. At the time of the inspection, he was the Mine Manager and accompanied Inspector Winders. Tr. 157-158. Mr. Bosch, testified that the ground wire protruded from the cable splice by only ½ inch. Tr. 159-160. Mr. Bosch testified that this cable was 400 to 500 feet long, and the location of the cited splice was usually wound on its reel on the back of the roof bolter machine roof, unless the cable was fully extended and unwound. Tr. 159. The cable was generally kept dry, because the elevated reel helps keep the cable off the ground. *Id.*; Tr. 39. Additionally, Inspector

Winders testified that the reel is covered and the mine is not a naturally wet mine. Tr. 29 and 39. However, Mr. Bosch acknowledged on cross examination that water is introduced into the mine environment from spraying it on the continuous miner machines, which are followed by the roof bolter machines, and from directly washing the roof bolting machines themselves.[9] Tr. 165-166.

Upon questioning by Respondent, Inspector Winders acknowledged that no bare wires were exposed, no insulation was torn off the energized conductors, and no energized conductors were visible through the splice. Tr. 37. However, his concern was not for the ground wire *per se*, but rather that the splice was not effectively insulated and could worsen under normal operating conditions. Tr. 40, 45-48. He stated "I believe that under normal mining operations, this condition would only worsen as it's drug [sic] on the hostile mine floor, pulled on and off the reel, hung twisted, bent." Tr. 46.

C. Findings of Fact

Based on the testimony and exhibits introduced into evidence at hearing, the undersigned makes the following findings of fact:

-- An improper splice existed on the trailing power cable of the roof bolter machine.

-- The protruding wire never carried electricity and was never even intended by the mine operator to do so, nor to be functional in any way.

-- The mine operator employed a sophisticated electrical safety system, including a wireless radio frequency ground check system, designed to interrupt the flow of electricity upon the detection of any electrical leaks.

-- The reel housing the spliced power cable was covered and the splice was at the end of the cable nearest the reel, making the splice less likely to be exposed to water or be contacted by miners.

-- Although conditions at the time the citation was issued -- including specifically the lack of live current in the protruding wire and the lack of moisture in the immediate area of the splice -- were not then particularly risky, over time under continued normal mining operations those conditions could reasonably worsen -- the protrusion could contribute to abrasion and deterioration of the

[9] This testimony was buttressed by that given by mine employee Dennis Travers in regard to Citation 8489154 (regarding dust on the loose roof bolt). Specifically, Mr. Travis averred that the operator generally dusted the supply roads weekly and, after dusting, generally used a "water car" to "put water down on the roads" to control the dust. Tr. 191. He also stated that watering after dusting was not always necessary, because, for example, "right now, the mines are real moist and damp." Tr. 192.

cable's physical integrity and could be located in the presence of moisture, for example, from machine cleaning, such that the admittedly improper splice did in fact create an increased risk of electrical injury to the miners.

-- Although the mine was not naturally wet, normal mine processes, including washing the machines, could realistically introduce significant moisture in the vicinity of the splice.

-- The admittedly improper splice created and increased risk of significant injury.

D. Conclusions of Law

1. Liability

The undersigned finds that, as admitted, Respondent is liable for violating 30 C.F.R. § 75.604(b), in that a ground monitor wire was protruding from a splice of trailing cable for a roof bolter machine and thus the cable was not "effectively insulated and sealed so as to exclude moisture." On cross examination, Respondent's witness, Mr. Wood, admitted that it is not normal for a wire to be sticking out of a splice and that, if he had seen something like that, he would consider it a damaged splice that needed repair. Tr. 155. In fact, in its Post-Hearing Brief, "Respondent acknowledges that 30 C.F.R. § 75.604(b) was violated." R's Brief at 5. However, Respondent argues for a lower penalty.

2. Penalty

As noted above, the Mine Act lists the following factors that must be considered when assessing civil penalties:

> the operator's history of previous violations, . . . the size of the business . . ., whether the operator was negligent, . . . the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

FMSHA §110(i), 30 U.S.C. § 820(i).

Gravity of Violation; Significant and Substantial (S&S)

General Standards

The standards for finding an S&S violation were discussed above in regards to Citation 8489154. To reiterate, sections 104(d) and (e) of the Act describe a "violation of any mandatory health and safety standard . . . [that] while the conditions created by such a violation do not cause imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

Under *National Gypsum Co.*, 3 FMSHRC 822, a violation is significant and substantial if "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. Subsequently, the Commission enumerated a four part test:

> 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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies Coal Co., 6 FMSHRC 1, 3-4.

Parties' Arguments

In their Post-Hearing Briefs, the parties argue about the relevance of Mr. Wood's testimony describing the cable structure. In the undersigned's view, there is some merit to both positions. On Respondent's side, in the condition in which the cable existed at the time the citation was issued, there was a very low risk that the faulty cable would inappropriately transfer electricity in a way that might harm miners. However, as argued by the Secretary, through the normal wear and tear that transpires in the harsh conditions of an underground coal mine, the faulty splice could reasonably increase the chances of a harmful electrical shock to miners. Respondent further argues, based on Mr. Wood's testimony that "[e]ven if the Court were to accept that during normal mining conditions damage to a conductor would occur, the circuit breaker would shut off power to the roof bolter, thereby making it not reasonably likely that a miner would suffer an injury resulting from this damaged splice." R's Brief at 7.

The Secretary cites *U.S. Steel Mining Co., Inc.*, for the proposition that determinations of whether a violation is significant and substantial are made in the context of "continued normal mining operations." 6 FMSHRC 1573, 1574 (July 1984). The facts there were similar to those here: a gash in the outer jacket of a 480 volt trailing cable exposed a ground wire, but there was no visible damage to the inner insulated conductors. *Id*. The Commission found that a damaged outer jacket "weakened the overall system of protective insulation and increased the risk of danger to the internal layer of insulation on the power wires" and that "a trailing cable is subject to 'extraordinary abuse' in the harsh environment of a coal mine." *Id.* The Commission noted that, despite the presence of a ground fault system, electrical shock of some degree could still occur. 6 FMSHRC at 1575. The Commission upheld the ALJ's determination that the violation was significant and substantial. *Id*.

The Secretary also refers to *Harlan Cumberland Coal Co.*, in which the Commission upheld S&S determinations for two violations of § 75.604(b), rejecting the operator's arguments that lack of exposed leads negated a reasonable likelihood of injury. 20 FMSHRC 1275, 1285 (Dec. 1998). Further, in *Webster County Coal*, the ALJ upheld an S&S assessment for a damaged splice on a trailing cable. 31 FMSHRC 219 (Feb. 2009)(ALJ).

Respondent counters by asserting the distinction that, unlike this case, in *U.S. Steel Mining* and *Harlan Cumberland Coal*, the cable was lying in water. 6 FMSHRC at 1574; 20 FMSHRC at 1287. Respondent likens its violation to that in *Lone Mountain Processing*, 29 FMSHRC 557 (June 2007) (ALJ). In *Lone Mountain*, Judge Weisberger held a violation of §75.604(b) was not S&S, reasoning that there was insufficient evidence a serious injury would develop during normal mining conditions. R's Brief at 7.

Findings

The *U.S. Steel* case is instructive and provides significant relevant guidance here. In that case, the Commission rejected two closely connected arguments that are also relevant to the instant case: (1) that a gash in the outer jacket of the trailing cable does not present a risk, because the inner layer of insulation on each power wire will prevent any electrical shock to miners, and (2) that evaluation of the risk "should be limited solely to consideration of the condition as it exists at the precise moment of inspection." 6 FMSHRC at 1574. Based on the interpretive language in *National Gypsum Co.*, 3 FMSHRC 822, 825 -- interpreting the statutory "significant and substantial" standard to mean a "reasonably likelihood that the hazard contributed to will result in an injury ... of a reasonably serious nature" -- the Commission affirmed the ALJ's ruling that the S&S determination must consider "continued normal mining operations." 6 FMSHRC at 1574. The Commission recognized, as the judge had written, that "a trailing cable is subject to 'extraordinary abuse' in the harsh environment of a coal mine." *Id.* The Commission also found justified the judge's finding that "both the outer and inner layers of insulation provided important protection against electrical shock," in light of testimony by both parties' witnesses that "damage to the outer layer of insulation weakened protection afforded by the inner layer." 6 FMSHRC at 1575. Lastly, the Commission also noted that the future introduction of water into the vicinity of this cited splice is "an example of how conditions could develop in the mining environment which could cause an improperly protected cable to become more hazardous."[10] 6 FMSHRC at 1574, n.3. In sum, as the factual circumstances of these two cases are quite similar, the undersigned finds that the Commission's decision in *U.S. Steel* strongly supports the Secretary's contention here that this citation can appropriately be sustained as S&S. See also, *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1285 (Dec. 1998)(citing to *US Steel* in rejecting argument that exposed electrical wires must be visible to support S&S finding); *Excel Mining, LLC,* 31 FMSHRC 473 (April 2009)(ALJ)(following *US Steel* and

[10] Respondent's Brief states that the cable in *U.S. Steel* was "lying in mud or water." R's Brief at 6. To the contrary, the footnote quoted from the *U.S. Steel* decision indicates that the presence of water was an example of a condition that "could develop" and "could cause an improperly protected cable to become more hazardous." 6 FMSHRC at 1574, n.3.

Harlan in finding three inch gash on outer jacket of roof bolter trailing cable constituted S&S violation of 30 C.F.R. § 75.517 despite intact insulation on inner wires); *Webster County Coal, LLC*, 31 FMSHRC 219, 235 (Feb. 2009)(ALJ)(sustaining S&S finding because "during continued normal mining operations the cables would likely sustain further wear and ... the splices would likely deteriorate"); *ABM Coal Co., Inc.,* 16 FMSHRC 2345, 2352 (Nov. 1994) (ALJ)(held unsealed splice violating 30 C.F.R. § 75.604(b) was S&S because "water was present in the mine from the coal seam, from the water spray system on the continuous miner, from the dust suppression system on continuous hauling system and from water sprayed to wet the roadways down").

Respondent's Brief argues that the facts of this case are like those in *Lone Mountain Processing,* 29 FMSHRC 557 (June 2007)(ALJ) and similarly warrant rejecting an S&S finding. R's Brief at 7. In *Lone Mountain Processing*, Judge Weisberger based his decision on the contemporaneous absence of pinholes, exposed wires, or protruding wires and the absence of evidence indicating a reasonable likelihood that those defects would develop during continued normal mining operations. 29 FMSHRC at 559. Similarly, in *Oak Grove Resources*, *LLC.*, 29 FMSHRC 1089 (Nov. 2007)(ALJ), Judge Melick held that a citation involving 30 C.F.R. § 75.604(b) was not S&S, because, at the time the citation was issued, the inspector did not indicate any bare wire was exposed and the operator's safety supervisor who accompanied the inspector testified there was none. 29 FMSHRC at 1092. The undersigned notes that, in Judge Melick's subsequent decision in *Webster County Coal, supra*, he referred to both *Oak Grove Resources* and *Lone Mountain Processing* as "factually distinguishable" (without elaboration) and thus rejected respondent's reference to those cases. 31 FMSHRC at 235. While the factual distinctions were not explained, the undersigned notes that in both *Oak Grove Resources* and *Lone Mountain Processing* the Secretary did not introduce any evidence showing that an increased hazard could reasonably arise through continued normal mining operations. Such is not the case here.

Respondent's Brief contains the assertion that, even if normal mining operations were to significantly degrade the integrity of this splice and cable, the circuit breaker system would terminate the flow of electricity, thereby rendering injury unlikely. R's Brief at 7. While this assertion appears logical, in the undersigned's view, it was not adequately supported by the evidence. Firstly, Mr. Wood did not specify how quickly the electricity would be terminated, whether it would be instantaneous, and to exactly what extent it would succeed in preventing all electrical injuries of the type contemplated here. Secondly, he noted that the sophisticated system employed by this mine requires weekly testing; while this appears laudatory, it also indicates the potential for failure. Thirdly, Mr. Wood then went on to mention other allegedly mitigating factors, one of which was that "all our men, our standard operating procedure is to wear gloves at all times . . . . I have been taught that there's never been a fatality, electrical - electrocution with a person wearing gloves." Tr. 149. Again, while the efforts at safety are to be complimented, the routine use of gloves to guard against electrical injuries, particularly electrocution, indicates to the undersigned that the mine's circuit breaker system alone is not viewed by the mine operator and Mr. Wood as providing full-proof protection. This conclusion is further buttressed by similar precedential S&S findings, despite mine operators asserting the

presence of circuit breakers, in other such cases. *Webster County Coal, LLC*, 31 FMSHRC 219, 235 (Feb. 2009)(ALJ)(the inspector testified that the circuit breaker would not necessarily protect against the risk of electrocution); *Beech Fork Processiing, Inc.*, 16 FMSHRC 1346, 1354 (June 1994)(ALJ) (violation of 30 C.F.R. § 75.517 held S&S despite presence of circuit breaker). Thus, based on the above described law and evidence, the undersigned concludes that the S&S determination is appropriate for this citation.

On the citation form, Inspector Winders indicated that two persons were potentially affected and the injury could be "permanently disabling." At the hearing, he stated that this is because there were two roof bolter operators present. Tr. 24. Respondent argues that "only one miner would be handling the cable at any given time" and "[i]n the event that one miner were to suffer an electrical shock by grabbing the cable, it is not reasonable to think that a second miner would also grab the cable and suffer the same injury." R's Brief at 8. Respondent also argues that the cited safety standard, 30 C.F.R. § 75.604(b), by its terms, deals only with exclusion of moisture, so "[a]ny opinions offered by Inspector Winders about potential dangers presented by a damaged splice touching the cable reel on the roof bolter (Tr. 22 and 46) are baseless and irrelevant." R's Brief at 4, n.2. However, in the context and spirit of these preventative safety requirements, the undersigned finds more persuasive the Secretary's assertion that "[i]t is reasonably likely that these two miners could come into contact with the damaged cable or that the damaged cable could energize their roof bolter" machine. S's Brief at 9; see also Tr. 22 and 46. The existence of water or moisture in the presence of the improperly sealed splice could significantly and substantially contribute to the harmful flow of electricity to the miners directly from the cable or indirectly via the roof bolter machine.

Degree of Negligence

Based on the numerous afore-mentioned mitigating circumstances asserted by Respondent's counsel -- including the lack of bare or energized wires, the various safety measures employed by the mine operator, and the relatively inconspicious location of the splice on the reel end of the cable -- the undersigned determines it appropriate to reduce the assigned negligence level from "moderate" to "low."

Other Penalty Factors

Again, after assessing gravity and negligence, we turn now to the other penalty factors enumerated in section 110(i) of the Act. Respondent stipulated that a reasonable penalty will not affect the operator's ability to continue in business. Based on that stipulation, and the stipulation regarding the tonnage of coal produced by this mine, the assessed penalty is appropriate relative to the size of the operator's business. The penalty assessment form attached to the Secretary's Petition (Form 1000-179) indicates that this operator had very few previous violations of this type in the preceding 15 months. That penalty assessment form also indicates that, consistent with section 110(i) of the Act and 30 C.F.R. § 100.3(f), the Secretary awarded Respondent the standard 10% reduction for good faith abatement of the violation within the time set by the inspector in the citation.

Penalty Amount

Having sustained this violation as S&S, but reduced the degree of negligence to "low," the undersigned thus reduces the proposed penalty of $946 and assesses a penalty of $392 for this violation.

ORDER

THEREFORE, it is hereby **ORDERED** as follows:

1. Citation number 8489154 is reduced to non-S&S and low negligence. Respondent shall pay a penalty of **$101.**

2. Citation number 8489163 is **DISMISSED.**

3. Citation number 8489493 is sustained as S&S, but the negligence level is reduced to low. Respondent shall pay a penalty of **$392.**

4. Respondent is hereby **ORDERED** to pay the afore-stated penalty amounts within thirty (30) days of the date of this Order.[11] Upon receipt of payment, these citations are **DISMISSED**.

SO ORDERED.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

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[11] Payment shall be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
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May 8, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2011-520
Petitioner,	:	A.C. No. 46-08763-237287-01
	:	
v.	:	
	:	
COAL RIVER MINING, LLC,	:	
Respondent.	:	Mine: Fork Creek No. 1

AMENDED DECISION

Appearances: F. Thomas Rubenstein, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Boulevard, Suite 310, Morgantown, WV for Respondent

Lucy C. Chiu, Esq., Office of the Regional Solicitor, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA for the Secretary

Before: Judge Andrews

STATEMENT OF THE CASE

This civil penalty proceeding is pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000) (the "Mine Act" or "Act"). This matter concerns Order No. 8109413 issued under Section 104(d)(1) of the Act and served on Coal River Mining, LLC ("Coal River" or "Respondent") for failure to complete an adequate weekly examination. A hearing was held in Charleston, West Virginia, on October 11, 2011 at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs, Reply Briefs, and Joint Stipulations.

JOINT STIPULATIONS

1. Coal River Mining, LLC was and is an "operator" as defined in § 3 of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), a coal or other mine at which the citation and order at issue in this proceeding were issued.

2. Coal River Mining, LLC is the owner of Fork Creek No. 1 mine.

3. Operations of Coal River Mining, LLC at the Fork Creek No. 1 mine are subject to the jurisdiction of the Mine Act.

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

5. For purposes of 30 U.S.C. § 820(i), for the year 2010, Coal River Mining, LLC, Fork Creek No. 1 Mine produced 662,319 tons of coal, and its employees worked a total of 439,228 hours. Under 30 C.F.R. § 100.3, Table I – Size of Coal Mine, a coal mine producing 662,319 tons of coal would be assessed 12 out of a possible 15 penalty points.

6. The products of the mine at which the citation and order at issue in this proceeding were issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.

7. Operations of Coal River Mining, LLC at the coal mine at issue are subject to the jurisdiction of the Act.

8. Inspector John S. Crawford was acting in his official capacity and as an authorized representative of the Secretary of Labor when Citation No. 8109413 was issued.

9. A true copy of Citation No. 8109413 was served on Coal River Mining, LLC, or its agent as required by the Mine Act.

10. A total proposed penalty of $34,652 in these proceedings will not affect Coal River Mining, LLC's ability to continue in business.

11. At all times relevant to these proceedings, Coal River Mining, LLC is and was a limited liability company.

Submitted with the joint stipulations, and also of record, is a chart listing both the Secretary's and Respondent's exhibits with descriptions of the contents of each.

THE REGULATION

Pertinent to the matter at issue here is 30 CFR § 75.364 entitled "Weekly Examinations." It explains that:

> At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and

> leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

30 C.F.R. § 75.364(a)(1).

As cited in the original Order No. 8109413, 30 C.F.R. § 75.364(f)(2) states, "Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days."

SUMMARY OF THE TESTIMONY

A. Testimony of Inspector John Crawford

Inspector John S. Crawford ("Crawford") has been a coal mine inspector for the Mine Safety and Health Administration ("MSHA") for four years. Tr. 30. He graduated from high school in 1972 and college in 1988, and worked in coal mines for approximately thirty years, earning his foreman's certification in 1980. Tr. 30-31. As part of this mining work, Crawford has ten years of experience conducting weekly examinations in mines. Tr. 31.

In his testimony, Crawford explained the ventilation plan, highlighting the following requirements set forth in the plan: (1) that at least two safe travelways are maintained to each evaluation point; (2) that accumulations of water will be controlled so as not to affect the bleeder evaluation system; and (3) that at least every seven days methane, oxygen, air flow and air quantity measurements shall be taken at bleeder evaluation points. Tr. 38-43. This testimony mirrors the regulatory language of 30 C.F.R. § 75.364(a)(1). Crawford asserted on cross-examination that if you do not get good air quantity readings each week, it is difficult to develop a trend so that you can understand what is going on in a particular panel. Tr. 158. And, the monitors carried while conducting an examination are important because human senses are unable to detect low oxygen or the presence of methane. Tr. 41-42.

Crawford testified that the operator's examination showed that air quantity went down on April 30, 2010 at the 34B and 34C evaluation points ("EP"). Tr. 141. In addition, Crawford explained that the weekly examination log for May 7, 2010 indicated that air was barely flowing out of EP 34B, EP 34C, and another evaluation point labeled A. Tr. 140. According to Crawford, if air quantity begins decreasing, there is usually a problem, and to most inspectors, it would indicate a body of water. Tr. 142-143.

On May 14, 2010, Crawford accompanied an examiner to the area where EP 34B and EP 34C are located. Tr. 58. Before they reached the evaluation points, the alarms worn by the examiner and him went off and they had to back up until they received a "good reading." Tr. 58. He then issued Citation No. 8109409 due to low oxygen levels in the bleeder entries and at EP 34C. Tr. 131; Exs. G-4-3; D. As a courtesy, Crawford suggested the use of more intake air and reminded Scott Brown, Larry Blackburn, Manasses Hensley, and Gilbert Sada that the low oxygen prevented an examination of EP 34C, and that the oxygen must be up and the weekly

examination completed by midnight that night[1] in order to allow people into the mine. Tr. 69-73, 88, 95, 140. Further, Crawford explained to the miners that if the examination could not be completed, they would not be permitted to send people into the mine. Tr. 150. Per Crawford's testimony, no one disagreed with him regarding EP 34C and each man understood that an examination of EP 34C would be due. Tr. 72, 73, 88, 95. Crawford left under the impression that the low oxygen would be fixed that evening, May 14, 2010. Tr. 81, 82.

Crawford returned to the mine on May 17, 2010, to focus on dust collection, and neither he nor the other members of the dust inspection team were warned that low oxygen was still present. Tr. 84, 199-200. Although he did not necessarily recall the conversation, Crawford's notes revealed that Larry Blackburn informed him that someone had been to EP 34C. Tr. 199; Ex. I.

On May 18, 2010, Crawford stated, however, that the record books did not indicate an examination of EP 34C for the week ending May 15, 2010 and, upon questioning miners, found that none of them had examined the evaluation point. Tr. 156, 202-203; Exs G-8; B.[2] A conversation with Scott Brown ("Brown") revealed that the oxygen level was still not at or above 19.5% and that the cause was a water impoundment[3] blocking access to EP 34A-1, which, in turn, blocked air flow to EP 34C. Tr. 87-91. Brown also indicated that the pumps were not working. Tr. 99. Based on this, 104(d)(1) Order No. 8109413 was issued on May 18, 2010, at 8:26 am by Crawford to Brown citing a violation of 30 CFR § 75.364(f)(2). The Order states as follows:

> Persons have been allowed to enter the underground areas of this mine although the weekly examination has not been completed within the previous 7 days. Low oxygen content prevented the exam of the EP 34 C area on 5/14/2010 and the exam was due before midnight on 5/15/2010. These requirements were discussed with the operator at the time of issuance of Citation No. 8109409 on 5/14/2010. The operator has engaged in aggravated conduct more than ordinary negligence in allowing persons to enter the mine without a completed weekly examination and was aware of the requirement. This exposes persons to hazards of low oxygen levels and other unfound or unreported hazards. Water has accumulated to the point at EP 34 A1 that access is blocked and the examination cannot be verified.

[1] Inspector Crawford may have calculated the 7-day period from the last inspection of EP 34C, on May 7, 2010, or was mistaken in his testimony and the actual day and time was 12:00am on May 15, 2010.

[2] The record book states that, for the week ending May 15, 2010, EP 34C could not be examined due to low oxygen.

[3] Crawford testified that the water was deep enough that it prevented him from accessing EP 34A-1. Tr. 90-91.

Exhibit G-6-4.

The inspector found that the violation was reasonably likely to result in injury that could reasonably be expected to be fatal. It was further designated as significant and substantial ("S&S"), affecting all 48 persons working in the mine, and was the result of high negligence on the part of the operator due to the fact that mine management had disregarded plain instructions regarding the improvement of the air quantity and the conducting of a weekly examination. Tr. 95-97, 196-198. Because the oxygen was still low and no weekly examination had been conducted, Crawford evacuated the mine. Tr. 92-93, 95-96. The Secretary proposed a penalty of $34,652.00. The violation was abated when, after four days, the decreased oxygen quantity was moved out of the panel per a revision to the ventilation plan approved on May 20, 2010. Tr. 136-137. The hazard at EP 34C remained until that time. Tr. 136-137.

On August 11, 2010, the Order was modified to a 104(d)(1) citation. Ex. G-6-4.

B. Testimony of Larry Blackburn

Larry Blackburn ("Blackburn") has been a Production Manager for three underground mines owned by Respondent, including the Fork Creek No. 1 mine. Tr. 210. Blackburn has more than thirty-eight years of experience in the mining industry and currently has a West Virginia Foreman's Certification. Tr. 209. Blackburn testified that on May 14, 2010, four days prior to the issuance of Order No. 8109413, he and Brown met up with Crawford as well as Manasses Hensley ("Hensley"), who had found a low oxygen spot at one of the bleeders at EP 34C. Tr. 211.

According to Blackburn, upon discovering the point of low oxygen, Crawford asked Blackburn if he could add additional ventilation to "sweep out" the low oxygen, and, in response, Blackburn went with Hensley to adjust the regulators. Tr. 215-216. Blackburn further testified that he could not say whether Crawford told him that another examination at EP 34C would be required to be completed by midnight on that day, May 14. Tr. 217-218. Blackburn explained that he thought the examination that resulted in the detection of low oxygen earlier that day was the weekly examination required in order to permit workers to re-enter the mine. Tr. 218. He stated that it was his belief that another examination of 34C was not due until the following Friday, May 21, 2010. Tr. 218.

With respect to water issues near the area in which low oxygen was discovered, Blackburn testified that as of May 14, 2010, pumps were operating in the top end of the first bleeder, and prior to that day, new discharge lines had been laid and a step-up transformer purchased. Tr. 220-221. In addition, a new water line had been installed. Tr. 227.

Blackburn also stated in his testimony that on May 14, he and Hensley inspected EP 34A-1, where the above-referenced pumps were operating, as well as EP 37A, 37B, and 37C, which were also tied to the ventilation of the grouping that included EP 34C. Tr. 228-231. Blackburn stated that he and Hensley inspected the entire group of panels in the area related to this ventilation system on that same day. Tr. 233. After May 14, the plan was to monitor the EPs and the pumps through the weekend (which Brown did on Saturday and Blackburn did on Sunday) to

ensure that the pumps were still pumping and that the ventilation was improving, which Blackburn claims was the case. Tr. 234. Despite his testimony that he checked the EPs and that the ventilation was improving, Blackburn could not recall the oxygen reading on his Solaris spotter. Tr. 235. The day following his weekend visit to the mine, on May 17, miners were permitted to enter the mine.

On cross-examination, Blackburn explained that he did not recall the reading on that spotter because he did not note it at the time and did not record his observations in the weekly examination book. Tr. 247-248. In addition, Blackburn did not take a reading with an anemometer at EP 34C, nor did he record an air quantity reading. Tr. 251. Blackburn explained that he did not record his observations because he did not believe the examination was due for another week, but admitted that he "probably should have" made a note of the oxygen reading. Tr. 247-248.

Though Blackburn testified that he thought EP 34C had been checked, he admitted on cross that he was not aware that Hensley could not reach the EP due to low oxygen and instead only got as near as fifty or seventy-five feet away. Tr. 249. Blackburn admitted that he did not know if EP 34C was checked at any time after the incident on Friday, May 14, 2010. Tr. 252.

C. Testimony of Scott Brown

Brown is a Superintendent at Coal River's Fork Creek No. 1 mine. Tr. 260. Brown graduated in 1987, received an Associate's Degree in Electronics, and has been working in coal mines since 1989. Tr. 261. He has held various positions within the mine and is now superintendent. Tr. 262. Brown received his West Virginia Foreman's Certification in 2001. Tr. 262.

Brown testified that he was contacted on May 14, 2010, after Crawford accompanied Hensley on Hensley's weekly examination, during which they discovered low oxygen in the area of the EP 34A, 34B, and 34C. Tr. 263. Brown was contacted because Crawford wanted to pull out the miners in that area, which he subsequently did. Tr. 263. After fixing an airlock door that had been knocked down, the miners were allowed to return to the area and to run coal in the A section. Tr. 264, 270. Brown also testified that Crawford would not let anyone go near the EP 34C because of the low oxygen. Tr. 264. Brown went on to explain that even with the damaged door, the air in that area was moving in the proper direction. Tr. 268. He admitted that he never entered the area of EP 34C, but, to his knowledge, there was still low oxygen there after the door was repaired. Tr. 270.

Brown also testified that Crawford did not inform him that an examination of EP 34C was required by midnight on May 15, 2010. Tr. 272. Brown was under the impression that his responsibility relative to EP 34C was to take care of the low oxygen by adding more fresh air to the area, which was done by closing the regulator to put more air into the first bleeder to let it exit at the EP 34C. Tr. 273. This process began on May 14, 2010. Tr. 274.

According to Brown, the next examination at 34C was due on May 21, 2010, but he admitted that Hensley keeps track of the weekly examination requirements in his capacity as fire

boss. Tr. 274. Brown explained that he did not discuss the weekly examination of EP 34C with Hensley, but that on the evening of May 14, Hensley shared with him the examination book, which read "could not exam due to low oxygen" for the EP 34C. Tr. 275-276.

Brown testified that on May 15, 2010, he returned to the mine and the area around the EP 34A, 34B, and 34C and found that the oxygen level was improving, but had not reached 19.5%, stating that when he neared 34C, his spotter went off. Tr. 277-278. However, he made no record of his observations. Tr. 280. Reiterating that he did not believe the next examination was required until the following Friday, May 21, 2010. Tr. 281.

Brown explained that on Monday, May 17, 2010, when work resumed at the mine, pre-shift and on-shift examination were conducted and did not uncover issues with oxygen, methane, or carbon monoxide and that the pumps at EP 34A-1 were monitored. Tr. 283. Brown continued that on May 18, 2010, Crawford asked him if an examination of EP 34C had been conducted, and when Brown said that they couldn't get to it but that they go near the corner, Crawford threatened that everyone would have to be pulled out of the mine if they could not get to the actual EP. Tr. 287.

Brown also explained that the withdrawal order was issued that day, May 18, 2010, at 8:26 am and that mine foreman Gilbert Saba checked the oxygen at EP 34C at 9:02 am and verified that it was above 19.5%. Brown also testified that the time elapsed between the issuance of the withdrawal order and the verification of the oxygen level was not enough to have improved a low oxygen condition if one had existed. Tr. 288-289.

D. Testimony of Manasses Hensley

Hensley is Coal River's Mine Examiner at the Fork Creek No. 1 Mine. Tr. 311. Hensley is a high school graduate with thirty-eight years of coal mining experience and a long personal history with mining. Tr. 309. Hensley received his West Virginia Foreman's Certification in 1976 and has maintained it ever since. Tr. 310-11. Testifying that he traveled with MSHA Inspector Crawford on May 14, 2010 while making one of his weekly examinations, Hensley explained that it takes five days to examine the entire mine, so a particular area is inspected on each of the five working days. Tr. 312. On May 14, he was examining the area of the mine known as the ABCD split. Tr. 313.

In reference to the events of May 14, 2010, Hensley explained that he traveled with Crawford up to EP 34A, and as they continued on toward EP 34C, the alarm on one of the detectors went off at the mouth of that evaluation point. Tr. 314-315. Hensley testified that though the alarm went off, he proceeded toward the checkpoint of EP 34C, during which time his oxygen reading was 17.9%. Tr. 316. At that point, Crawford and Hensley withdrew back out through the door, discovering that one of the doors had been torn out. Tr. 317. Upon this discovery, Hensley stated that Crawford told him to contact Brown and withdraw the men in the mine, which Hensley proceeded to do. Tr. 317-18. Following this action, they reinstalled, plastered and sealed the doors to make the repair. Tr. 317-18.

According to Hensley, after they repaired the door, Crawford had to leave, but on leaving told Hensley he would have until 12:00 am to finish the weekly examination. Tr. 319. Hensley testified that Crawford never explicitly stated that they would need to re-examine EP 34C, and for this reason Hensley took his earlier examination as the required examination. Tr. 320. However, on cross-examination, Hensley testified that he could not recall how close to the exact evaluation point at 34C he was able to reach, and that he had not taken a methane or air quantity reading near the 34C evaluation point. Tr. 333-335.

Hensley affirmed that it is his responsibility to keep track of the examination requirements for this mine, and that when an inspector travels with him during his examination he consults with them on what he writes into the log book. Tr. 324-25. Hensley recalled that on May 14, 2010, Crawford told him to write for EP 34C that they could not conduct an examination at that point. Tr. 324-25. Hensley testified repeatedly that despite what he wrote in the log book, he believed his next examination of EP 34C was not due until the following Friday, May 21, 2010. Tr. 330.

E. Testimony of Kenny Workman

Kenny Workman ("Workman") is an Outby Foreman at Coal River and has been working in mines since 1992. Tr. 342. Workman received his West Virginia Foreman's Certification in 2008, at which point he was allowed to conduct examinations. Tr. 343. On May 14, 2010, Workman monitored and examined the pumps at EP 34A to ensure that water was not gaining in that area. Tr. 345-346. Workman testified that on that day, May 14, he wore waders and waded up to within fifteen or twenty feet of EP 34C to examine the pumps. Tr. 347-348. Because he could tell that Hensley had not made it that far, Workman explained that he conducted a weekly examination while checking the pumps, but on cross-examination admitted that he did not record air quantity readings as part of this examination. Tr. 353, 363.

CONTENTIONS OF THE PARTIES

Respondent argues that on May 14, 2010, an examination of EP 34C was properly conducted pursuant to 30 C.F.R. § 75.364(f)(2) because Hensley, Blackburn and Crawford obtained the required information and properly recorded the observed hazardous condition, low oxygen, and there is no ALJ or Commission precedent that identification of hazardous conditions invalidates the examination. Respondent further contends that subsequent examinations were conducted on May 15, 2010 and May 16, 2010, and since all appropriate measures were taken by mine personnel adjusting ventilation controls to abate the condition, it was improper for Crawford to not provide additional time for abatement. According to Respondent, at worst, the Respondent's actions constitute a minor record-keeping violation. Respondent also argues that the Crawford did not direct or advise mine management that the weekly examination of EP 34C had to be completed by midnight on May 15, 2010. In addition, Respondent claims that Citation No. 8109413 (the "Citation") does not rise to the level of S&S because there were no ventilation problems within the bleeder system and, also, due to a lack of likely exposure to the low oxygen. Finally, Respondent contends that due to extensive mitigating circumstances and a lack of aggravated conduct, the citation does not constitute an unwarrantable failure and the proposed penalty is inappropriate due to incorrectly designated gravity and negligence.

The Secretary argues that no weekly examination at EP 34C had been conducted for the week ending May 15, 2010, as was required under 30 C.F.R. § 75.364(f)(2), even though Respondent was reminded to do so prior to letting anyone into the mine by Crawford. The Secretary contends that persons were allowed in the mine on Saturday, Sunday, Monday and Tuesday even though the weekly examination was not complete. Further, the Secretary claims that Respondent's violation of the weekly examination requirement was properly designated as S&S because it exposed miners to serious harm from low oxygen levels and unreliable methane levels near the EP 34C. In addition, the Secretary argues that failure to complete the required weekly examination is presumptively S&S because it is a prophylactic standard designed to detect and correct potential unknown hazards and, therefore, the *Mathies* test does not apply. The Secretary further argues that allowing post violation evidence to rebut the S&S presumption would eviscerate the prophylactic purpose of the weekly examination and such evidence is not determinative of the condition that existed when the weekly examination should have been completed. The Secretary likewise contends that Respondent's negligence with respect to its violation of 30 C.F.R. §75.364(f)(2) does amount to unwarrantable failure because the violative condition was extensive, existed for a significant length of time, posed a high degree of danger, and the order could have been written as reckless disregard.

BRIEF OVERVIEW OF EXAMINATION SCHEME

MSHA is taking an increasingly proactive approach to mine health and safety by imposing examination requirements for underground coal mines. The examinations required by 30 CFR Part 75 are designed to protect miners from the dynamic conditions in underground coal mines by monitoring for and correcting unsafe conditions before and during shifts. 30 C.F. R. § 75.360; 30 C.F.R. § 75.362. Additionally, a weekly examination is required for less frequently accessed areas of the mine as additional protection for miners. 30 C.F.R. § 75.364. Without these examinations, miners are vulnerable to potentially unsafe conditions and may be unaware of the hazards nearby until it is too late to prevent an accident.

The examinations required for underground coal mines include preshift, on-shift, and weekly examinations. 30 C.F.R. §§ 75.360, 75.362, 75.364. These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine. *See* 75 FR 81165, "Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards," December 27, 2010. The preshift examination helps to ensure that any hazardous or unsafe condition that has manifested since the last examination can be abated before anyone enters the mine. *Id*.[4] At least one on-shift

[4] 30 C.F.R. § 75.360 demands that an examination for hazardous conditions, methane and oxygen deficiencies and proper air movement be conducted in areas of the mine where work will be conducted, equipment will be energized, ventilation may be affected or miners will travel at least three hours prior to the start of the shift. Until this examination is conducted, no one may enter the mine.

examination must be conducted following the preshift examination, and more may be conducted if necessary to ensure the safety of the miners. 30 CFR § 75.362.[5]

In addition to the preshift and on-shift examinations, a weekly examination must be conducted in the less-traveled areas of the mine. 30 CFR § 75.364. The weekly examination must be conducted at least every seven days unless no one enters any underground area. 30 CFR § 75.364(f)(2). If at any time during a preshift, on-shift, or weekly examination a hazardous condition is observed, a conspicuous DANGER sign must be posted and the condition must be corrected immediately, or everyone is to be withdrawn. 30 CFR § 75.363(a).

The weekly examinations must also include examination for violations of mandatory health and safety standards that could result in hazardous conditions while, until recently, the preshift and on-shift examinations did not.[6] It is particularly important to note that hazardous conditions, when found, must be corrected *immediately*. 30 CFR §§75.363(a), 75.364(d) (emphasis added).

Weekly examinations serve different purposes than preshift and on-shift examinations. While the preshift and on-shift examinations are focused on identifying and correcting conditions that are potentially hazardous to miners in those areas of the mine most accessed, the weekly examination supplements these examinations by requiring examiners to assess not only hazards, but also mandatory health or safety standard violations, in areas of the mine that are not as frequently accessed. Preshift or on-shift examinations, then, are not an adequate substitute for the weekly examination because they focus on different areas of the mine.

ANALYSIS AND CONCLUSIONS

A. Validity of Citation No. 8109413

In meeting the requirements of 30 C.F.R. § 75.364, Respondent must measure and record four criteria at each evaluation point on a weekly basis. First, it must measure the methane level. Second, it must measure the level of oxygen saturation. Third, it must measure the air quantity flowing at the EP and, fourth, it must test to ensure that air is moving in the

[5] This regulation mandates that a certified person must conduct an on-shift examination of each section where anyone is assigned to work during shift and where mechanized mining equipment is being installed or removed. The examiner must check for hazardous conditions, methane and oxygen deficiencies and proper air movement. *Id*.

[6] The new rule, passed April 6, 2012, does require operators to examine for violations of mandatory health and safety standards during the preshift and onshift examinations. 75 FR 20702, April 6, 2012. It further requires examiners conducting weekly examinations to pay particular attention to nine categories of violations: mine support, roof control plans, maintenance of ventilation controls and *mine ventilations plans*, accumulations of combustible materials, application of rock dust, other safeguards – limited to travelways […], guarding moving machine parts and maintenance of belt conveyor components. *Id*. at 20702-20703 (emphasis added).

proper direction according to the ventilation plan. *See* 30 C.F.R. § 75.364. This four-step examination serves an important function in the protection of miners from the buildup of hazardous conditions in less-traveled parts of the mine since methane could accumulate in those areas and result in an explosion if not detected and corrected. If these requirements are not met for each EP in the ventilation plan every seven days, 30 C.F.R. § 75.364(f)(2) prevents the entrance of miners into the mine.

In examining the facts, circumstances and issues raised at hearing, the undersigned lends credibility to Crawford over the witnesses of Respondent. Although Crawford only has four years of experience as an inspector, he has over thirty years of experience in the mining industry, including ten years of experience conducting weekly examinations. Tr. 30, 31. Further, his testimony at hearing was clear, consistent and uncontroverted.

Respondent's witnesses, on the other hand, were not as credible. Each witness stuck to the same rehearsed story about completion of the weekly examination at EP 34C even when the facts surrounding the story completely contradicted the testimony. First, although Brown testified that Crawford did not advise the operator that the weekly examination had to be conducted by midnight on May 15, 2010, Hensley specifically admitted that he was warned by Crawford that the weekly examination had to be conducted by this time. Tr. 272, 320. Second, while Blackburn, Hensley and Workman all testified that the weekly examination was conducted, each admitted that, during his individual examination, one or more of the four required tests had not been performed. Tr. 251, 333-335, 363. Finally, while Hensley states that a weekly examination was conducted, he admitted at hearing that Crawford specifically stated that an examination still had to be conducted. Tr. 319, 320. For all of these reasons, the undersigned finds Inspector Crawford's testimony to be more credible.

Based on all the testimony and evidence presented at hearing, the undersigned finds that the Secretary has shown a violation of 30 C.F.R. § 75.364(f)(2) for failure to conduct a weekly examination at EP 34C. Although several of Respondent's witnesses claim that a weekly examination was conducted, each admits that his own examination was lacking in at least one of the requirements. Blackburn testified that, although the plan was to monitor the EPs, he took no anemometer or air quantity readings and, further, did not record anything in the record book. Tr. 247, 248, 251. Brown admitted that the Hensley brought the record book to him with the notation that EP 34C "could not be examined due to low oxygen." Tr. 275, 276. Although Hensley claimed that he had conducted the weekly examination, he admitted that he did not know how close he was to the actual evaluation point and that he did not take methane or air quantity measurements. Tr. 333-335. Finally, Workman admitted that he did not record air quantity readings as part of the examination. Tr. 353, 363. Moreover, Hensley admitted that Crawford expressly stated that he was to write that the examination of EP 34C had not been conducted. Tr. 324-325. From this testimony, it is incredible that the employees could have mistakenly believed that the next weekly examination did not have to be conducted until the following week. Respondent's own testimony shows that no examiner conducted an adequate examination as required; however, it still allowed miners to repeatedly enter the mine in violation of the regulation. Therefore, the Secretary has proven a violation of 30 C.F.R. § 75.364(f)(2).

Respondent argues that the weekly examination was conducted since the hazard of low oxygen was discovered. It contends that no ALJ or Commission precedent states that the identification of a hazardous condition invalidates the examination. Aside from the fact that the requirements for the examination where not even met, Respondent misses the fact that a weekly examination cannot be conducted if the evaluation point cannot even be reached. In *Williams Brother Coal Co.,* the operator argued that there could be no violation of the weekly examination requirements because the area was inaccessible. 24 FMSHRC 110, 117 (Jan. 2002)(ALJ). However, the ALJ upheld the citation as issued. *Id*. at 117. Although this was an ALJ bench decision, it illustrates that inaccessibility does not excuse the requirement of a weekly examination. Workman was the only witness who testified to coming within twenty feet of EP 34C and, even so, he did not complete the requirements of the regulation, rendering his examination invalid. Further, the argument that discovery of the hazard in the vicinity of EP34C satisfied the weekly examination requirements borders on the absurd. The weekly examination requires completion of all four measurements at each EP in the ventilation plan every seven days, and the discovery of a hazard to safety cannot satisfy that requirement. Also, upon discovery of a safety hazard, immediate correction is required. In the instant case, Respondent failed both of these responsibilities. There does not need to be Commission precedent to understand what was required of the operator; the governing regulations are not ambiguous.

Second, Respondent argues that since appropriate measures were being taken in adjusting the ventilation controls to abate the condition, it was inappropriate for the inspector not to provide additional time for abatement. However, Respondent had until midnight on May 15, 2010 to conduct its examination as required by the regulation, *i.e.* when the examination was, in fact, due. It would be impossible for Crawford to provide additional time for abatement when the violation had not yet occurred at the time he provided specific guidance to mine personnel, including Superintendent Brown. Further, it was the responsibility of mine officials to request additional time if, despite immediate and concerted efforts to correct the hazard by properly ventilating EP34C, they found that restoration of air flow could not be accomplished by midnight on the 15th. The mine did not submit such a request prior to the order, on this record. As such, this argument cannot be accepted.

Third, Respondent contends that the Order No. 8109413 was improperly issued because Crawford did not direct or advise mine management that the weekly examination had to be conducted by midnight on May 15, 2010. This argument fails for two reasons. First, it is Respondent's responsibility to know the regulations and to follow them accordingly. At the hearing, Crawford emphasized that he advised Respondent of the need to conduct the weekly examination as a *courtesy*. Tr. 73(emphasis added). To be sure, Respondent understood that it had to conduct a weekly examination; it just did not do so properly. This would indicate that either the examiners had an inherent misunderstanding of the regulation and, thus, their job, or that Respondent had provided inadequate or even improper training in the conduct of the weekly examination, or *both.* Second, Respondent's argument flies in the face of its own testimony. Both Blackburn and Hensley specifically testified that Crawford stated that the examination of EP 34C would have to be completed by midnight on May 14 or 15, 2010[7], but,

[7] There is some dispute as to whether Crawford meant that it was due on May 14, 2010, before midnight or by midnight on May 15, 2010.

for some unknown reason, each still believed that the next weekly examination was not due until May 21, 2010. Based on all the foregoing, the undersigned finds a violation of 30 C.F.R. § 75.364(f)(2).

Finally, Respondent argues that this is, at most, a minor record-keeping violation. The testimony and evidence contradict this assertion. If Respondent had, in fact, conducted the examination and simply forgot to record it in the examination book, this could be considered a record-keeping violation. However, Respondent's witnesses each testified that, although there was some type of examination in the vicinity of EP 34C, each was deficient in the requirements found in 30 C.F.R. § 75.364. Therefore, this argument fails.

B. S&S

A S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

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

The undersigned finds that the violation at issue is S&S in nature. The Secretary has proven that Respondent did not conduct a full weekly examination within the seven days mandated by the regulation. During this time, the oxygen levels had become dangerously low at EP 34C, due to a water impoundment near EP 34A-1. Tr. 87-91. This contributed to a hazard of a miner walking into the area, being overcome by low oxygen and suffering fatal injuries. The oxygen levels reached levels as low as 17.9%, of which we are aware. It has been established that over exposure to oxygen deficient air could have adverse psychological affects and can result in serious, and potentially fatal, injuries. *See generally, McElroy Coal Company*, 30 FMSHRC 45, 64-65 (Jan. 2008)(ALJ); *Jim Walter Resources*, 29 FMSHRC 212, 218 (Mar. 2007)(ALJ). As such, the undersigned finds that the four prongs of the *Mathies* test have been met and the violation is S&S.

Oak Grove Resources, LLC., involved a nearly identical situation where the mine's examination records indicated that a weekly examination could not be conducted at certain locations in the mine due to high water. Id., 2012 WL 894523 (Mar. 2012)(ALJ). Despite the inability to examine the entire mine, and thus failure to conduct an adequate weekly examination, the mine operator permitted eighty-three miners into the underground portions of the mine to produce coal. *Id*. The ultimate finding was that the way in which the water accumulation impacted the ventilation within the mine, along with the volume of methane produced in the mine each day and the inability to access the area for examination justify the elevation of the underlying violation to the level of S&S. *Id*. The ALJ made further note that given the Congressional statement of the importance of this requirement, it would not be unreasonable to view a violation of this regulation as presumptively S&S. *Id*.

Respondent argues that this violation does not rise to the level of S&S because there were no ventilation problems within the bleeder system and, also, due to a lack of likely exposure to the low oxygen. This is unpersuasive in the fact that the weekly examination is the only way for an operator to identify a problem in a worked-out area before it spreads to other parts of the mine. During the week in which the weekly examination was to be conducted, the pumps had gone down in a particular part of the mine, allowing water to accumulate impeding ventilation to that part of the mine affecting EP34C. Under normal continued mining conditions, water could continue to accumulate, making the lack of ventilation a much more pervasive problem by spreading to working areas of the mine or by allowing oxygen levels to drop low enough to cause rapid serious injury to those entering that section for even a brief period of time. As acknowledged by MSHA, a proactive examination scheme is the only way to prevent conditions from becoming worse. For these reasons, this argument cannot be accepted.

The Secretary has also argued that, given the prophylactic nature of the examination scheme, this violation is presumptively S&S. The undersigned declines to find that this is the case. The theory of presumptive S&S violation was first considered in *Consolidation Coal Co*., 8 FMSHRC 890 (June 1986). The Commission recognized that the facts and circumstances presented by the Secretary in each of these cases involving respirable dust violations would be essentially identical and that, once the Secretary proved overexposure, it could be presumed that the violation was S&S. *Id*. at 899. The Commission also relied heavily on the purpose and legislative history of the Act to reach this conclusion. *Id*. at 895-897; *See also Clayton's Calcium, Inc.,* 29 FMSHRC 230 (Mar. 2007)(ALJ)(The ALJ acknowledged this heavy reliance on the legislative history and refused to apply a presumptive S&S standard to other dust violations).

As of this time, the Commission and its ALJs have been more reluctant to expand the presumption of S&S to examinations. In *Manalapan Mining Company*, the Commission found that, based on the facts argued by the Secretary, the presumption of an S&S violation would actually produce absurd results because the presumption raises the operator's defense of producing evidence that no hazardous conditions existed. *Id*., 18 FMSHRC 1375, 1381 (Aug. 1996). The ALJ had, in fact, found that the violation was non-S&S because no hazardous conditions had been found. *Id*. Chairman Jordan and Commissioner Marks made a spirited argument that the presumption of S&S was appropriate given the fact that the *preshift* examination was the linchpin of the safety protections since it prevents unwary miners from being sent into areas containing hazardous conditions and that Congress had emphasized its importance. *Id*. at 1390 (emphasis added).[8] However, this is a weekly examination and, while it is an extremely important part of the overall examination scheme, the legislative history, until recently, did not espouse quite the same importance as the issues of preshift examinations or respirable dust exposure. For the foregoing reasons, the undersigned declines to find that the violation is presumptively S&S.

C. Negligence and Unwarrantable Failure to Comply with a Mandatory Standard

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id*. MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id*. Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id*. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violation condition or practice, and there are no mitigating circumstances." *Id*. *See also Brody Mining, LLC*, 2011 WL

[8] Given the revisions to the regulations and the legislative history that has been generated in their wake, it may be more likely that new rules would make a violation presumptively S&S. These revisions, however, would not apply retroactively to the instant case.

2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

By its definition, an unwarrantable failure suggests more than ordinary negligence. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353 (Mar. 2000). A judge may also determine, in his discretion, that some factors are not relevant or may determine that some factors are much less important than other factors under the circumstances. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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 by the judge. *IO Coal Company*, 31 FMSHRC at 1351.

The undersigned finds that the negligence attributable to the operator was correctly designated as high, as well as an unwarrantable failure to comply with a mandatory standard. The record and testimony shows that Respondent knew that the oxygen levels were low at EP 34C on May 14, 2010, when it failed to be able to conduct an appropriate weekly examination. Crawford warned mine officials that the weekly examination would have to be completed or no one would be permitted to enter the mine. Tr. 150. Although its witnesses testified that an examination was conducted, each admitted that he did not fulfill at least one requirement of the regulation. Moreover, the record book specifically stated that the weekly examination could not be conducted. Tr. 325. Despite this, and the fact that Respondent was aware that the oxygen levels were still too low to reach EP 34C to conduct the weekly examination on May 17, 2010, three days later, it still permitted miners to enter the underground areas of the mine. In *Oak Grove Resources, LLC*, the operator allowed miners to enter the mine despite the fact that

weekly examinations could not be conducted in certain locations due to water. *Id*. 2012 WL 894523 (Mar. 2012)(ALJ). The ALJ found an unwarrantable failure based on the fact that the operator was "on notice" about the failure to conduct the weekly examination. *Id*. In *Pine Ridge Coal Company, LLC*, the ALJ found the operator's failure to conduct an adequate weekly examination to be an unwarrantable failure due to the prophylactic nature of the regulations requiring examinations. *Id*., 2012 WL 601258 (Jan. 2012)(ALJ). Based on all the relevant factors presented here and case law, Respondent's conduct was aggravated, resulting in an unwarrantable failure to comply with a mandatory safety standard.

The Secretary makes the argument that, given the facts and circumstances surrounding the violation, this Order actually could have been designated as reckless disregard. While the undersigned declines to make such a finding, it should be noted that the Secretary makes a very good argument in this respect. During a weekly examination, 30 C.F.R. § 75.364(d) mandates that "[h]azardous conditions *shall* be corrected *immediately*." (emphasis added). But the correction of the low oxygen condition at EP34C was anything but immediate, as required by Sections 75.363(a) and 75.364(d). Respondent's immediate action was only to adjust the regulator, which did not solve the problem, likely due to the water impoundment. Additionally, Respondent had the entire weekend when no work was scheduled in the mine to correct the condition. It could have easily assigned a crew to accelerate the pumping and de-water the affected area of the mine. This should have been the most obvious course of action and, while not immediate, it would have been prudent. However, although Brown claimed to have come into the mine on Saturday in order to monitor the problem, on Tuesday, May 18, 2010, he stated to Crawford that he believed that the problem still existed, and, in fact, had no idea whether the problem persisted. Respondent's conduct does very nearly rise to the level of reckless disregard. But a total absence of care is not shown.

Respondent contends that due to extensive mitigating circumstances and a lack of aggravated conduct, the citation does not constitute an unwarrantable failure. It sites its actions to adjust the regulator and attempts to conduct the examination. The undersigned is not persuaded by these arguments. First, Respondent was aware on May 14, 2010, that the low oxygen levels were the result of a water impoundment near EP 34A-1 that was blocking air flow. At best, adjusting the regulators to pump more air through the ventilation system was a token effort to appease the inspector. It was probable that, until de-water pumping could be accomplished, the air quality was not going to improve. Second, as stated many times before, each miner who testified to conducting an examination of EP 34C also admitted to omitting one or more of the four examination requirements. The only conclusion that can be reached is that Respondent knew that a hazardous condition existed at EP 34C, preventing it from conducting a weekly examination that was required prior to allowing miners into the underground areas of the mine. Despite this, it allowed them to enter anyway in direct violation of the clear prohibition expressed in Section 75.364(f)(2). This is exactly the type of aggravated conduct contemplated by an unwarrantable failure.

D. Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Act are well-established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

The undersigned has considered all six statutory penalty criteria and finds that $34,652.00 is a reasonable penalty for the violation at issue. The criteria in particular concern are the operator's negligence, the gravity of the violation and the demonstrated good faith in attempting to achieve rapid compliance. Although Respondent had warning on May 14, 2010, that the weekly examination would need to be conducted by midnight that night, it, instead, made a token effort to correct the underlying issue preventing the weekly examination and had not corrected the problem by the time the Order was issued on May 18, 2010, three days later. This illustrates, at least, a lack of mitigating circumstances and, at most, an absence of care. Further, it certainly does not evidence immediate correction of a known safety hazard. Respondent ignored this hazard when it allowed miners into the underground areas on Sunday, Monday, and Tuesday. This is underscored by the fact that on May 18, 2010, Brown admitted to Crawford that he did not even know whether the hazard had been corrected and the weekly examination completed. Considering the stipulation that the penalty would not affect the operator's ability to continue to in business and the history of violations entered as evidence at hearing, the penalty as assessed is reasonable and is affirmed.

ORDER

It is hereby **ORDERED** that Order No. 8109413 is **AFFIRMED** as written on May 18, 2010. It is further **ORDERED** that Coal River Mining, LLC, **PAY** the Secretary of Labor the sum of $34,652.00 within 30 days of the date of this Decision.[9]

/s/ Kenneth Andrews
Kenneth Andrews
Administrative Law Judge

Distribution:

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[9] 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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May 10, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of ROBERT A. ALBRECHT,	:	Docket No. LAKE 2012-345DM
Complainant,	:	NC-MD 12-04
	:	
v.	:	Mine: Eustice Portable Mine
	:	Mine ID: 11-00236
CONMAT, INC.,	:	
Respondent.	:	

DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT, APPROVING WITHDRAWAL OF AMENDED TEMPORARY REINSTATEMENT APPLICATION, AND DISMISSING AMENDED TEMPORARY REINSTATEMENT APPLICATION

This case is before me on an Amended Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Robert A. Albrecht, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (Mine Act). Albrecht's initial discrimination complaint was filed with MSHA on January 3, 2012. MSHA special investigator, Thomas J. Pavlat filed his declaration in support of said complaint on February 9, 2012.

On February 10, 2012, the Secretary filed her initial Application for Temporary Reinstatement on behalf of Albrecht under section 105(c)(2) of the Mine Act. The February 10, 2012 Application was amended on February 13, 2012. The Amended Application seeks the reinstatement of Albrecht to the position he would have held but for the alleged discriminatory November 22, 2011 layoff/termination of Albrecht, pending final disposition of the complaint before the Commission.

On February 17, 2012, Respondent, by counsel, pursuant to Commission Rule 45(c), requested a hearing on the Secretary's Amended Application. On February 20, 2012, Respondent recalled Albrecht from layoff, effectively reinstating him, but at a lesser rate of pay and benefits than he had received at the time of his layoff/termination. Given Albrecht's recall and ongoing settlement discussions, the parties and the undersigned agreed to an extension of the hearing date until May 8, 2012, should the parties be unable to settle this matter.

On or about February 27, 2012, the Secretary filed a Motion in Limine to Exclude Respondent's Evidence Regarding Its Affirmative Defenses, as set forth in its Request for Hearing. Thereafter, on March 13, 2012, Respondent filed its Response to Motion in Limine, arguing that the evidence it seeks to present at hearing is relevant to determining whether Albrecht should be reinstated with the same pay and benefits he held prior to his lay-off and to show that Albrecht's complaint allegations are frivolous.

On March 13, 2012, the Secretary filed her Reply and argued that the only issue in a temporary reinstatement hearing is whether the discrimination complaint was frivolously brought, and upon a finding that a complaint is not frivolously brought, the complainant shall be reinstated to the same or substantially equivalent position, with the same pay and benefits.

During the most recent conference calls with the parties on April 30 and May 7, 2012, I advised that I would reserve ruling of the Secretary's Motion in Limine until the issue arose in the crucible of hearing, should the parties remain unable to settle this matter. I also informed the parties that I would issue a Bench Decision. On May 4, 2012, the parties filed a joint stipulation of facts.

A hearing on the Amended Application was held on May 8, 2012 in Rockford, Illinois. Prior to commencement of the hearing, the parties reached a global settlement, which encompassed an additional discrimination complaint filed by Albrecht since his recall, and certain 104(a) citations. The Settlement Agreement was executed by all parties (the Secretary, the Respondent, and Albrecht) and resolved, inter alia, all pending claims arising out of Albrecht's discrimination complaints and the Secretary's Amended Application for Temporary Reinstatement. It was received in to the record by the undersigned as Jt. Exh. 1. Pursuant to the terms of the Settlement Agreement, the Secretary agreed to withdraw her Amended Application.

Having reviewed the terms of the Settlement Agreement and found them to be consistent with statutory criteria under section 110(i) of the Act and to effectuate the purposes and policies of the Mine Act, I issued a Bench Order Approving the Parties' Joint Motion to Approve Settlement Agreement, the Secretary's Withdrawal of Temporary Reinstatement Application, As Amended, and Dismissing Temporary Reinstatement Application, As Amended. I hereby confirm that Bench Order by this written Decision and Order.

ORDER

Accordingly, **IT IS ORDERED** that the all-party Settlement Agreement (Jt. Exh. 1) is **APPROVED**, the Secretary's withdrawal of her Temporary Reinstatement Application, as amended, is **APPROVED**, and this proceeding is **DISMISSED**.

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

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/tjr

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May 10, 2012

KNIFE RIVER CORPORATION, NORTHWEST, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2011-486-RM
	:	Citation No. 8599811; 12/20/2010
v.	:	
	:	Docket No. WEST 2011-512-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	:	Order No. 8599817; 01/13/2011
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2011-666
	:	A.C. No. 35-03321-246378
v.	:	Mine: MBI Portable Crusher No. 1
KNIFE RIVER CORPORATION, NORTHWEST, Respondent.	:	

DECISION AND ORDER

Appearances: Adele Abrams, Esq., Law Office of Adele Abrams P.C., Beltsville, Maryland, for Contestant

Patricia Drummond, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, for Respondent

Before: Judge McCarthy

These cases are before me upon two notices of contest and a related petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On December 20, 2010, Citation No. 8599811 was issued to the Contestant charging a violation of 30 C.F.R. § 56.9300(b) because the "truck scales roadway had a guardrail that was not at least mid-axle height of the largest piece of equipment to travel the

roadway." On January 13, 2011, Order No. 8599817 was issued charging that the Contestant violated section 104(b) of the Mine Act by failing to abate the violation alleged in Citation No. 8599811.

A hearing was held in Portland, Oregon, after unsuccessful settlement negotiations. Thereafter, post-hearing briefs were filed. The primary issues presented are whether Respondent violated 30 C.F.R. § 56.9300(b), as alleged in Citation No. 8599811, and whether Respondent failed to abate that citation under section 104(b), as alleged in Order No. 8599817.

As this decision was being drafted, the Commission issued its decision in *Lakeview Rock Products, Inc.*, 33 FMSHRC 2985 (Dec. 2011), which set forth an analytic framework for determining whether the requirements of 30 C.F. R. 56.9300 have been met in the context of truck scales. Applying the analytic framework set forth in *Lakeview*, I find that the Paetsch pit truck scale at issue is not a roadway or part of the mine's roadways. I further find that under the facts and circumstances of this case, the Secretary has failed to prove by a preponderance of the evidence that the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Accordingly, Citation No. 8599811 is vacated. Since I find no violation, the failure to abate Order No. 8599817 is also vacated. Moreover, even assuming a violation, I find that Knife River lawfully abated the citation by removing the truck scale from service.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the post-hearing briefs, I make the following:

II. FINDINGS OF FACT

A. Background

Knife River Corporation, Northwest, operates a portable crusher, known as Portable Crusher No. 1. During the inspection at issue on December 20, 2010, Portable Crusher No. 1 was located at a crushed stone operation known as the Paetsch pit in Lin County, Oregon. (Tr. 16, 34.)[2] Like the crusher, the truck scale at issue is also portable, and was transported to the

[1] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

[2] In this Decision and Order, citations to the transcript are designated as Tr. followed by page number(s), the Secretary's exhibits are designated Sec'y Ex. #, and Knife River's exhibits are designated K.R. Ex. #.

Paetsch pit from another site north of Portland, Oregon about the spring of 2005. It has been operated in essentially the same condition since its installation at that time. (Tr. 272.)

The truck scale is 80-feet long and approximately 11-feet wide. (Tr. 39, 278.) It is elevated above ground to provide clearance for operation and to allow access for cleaning and maintenance. (Tr. 264, 279.) The elevation varies slightly along the length of the scale. The highest elevation of the scale is 41 inches off the ground. (Tr. 36, 91.) The scale has two, 10-inch "rub rails," which extend along both sides of the scale and along the sides of the ramp that lead onto and off of the scale. (Tr. 36.)[3] A small section of the right rub rail along the approach to the scale is bent downward and outward as a result of damage caused several years ago when a large, front loader drove onto the rail. (Tr. 38, 274.)

Drivers wishing to access the scale must exit the main roadway at the Paetsch pit and use a side access road that leads to the weighing equipment. The vehicles on the access road are restricted to 15 miles per hour (15 mph). (Tr. 43; Sec'y Ex. 2.) Upon approach, a truck driver can choose to enter the one-way scale, however, there is a finished area around the scale, which may permit a driver to circumvent the scale entirely.[4]

Access to the scale is controlled by red and green lights, which indicate when a driver must stop or may proceed across the scale. (Tr. 248.) Typically, trucks are driven at two to three mph on and off the scale. Truck speed is limited by multiple stops, which are required during the weighing process. Truck speed is strictly enforced for driver safety, and to protect the scale from damage. (Tr. 247, 250, 269-270.) The driver must come to a complete stop when exiting the scale to obtain a weight ticket from the scale operator. (Tr. 248.)

Since installation, an estimated 67,661 truck loads have crossed the scale. (Tr. 269, 300; K.R. Ex. 5.) Despite such heavy usage, there has been no reported incident of any truck over traveling the edge of the scale, or overturning upon entering, traveling, or exiting the scale. (Tr. 133, 249-250, 270, 301.)

Between 2005 and August 2010, MSHA inspected the Paetsch pit ten times. (K.R. Ex. 23.) No citations were issued, nor was Knife River told that the scale was unsafe or in violation of 30 C.F.R. § 56.9300(b). (Tr. 55-56.)

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[3] The scale was originally manufactured and sold without rub rails. (Tr. 287.) The rub rails were installed by Knife River's fabricating shop out of Tangent, Oregon. (Tr. 275-76, 287.)

[4] The area to the left of the scale is finished with the same gravel that was used to construct the access road. (Sec'y Ex. 2 at 10.)

On August 26, 2010, MSHA issued Program Policy Letter (PPL) No. P10-IV-1 in an attempt to clarify that elevated truck scales at metal and nonmetal mines required guardrails under 30 C.F.R. § 56.9300, and to provide guidance on design parameters for guardrails. That PPL was effective on issuance and expired on March 31, 2012. (Sec'y Ex. 6.) The PPL provides:

> **Policy**
> Elevated truck scales are considered elevated roadways if a drop-off exists of sufficient grade or depth that could cause a truck to overturn or endanger persons in the truck. Consequently, under 30 C.F.R. § 56.9300, elevated scales need to be equipped with either berms or guardrails up to mid-axle height of the largest vehicle driving over the scale to restrain the vehicle from driving off the elevated surface.
>
> **Guidance on guardrails and design parameters for guardrails.**
>
> Curb, Rub Rail, or Guardrail
>
> All elevated scales should be equipped with a curb, rub rail, berm, or guardrail, depending upon its elevation level. For scales having a driving surface elevated 16 inches[*] or less above the ground, the scale should, at a minimum, be equipped with either a substantial curb or rub rail at least 6 inches high. If the height from the driving surface on the scale to the lowest ground surface adjacent to the scale is greater than 16 inches, either the drop-off hazard can be mitigated by raising the ground[**] to decrease the distance to less than 16 inches or equipping the scale with a guardrail capable of restraining the vehicle from driving off the scale. Any guardrail should extend to at least mid-axle height of the largest truck using the scale.
>
> Most truck scales are provided with a rub rail to guide the vehicle. These are intended to provide a visible, audible, or tactile indication to the truck driver to identify the edge of the roadway. These rails generally are not mid-axle height

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[*] If a truck wheel goes over a 6-inch rub rail or curb and has a 16-inch or less drop-off distance to the ground, the truck would not be expected to overturn. A truck's typical 20-inch+ mid-axle height would create greater stability in the event a truck drove off the side of the scale.

[**] Given that the underside of a scale must remain accessible, the ground could be raised using several techniques. For example, a retaining wall can be constructed adjacent to the scale to support an earthen slope at a gentle angle. Other means of reducing the drop off include placement of materials, such as concrete slab or blocks, adjacent to the scale to form an acceptable slope.

and typically are not considered structurally sufficient to prevent a vehicle from driving over or through them. Conversely, a guardrail at least mid-axle height is intended to prevent the vehicle from driving through or over it.

Guardrail Design Parameters

When a vehicle impacts a guardrail system[***], there is a transfer of energy from the vehicle to the guardrail system. Specifically, the vehicle's kinetic energy, which is related to its mass and velocity, must be absorbed and deflected by the guardrail system. There are four parameters that should be considered in designing guardrails for a scale: the height of the rails (impact height); the speed of the vehicle while driving onto, over, or off the scale; the loaded weight of the vehicle; and the angle of impact. The mine operator should evaluate each of these variables for their operation and design accordingly. There is no "one-size-fits-all" design for guardrails on truck scales.

Guardrail Height - 30 C.F.R. § 56.9300 requires that the guardrail must be at least mid-axle height on the largest vehicle using the scale.

Background

Two Administrative Law Judge opinions affirm MSHA's position that elevated truck scales fall within the guardrail or berm requirements of § 56.9300 (*Secretary of Labor v. APAC-Mississippi, Inc*., 26 F.M.S.H.R.C. 811 (2004) and *Secretary of Labor v. Carder, Inc*., 27 F.M.S.H.R.C. 839 (2005)). This policy letter clarifies the Agency's application of 30 C.F.R. § 56.9300 to elevated scales . . . .

(Sec'y Ex. 6; K.R. Ex. 16.)

Brad Breland, the field office supervisor in MSHA's Albany, Oregon office, testified that he discussed the PPL with field inspectors at a staff meeting shortly after it was issued. (Tr. 113.) Breland did not recall exactly what was said at the staff meeting, but recalls instructing his inspectors to rely on their common sense when applying the PPL, which he described as a minimum standard for the industry. (Tr. 114.)

Breland testified that prior to the instant inspection, he was aware that Knife River had been cited for two alleged violations of 30 C.F.R. § 56.9300 at its truck scales; one at the Coffee

[***] Guard rail systems typically consist of a horizontal rail or rails, vertical posts, and connections to the scale frame or ground. Alternatively, a system could consist of an above deck integral steel girder, concrete barrier, or parapet wall and connections to the scale frame or ground.

Lake Pond Mine on April 2, 2010, and another at the Angell Quarry on October 5, 2010. (Tr. 116.) The Coffee Lake citation was vacated by an ALJ because the Secretary failed to establish by expert testimony or otherwise that the drop-off from the approximate 26-to-36-inch scale elevation was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. 32 FMSHRC 912 (July 2010). The judge's decision vacating the Coffee Lake citation became a final decision of the Commission. Breland testified that he decided not to pursue the Angell Quarry citation because the MSHA inspector was not available to testify and MSHA had no expert testimony at that time. (Tr. 117.) When the Angell Quarry citation was vacated, Breland sent a copy of the vacated citation and a copy of the PPL to Knife River. (Tr. 128.)

B. The Instant Inspection

On December 20, 2010, MSHA inspector Benjamin Burns conducted an inspection at the Paetsch pit and issued a single section 104(a) citation. Citation No. 8599811 alleges verbatim:

> The truck scales roadway had a guardrail that was not at least mid axle height of the largest piece of equipment to travel the roadway. Truck and pup tractor trailers, and bob tailed trucks with an approx. mid axle height of 18 in. to 20 in . travel this roadway. The existing railing measured 10 in on the east and west ends running the length of the 90 ft. long scales. The drop off to the ground below measured approx. 41 in. from scales deck and 51 in. from top of railing to ground. The approach to the scales was on a downward grade. The roadway was wet at the time of inspection. Visible rub marks were observed on both side railings. If a person were to over travel in this area, serious head, neck and spinal injuries could result. The company was aware of this requirement, however, they were under the impression they were in compliance with MSHA standards.

(Sec'y Ex. 1.) Inspector Burn's evaluation of gravity was that an injury or illness was unlikely to occur, but could reasonably be expected to be permanently disabling. He designated negligence as moderate. *Id*.

After receipt of the citation, Knife River removed the scale from service by placing caution tape across the entrance to the scale and large concrete barriers at both ends of the scale, which prevented any vehicles from using the scale. (Tr. 48, 59.) The Secretary presented no evidence that the concrete barriers had been moved or that any trucks had used the scale since the concrete barriers were put in place. (Tr. 62.) In fact, Burns credibly testified to the contrary. Burns testified that when he returned to the Paetsch pit on January 13, 2011, he observed a concrete barrier and caution tape placed around the approach portion of the scale. (Tr. 47, 48.) Burns testified that the concrete blocks effectively kept trucks from entering the scale and the barriers could only be removed with the use of chain and hoist or front-end loader. (Tr. 60.)

Nevertheless, on January 13, 2011, inspector Burns issued Order No. 8599817 alleging that Knife River violated section 104(b) of the Mine Act by failing to abate the violation alleged in Citation No. 8599811. That 104(b) Order alleged that "no apparent effort was made by the operator to fix the cited condition on the scale." (Tr. 49-51; K.R. Ex. 2.)

C. The Expert Testimony and Reports

The Secretary presented expert testimony from Terence Taylor in an effort to establish that the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Taylor is employed as a senior civil engineer with MSHA's technical support group in Pittsburgh, Pennsylvania. (Tr. 171-172.) Taylor's background is in civil engineering. He does not possess any expertise regarding vehicle dynamics or biomechanics. (Tr. 172, 207-208.) Taylor did not examine the mine site or truck scale in question. (Tr. 208.)

With the help of a colleague, Taylor conducted analyses to determine if a tip-over hazard existed with a scale that was 41 inches off the ground. (Tr. 80.) Taylor presented a static and dynamic tip-over analysis. In the static analysis, the vehicle was assumed to be placed in a position with half of the wheels on the ramp and the other half on the ground. The dynamic analysis took into account the force of half of the vehicle falling off the scale. In both the static and dynamic analysis, Taylor did not take account for the speed of the vehicle or the existence of the rub rails, and he assumed that the vehicle began from a tipping point in which the vehicle completely straddled the side of the scale with only half of the wheels on the scale. (Tr. 180-195; Sec'y Exs. 3 and 4.)

Taylor found that there was a potential tip-over hazard if a truck had half of the wheels on the scale and the other half on the ground. He testified about a potential scenario in which half the wheels could be off the scale deck, such as where a driver approaching the scale, missed the entrance such that half the wheels went onto the scale while the other half went onto adjoining ground. (Tr. 216, 452.) Taylor posited that such a scenario was possible from alcohol impairment, a bee in the cab, or a heart attack. (Tr. 216.)

Taylor further testified that if a vehicle drove off the edge of the scale deck and dropped 13 inches, this would provide enough momentum to cause the vehicle to overturn. (Tr. 183-184.) Based on the conditions at the scale site and his mathematical calculations, Taylor opined that even 21 inches of drop off was sufficient to cause a vehicle to overturn and cause injury to the occupant of the vehicle. (Tr. 196). Taylor's analysis did not take into consideration the slow speeds at which vehicles must approach the scale, or the presence of the 10-inch rub rails. (Tr. 212-213.)

Knife River presented Dr. Dirk Smith as its expert witness. Dr. Smith has a doctorate degree in mechanical engineering. His area of expertise is in vehicle movement and dynamics. (Tr. 366.) Unlike Taylor, Dr. Smith visited the mine site and examined the configuration of the truck scale at issue. (Tr. 374.) Dr. Smith proffered testimony and a report regarding the

potential of a vehicle, traveling at the speeds required on the truck scale, to travel over the rub rails, continue over the scale deck, and tip over or endanger occupants. (*See generally* Tr. 373-424.)

In preparation for trial, Dr. Smith ran a series of simulations using assumptions about vehicle speed and maximum turning angles. In some cases, his simulation was based on twice the speeds and angles that realistically could be expected based on the history of trucks passing over the Paetsch pit truck scale. (Tr. 398; K.R. Ex. 6-13.) The simulations used two different vehicles, a dump truck and a tractor trailer. (Tr. 375.) The simulations assumed that a driver would react in one second and steer back towards the center of the scale if contact was made with the rub rails. (Tr. 428, 429.) Dr. Smith admitted that his simulation program assumed that rub rail strength was infinite. (Tr. 429, 430.)

In his critique of Taylor's findings, Dr. Smith found flaws in the methodology used to conclude that a vehicle could overturn on the truck scale. In his report, Dr. Smith found it was unrealistic to assume that a truck could ever obtain a position where either half of the wheels were on the scale and the other half were on the ground, as set forth in Taylor's static tip-over analysis, or half of the wheels were on the scale and the other half were suspended in air, as set forth in Taylor's dynamic tip-over analysis. (K.R. Ex. 3, pp. 4-5.) Dr. Smith testified that the undercarriage of the truck would prevent a truck from driving up the scale with two wheels on the scale and the other two on the ground, as Taylor had described. (Tr. 403.) Similarly, if a truck driving onto the scale were to travel over the rub rail, Dr. Smith opined that only one wheel could go over the side. Even without accounting for intermittent stops, Dr. Smith testified that the slow speed at which trucks travel across the scale did not provide enough forward momentum to permit a second wheel to travel over the edge. (Tr. 405.) Instead, a corner of the truck would drop and catch on the truck's undercarriage. At worse, this would cause some jostling to occupants, but be absorbed by the truck's suspension features. Dr. Smith testified that trucks, like the ones used at Knife River, usually possess shock-absorbing seating to ameliorate discomfort caused when traveling on rough and uneven terrain. In addition, he testified that seat belts would restrain the truck's occupants, and any impact from one wheel traveling over the side of the scale and catching on the undercarriage would be be mitigated. (Tr. 407.)

Dr. Smith concluded that "basically the probability is zero . . . of a truck going over the rub rails and then causing – having an accident with the data that we have." (Tr. 401). To date, Dr. Smith's opinion is supported by evidence that there have been no reported incidents of a vehicle over traveling the edge of *any* elevated scale, much less one with rub rails, at any location in the United States. (Tr. 70, 133, 204, 207.)

III. DISPOSITION AND ANALYSIS

The Secretary contends that all truck scales are considered part of a mine's roadways. Therefore, she argues that they are subject 30 C.F.R. § 56.9300, which states in relevant part:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
>
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

The Secretary further argues that Taylor's static and dynamic tip-over analysis and endangerment without tip-over determination established that a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Since the scales did not have guardrails of at least mid-axle height of the largest self-propelled mobile equipment to travel them, she argues that a violation of the applicable standard has been established.

Knife River contends that 30 C.F.R. § 56.9300 does not apply because truck scales are not a "roadway" as the term is commonly understood. (K.R. Br. at 6.) Even if 30 C.F.R. § 56.9300 applies to truck scales, Knife River argues that the rub rails sufficiently mitigate the risk of a vehicle overturning. In addition, Knife River contends that the citation should be vacated because fair notice was not given that the scale violated 30 C.F.R. § 56.9300. *Id.* at 22.[5] Lastly, Knife River argues that MSHA's Program Policy Letter No. P10-IV-1 cannot be used to establish an enforceable rule, absent notice and comment rulemaking. *Id.* at 17-22.[6]

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[5] Knife River argues that it did not have fair notice of MSHA's interpretation and enforcement of 30 C.F.R. § 56.9300. Knife River emphasizes that during the ten inspections from 2005 through August 2010 at the Paetsch pit, MSHA inspectors never cited the elevated truck scale, nor identified it as a safety concern. Although Knife River may not have been cited for violations at the Paetsch pit, it was cited for violations of the standard at its elevated truck scales at the Coffee Lake and Angell Quarry facilities. (K.R. Exs. 14 and 15). To ensure that the mining community was aware of MSHA's enforcement policy with regard to 30 C.F.R. § 56.9300, MSHA also issued Program Policy Letter No. P10-IV-1 in August 2010. That PPL purportedly clarified MSHA's enforcement position that elevated truck scales would be treated as elevated roadways. Breland credibly testified that a copy of the PPL, along with the vacated Coffee Lake citation, was mailed to Knife River. In these circumstances, I reject Knife River's argument that it did not have adequate notice of MSHA's clarified enforcement policy regarding elevated roadways.

[6] I find that the PPL is mere guidance for the enforcement community and industry and is not subject to notice and comment rulemaking requirements. *See, e.g., Nat'l Mining Ass'n v.*

(continued...)

A. The *Lakeview* Analytic Framework

The Commission has yet to decide whether a truck scale is a roadway for purposes of 30 C.F.R. § 56.9300.[7] In a recent decision, however, the Commission provided guidance

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[6](...continued)
Sec'y of Labor, 589 F.3d 1368, 1372 (11th Cir. 2009). The testimony in the record confirms this. As noted, Breland told inspectors at a staff meeting to use their common sense when issuing citations based on the PPL. (Tr. 144). Also, Breland exercised his discretion to vacate the Angell Quarry citation where the drop off exceeded the 16-inch guidance set forth in the PPL. Accordingly, I find that the PPL was used as non-binding interpretative guidance exempt from notice and comment rulemaking requirements.

[7] Generally, Commission judges have adopted the Secretary's position that truck scales are part of a mine's roadway under section 56.9300 where the Secretary has shown a danger of overturning or injuring occupants. In *Walker Stone Co., Inc*., 16 FMSHRC 1955, 1964 (Sept. 2004), the judge found that the scale was a roadway and the standard required the operator to provide guardrails or berms of mid-axle height when the scale was elevated 3.5 feet above ground level. In *Highway 195 Crushed Stone, Inc.*, 21 FMSHRC 800, 803-804 (Jul. 1999), the judge found that an elevated roadway going to and exiting from a set of scales with no berm or other guarding was a violation even though the cited standard, 30 C.F.R. §56.9300, suffered from ambiguity and vagueness. Thereafter, in another case involving scales with an unguarded edge, the judge relied on the dictionary definition of the term "roadway" to find that a scale was considered to be a part of that mine's roadway. *APAC-Mississippi, Inc*., 26 FMSHRC 811, 812-815 (Oct. 2004). Thereafter, in *Carder, Inc*., 27 FMSHRC 839, 858 (Nov. 2005), the judge vacated a citation involving elevated scales with no berms or guardrails because the mine did not have adequate notice that guardrails were required. The judge observed that a reasonably prudent person familiar with the mining industry would not have recognized that the scale was covered by § 56.9300 because, in part, the truck drivers drive over the scale at a very low rate of speed. *Id*. Notwithstanding the notice issue and the circumstances of use, the judge found that the scale did fit within the scope of the safety standard. *Id.*

More recently, in *Knife River,* 32 FMSHRC 912 (July 2010), the judge found that the standard applied, but vacated the citation because the Secretary failed to establish a hazard of a vehicle overturning on the edge of the scale or injuring the occupants. In *Lakeview Rock Products, Inc.* 33 FMSHRC 1538, 1545 (June 2011), the judge accepted the guidance of prior ALJ decisions that scales are a part of a mine's roadways, but drew a distinction between haulage roadways and scale roadways, and vacated a citation where the presence of rub rails on a scale prevented a vehicle from overturning and harming its occupants. As discussed below, the Commission majority vacated and remanded, but because of stipulated facts, never decided whether the truck scale at issue was a roadway or part of the mine's roadways. *Lakeview Rock Prod., Inc.*, 33 FMSHRC 2985, 2986, 2989-90. (Dec. 2011).

(continued...)

concerning the applicability of section 56.9300 to truck scales. *Lakeview Rock Prod., Inc.*, 33 FMSHRC 2985 (Dec. 2011). *Lakeview* arose in the context of cross motions for summary decision on stipulated facts. The administrative law judge granted Lakeview's motion and vacated the citation. Thereafter, the Commission majority (Commissioner Duffy dissenting), granted the Secretary's petition for discretionary review, vacated the judge's decision, and remanded with specific instructions. *Id.* at 2985-86.

In resolving the conflict between the parties' respective positions in the context of well-established summary judgment principles, the Commission majority broke down the requirements of section 56.9300 into three elements: (1) whether the scale is part of a roadway; (2) whether the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment; and (3) whether the scale is equipped with berms or guardrails that are at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. 33 FMSHRC at 2988. Applying this analytic framework, the Commission observed that Lakeview conceded the first and third elements element of section 56.9300, i.e., that the scales are part of a roadway, and that its rails are not at least mid-axle height. Given this concession, the majority deemed it inappropriate to address the issue that the scales were not part of a roadway, as set forth in Commissioner Duffy's dissent. *Id*. at 2989, n. 4. The majority noted that the judge accepted the findings, made by other administrative law judges in prior decisions, that scales are roadways. The majority further noted that the parties had stipulated that the mid-axle height of the trucks using Lakeview's scales range from 20 to 24 inches, and that all of Lakeview's scales have eight-inch high steel "rub rails." Therefore, the Commission found that the judge's decision should have turned on element (2), namely, whether each scale had a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in

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[7](...continued)

Most recently, in the context of a motion for summary decision, the judge applied the Commission's three part test in *Lakeview*. *McMurry Ready Mix Co.*, 2012 WL 1242979 (Mar. 2012). The judge concluded that the truck scale was part of the roadway and an essential part of the "commercial trek from the pit to the customer," *citing Knife River*, *supra*, 32 FMSHRC at 914. He further found that the scale was not merely a piece of stand-alone equipment since it was regularly used to weigh product mined and processed as it was leaving the mine to be delivered to purchasers, and the "*entire* route traveled by the trucks is to be considered a roadway," *citing APAC-Mississippi*, *supra*, 26 FMSHRC at 814. On the second element of the *Lakeview* test, discussed *infra*, the judge found that a genuine issue of material fact remained as to whether the 35 to 40-inch drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Accordingly, he granted the Secretary's motion for summary judgment, in part, and determined that an evidentiary hearing was necessary, absent settlement, on the drop-off issue.

equipment. The Commission determined that the judge erred by failing to make this determination and by instead concluding that the presence of the rub rails prevented a vehicle from overturning and harming its occupants. *Id*. at 2989.

The Commission concluded that the judge erred by failing to interpret the regulatory language according to its plain meaning. By the standard's plain terms, the Commission found that the judge must first decide whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Only if this element is established may the judge then consider any existing berms or guardrails. The Commission observed that although the operator challenged the expertise of the Secretary's engineers, the judge must address whether the operator disputed the Secretary's evidence that a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Indeed, the judge acknowledged that the Secretary's engineering study concluded that a vehicle might overturn depending on the depth of drop-off, which was uncontroverted by any expert opinion from Lakeview. *Id*. at 2989, n. 9.

The Commission issued the following instructions on remand:

> If the record before the judge contains an unresolved dispute concerning whether a drop-off ranging from 31.5 to 54 inches is of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment, the proper course is to proceed to an evidentiary hearing, allowing both sides to submit additional evidence on element (2) of section 56.9300. If, on the other hand, the operator never directly contested the Secretary's assertion that the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment, the judge should deny Lakeview's Motion for Summary Decision and grant the Secretary's Motion for Summary Decision.

Id. at 2989. Accordingly, the Commission vacated the judge's decision and remanded for a determination of whether the record contains an unresolved dispute of material fact. *Id*. at 2990.

Commissioner Duffy dissented. He would have affirmed the judge's decision in result and vacated the citation on the grounds that 30 C.F.R. § 56.9300 is inapplicable because of the faulty premise that the scales in question are part of the roadways at the subject mine, as set forth in MSHA's Program Policy Letter P10-IV-1 and several unreviewed decisions by Commission administrative law judges. The dissent observed that "roadway" is not defined in 30 C.F.R. Part 56, but it is generally defined as "a road, especially the part vehicles travel over." *American Heritage College Dictionary* 1201 (4th ed. 2002). In Commissioner Duffy's view, the plain meaning of the term "roadway" does not encompass the scales at issue. Rather, the entire context of 30 C.F.R. § 56.9300 contemplates travel-ways or haulage routes – in a word, "roads." It does not extend to adjunctive facilities, such as scales. Moreover, Commissioner Duffy does not consider the edge of a truck scale a "bank" to which the standard refers. Furthermore, he observed that scales do not accommodate two-way traffic, a circumstance that makes the installation of berms or guardrails necessary on the "banks" of "roadways."

In Commissioner Duffy's opinion, any potential hazards occasioned by a truck's movement on and off a scale is otherwise addressed in 30 C.F.R. Subpart H, which provides that "[o]perators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, visibility, and traffic, and the type of equipment used." *See* 30 C.F.R. § 56.9101. Accordingly, Commissioner Duffy would have vacated the citation because the standard was inapplicable to the facilities cited. *Id*. at 2991.

B. Application of the Commission's *Lakeview* Analytic Framework

1. Whether the Paetsch Pit Truck Scale is a Roadway or Part of the Mine's Roadways

a. As a Matter of Fact, the Knife River Truck Scale at the Paetsch Pit is Not a Roadway or Part of the Mine's Roadways

Inspector Burns opined that all truck scales are roadways under the standard. "You follow a road to get onto it. You get on the scale. You leave on a road. It's one continuous road. It's almost like saying that a bridge is not part of a highway." (Tr. 209.) Contrary to Burn's testimony and the Secretary's position, however, the first element of the Commission's *Lakeview* test presupposes that a truck scale is not always part of a mine's roadway. Rather, in applying the requirements of section 56.9300 to a truck scale, *Lakeview* requires an initial determination of whether the scale is part of the mine's roadway. I find that the design, location, and use of the truck scale at Paetsch Pit establishes that it is not part of the mine's roadways.

Initially, I note that sworn affidavit evidence from the President of UniBridge Systems, Inc., who designed and manufactured similar portable truck scales with rub rails at the Knife River Coffee Lake facility, establishes that truck scales are not designed to be part of a mine's roadways. That affidavit states:

> The Statute (sic) 56.9300 referenced in the Citation is regarding Berms or Guardrails for Roadways.
>
> A vehicle scale is not designed to be a Roadway. It is a scientific, metrologically approved measuring device intended for precise measurements of empty and loaded vehicles. The referenced scale has been reviewed, examined and approved by the National Institute of Standards and Technology and issued a Certificate of Conformance by said regulator.
>
> More specifically, above ground vehicle scales have approach requirements designed to regulate the speed of the vehicles accessing the scale deck which also protects the scale from misuse and abuse and insures the metrological integrity of the device.

> Above ground scales are not installed in roadways but are specifically routed so that ALL traffic does not access the scale.

(K.R. Ex. 19, para. 5.)

On the other hand, the Secretary argues, *inter alia*, that "the plain language of the standard would seem to support the standard being applied to an area where vehicles must travel." (Sec'y Br. at 36.) The Secretary, however, has failed to establish that the Paetsch Pit truck scale is a part of a road that a vehicle *must* travel to get from one point to another. The truck scale at Paetsch pit is not located on the main haulage road where all vehicles entering and exiting the mine must travel. Rather, the scale is removed from the main haulage road on the side of a single-lane access road. The photographs submitted by the Secretary show that the gravel assess road continues around the side of the scale. (*See* Sec'y Ex. 2.) Thus, an alternative route might be available for a vehicle traveling along the access road to bypass the scale if the driver chooses not to have his vehicle weighed. The record indicates that the location of the scale is such that only drivers intending to use the scale for weighing purposes will drive over the scale.

In my view, despite the Secretary's assertions to the contrary, the scale at issue is not a roadway simply by virtue of the fact that vehicles regularly pass over it. Drivers do not use the scale as one typically uses a road, bridge, bench, or ramp (i.e., as a means of traveling from one point to another). *See Capitol Aggregates, Inc*., 4 FMSHRC 846, 847 (May 1982)(use of structure is a factor in determining if it is a roadway and ramp was an elevated roadway based on dictionary definition rooted in common usage). Rather, the scale is used as a piece of equipment for the sole purpose of weighing vehicles, which slowly move across the scale with intermittent stops before proceeding back on course. The fact that trucks enter one end of the scale and exit on another is completely secondary to the scale's function and use.

Consider, for example, a self-propelled vehicle or piece of equipment that is loaded on the back of a flatbed truck for transportation to a mine site. When the vehicle is driven up the ramp and onto the flatbed truck, the truck does not become a "roadway" as the term commonly is understood. Instead, the flatbed truck is a piece of equipment, whose purpose and use is wholly independent of any adjacent roadway.

Similarly, the truck scale in the present case is a piece of equipment designated and used for a specific purpose. It was not designed to serve as a roadway and does not share roadway features, such as banks, that are envisioned in section 56.9300. Not all traffic must travel the scale to reach a particular destination and the scale is not integral to the adjacent roadway's function. Accordingly, I find, as a matter of fact, that the Secretary has failed to establish that the Paetsch pit truck scale is a roadway or part of the mine's roadways.

b. As a Matter of Law, a Truck Scale is Not Covered by the Plain Language of Section 56.9300.

1. The Legal Landscape: Seminole Rock, Chevron, Martin, Mead and Progeny

As explained above, the Secretary failed to establish as a matter of fact that the Paetsch Pit truck scale is part of the mine's roadways. I also find as a matter of law that the Secretary has failed to establish that a truck scale is a roadway for purposes of section 56.9300.

The seminal case on judicial deference to administrative interpretations of the agency's own *regulations* is the Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Seminole Rock* held that an agency's construction of its own regulation should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. Two other often-cited Supreme Court cases, reaffirmed the *Seminole Rock* principle of judicial deference to an agency's reasonable construction of its own regulations. *See Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504 (1994); *Auer v. Robbins,* 519 U.S. 452 (1997).[8]

In *Thomas Jefferson,* the Court stated:

> We must give substantial deference to an agency's interpretation of its own regulations. *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-151,(1991); *Lyng v. Payne*, 476 U.S. 926, 939,(1986); *Udall v. Tallman*, 380 U.S. 1,(1965). Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Ibid*. (quoting *Bowles v. Seminole Rock &*

[8] A crucial difference between *Chevron,* which governs agency interpretation of statutes, and *Seminole Rock*, which controls agency interpretation of its own regulations, is that the former preserves a separation of legislative and interpretive power, whereas the latter allows lawmaking and law-interpreting powers to be combined in a single entity, which has pragmatic advantages of expertise, efficiency, flexibility, and accountability, but raises countervailing constitutional and administrative concerns about separation of powers, regulatory unpredictability and arbitrary agency authority to adopt legally binding norms without either *ex ante* constraint of meaningful procedural safeguards or the *ex post* check of rigorous judicial review. For a comprehensive critique of *Seminole Rock/Auer* deference see Professor John Manning's article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). For a more recent update, see Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1460-61 (2011), which provides an incisive and insightful critique of the *Seminole Rock/Auer* domain and the Supreme Court's *Martin* decision.

> *Sand Co.*, 325 U.S. 410, (1945)). In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 697 (1991).

512 U.S. at 512 (underscore added, unofficial citation deleted).

Similarly, in *Auer,* the Court held, that the Secretary reasonably interpreted her own regulation setting forth the salary-basis test for determining whether employees were exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA) and such interpretation was controlling unless plainly erroneous or inconsistent with the regulation. The Court found that deferential standard was easily met because the critical phrase "subject to" in the applicable regulation *comfortably bore the meaning the Secretary assigned to it.* 519 U.S. at 459, citing dictionary definitions of the phrase "subject to." (underscore added).

Most recently, in *Talk Am. v. Michigan Bell Tel.,* 131 S.Ct. 2254 (2011) (Justice Scalia concurring), the Court held that in the absence of any *unambiguous* statute or regulation, it turns to the FCC's interpretation of its regulations in its amicus brief. 131 S.Ct. at 2260-61, citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. ___, 131 S.Ct. 871, 880 (2011). The Court stated that it would defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is "plainly erroneous or inconsistent with the regulation[s]" or there is any other "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." 131 S.Ct. at 880, 881, *quoting Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Court found the Commission's interpretation of its regulations to be neither plainly erroneous nor inconsistent with the regulatory text, and there was no danger that deferring to the Commission would effectively "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Id.*, *quoting Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

In his concurrence, Justice Scalia doubted the continued validity of *Auer* as contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well, and he was receptive to revisiting *Auer* deference. Recently, the Court did so in *Christopher v. SmithKline Beecham Corp*., 635 F.3d 383 (9th Cir. 2011), *cert. granted*, 132 S.Ct. 760 (U.S. Nov. 28, 2011) (No. 11-204) (oral argument transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-204.pdf).

Since this case involves MSHA's interpretation of its own regulation, it is clearly outside *Chevron's* domain and within *Seminole Rock/Auer'*s domain. What is not clear, however, is the proper scope of the *Seminole Rock/Auer* domain in the wake of *United States v. Mead Corp*., 533 U.S. 218, 227, 235-38 (2001). In *Mead,* the Court held that some agency statutory interpretations–particularly those contained in interpretive rules, informal orders, or other pronouncements issued without extensive procedures–were presumptively not entitled to *Chevron* deference. Such interpretations fall outside *Chevron*'s domain, and receive at most a measure of judicial respect, pursuant to the Supreme Court's 1944 decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) based on the extent of their power to persuade. Post-*Mead* circuit court cases have sent mixed signals regarding the effect of that decision on *Seminole Rock* deference. *See* Stephenson, *supra* note 9, at 1452, n.20 (2011). A strong case can be made for extending *Mead*'s logic to the *Seminal Rock/Auer* context by reserving strong *Seminole Rock* deference for interpretations issued in orders following formal, final agency adjudications, while granting only *Skidmore* deference to interpretive rules and informal orders. Stephenson, *supra* note 9, at 1481-96.

Stephenson's scholarly work also addresses how the *Seminole Rock* doctrine should apply in the context of a vertical split-enforcement regime, in which one agency has the authority to issue regulations and initiate enforcement actions, but another independent agency has the authority to adjudicate alleged violations of these regulations on a final administrative appeal. *Id.* at 1496-97. That is, when the agency with rule making or enforcement authority interprets its regulation one way, but the agency with final adjudicative authority interprets the regulation differently, which agency (if either) ought to receive *Seminole Rock* deference? In *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991), in a unanimous but narrow opinion written by Justice Marshall, the Court resolved this question in favor of the agency with rule making authority.[9] The Court held that a reviewing court should defer to the Secretary when both the Secretary and Commission furnish *reasonable* but conflicting interpretations of an *ambiguous* regulation promulgated by the Secretary under the Occupational Safety and Health Act.[10]

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[9] Only two of the *Martin* Justices (Scalia and Kennedy) still preside on the Court.

[10] The *Martin* Court inferred from the structure and history of the statute that the power to render authoritative interpretations of OSH Act regulations was a "necessary adjunct" of the Secretary's powers to promulgate and to enforce national health and safety standards. The Court found that the Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. 499 U.S. at 152. The Court reasoned that because OSHA promulgated the standard in the first place, it would be "in a better position than is [OSHRC] to reconstruct the purpose of the regulations in question." 499 U.S. at 152. In addition, *Martin* concluded that both expertise and accountability considerations favored granting deference to OSHA's interpretation rather than to OSHRC"'s interpretation. Regarding expertise, *Martin* stated that, "by virtue of [OSHA's] statutory role as enforcer, [it] comes into

(continued...)

Although *Martin* took pains to insist that its holding was narrow and context specific, subsequent courts have generally ignored this admonition and consistently held that interpretive authority follows rule making power, rather than adjudicative power, when the two are divided. See Stephenson, *supra* note 9, at 182, *citing*, *e.g.*, *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 319 (4th Cir. 2008) (citing *Martin* in the context of the split-enforcement scheme under the Federal Mine Safety and Health Act); *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Gen. Dynamics Corp*., 982 F.2d 790, 794-95 (2nd Cir. 1992) (applying *Martin* in the context of the split-enforcement scheme under the Longshore and Harbor Workers' Compensation Act). *But see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) ("The Commission . . . was established as an independent-review body to 'develop a uniform and comprehensive interpretation' of the Mine Act"). *Martin* seems to be a rare example where a principle that arose originally in the *Seminole Rock* context has influenced how courts have approached analogous issues in the *Chevron* context, rather than the other way around. See Stephenson, *supra* note 9, at 183, *citing*,, *e.g.*, *Speed Mining*, 528 F.3d at 319 (applying *Martin* in the context of statutory interpretation); *Gen. Dynamics*, 982 F.2d at 794-95 (applying *Martin* to determine which agency's statutory interpretation should prevail).

In sum, it appears clear, although perhaps erroneously so,[11] that in the context of a vertical split-enforcement regime, where rule making and adjudicatory functions are divided between two agencies, interpretive authority is held by the agency primarily tasked with rule making, rather than the adjudicative agency. *See*, *e.g.*, *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 319 (4th Cir. 2008); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *D.H. Blattner & Sons, Inc. v. Sec'y of Labor*, 152 F.3d 1102, 1105 (9th Cir. 1998); *Walker Stone Co., Inc. v. Sec'y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998). As the Mine Act creates such a regime with MSHA and FMSHRC, the Commission has limited review of the Secretary's regulatory interpretations for consistency with the regulatory language and for reasonableness.

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[10](...continued)
contact with a much greater number of regulatory problems than does [OSHRC]," which makes OSHA "more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation." *Id*. Regarding accountability, *Martin* relied in part on the legislative history of the OSH Act to reason that making OSHA responsible both for formulating rules and interpreting those rules in particular applications would further political accountability by making a single agency responsible for regulatory policy choices. 499 U.S. at 152-53. In addition, the Court rejected the inference that Congress intended to grant the Commission the normal complement of adjudicative powers possessed by traditional administrative agencies possessing a unitary structure. *Id*. at 154.

[11] While legal scholars put forth a very convincing argument that *Martin* was wrongly decided and the current tide of jurisprudence appears to be moving towards greater limitations on deference to agency interpretations, *Martin* remains good law and I am compelled to apply it to the present case. *See* Stephenson, *supra* note 9, at 1502-03 (providing an insightful analysis suggesting that *Martin* was wrongly decided).

Cf. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 145 (1991) (stating that the Occupational Safety and Health Act of 1970 vests interpretive powers with the Secretary of Labor, not OSHRC, but emphasizing that the reviewing court should defer only if the Secretary's regulatory interpretation is reasonable). *See Energy West*, 40 F.3d at 463, *citing Sec'y of Labor on behalf of Bushnell v.Cannelton Indus., Inc*., 867 F.2d 1432, 1435, 1439 (D.C. Cir.1989 (applying *Chevron,* not *Seminole Rock*); *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

2. The Secretary's Regulatory Interpretation is Unreasonable, Inconsistent with the Regulatory Language, and Unworthy of *Seminole Rock* Deference

The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *Cf. Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). In determining if the Secretary's interpretation is reasonable, the Commission may look to the Secretary's past informal interpretations of a regulation, as consistent application of an interpretation bears on the reasonableness of the Secretary's present interpretation. *Martin, supra,* 499 U.S. 144, 157 (1991); *see also Thomas Jefferson*, *supra*, 512 U.S. at 515 (1994)(stating that a regulatory interpretation that conflicts with a prior interpretation is "entitled to considerably less deference than a consistently held agency view" (internal quotation marks omitted)).

Applying these principles, I find the language of the regulation unambiguous. The text, regulatory history, and general safety purposes of the regulation establish that the elevated roadway standard does not contemplate truck scales. *Cf. Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) (remanding for Secretary's authoritative interpretation of ambiguous regulation in the context of prior inconsistent interpretations so that case could then be resolved under standard deference principles). There is no ambiguity in the phrase "on banks of roadways." This language and its regulatory history clearly were intended to cover haulage roads and travel ways, not equipment. If the Secretary intended the standard to include truck scales, she would have, could have, and should have said so. Even assuming, *arguendo*, that the regulation is ambiguous, however, I find that the Secretary's interpretation of section 56.9300 is unreasonable, runs counter to the clear intent of the regulatory language and its history, and is unworthy of deference.

Absent stipulated facts as in *Lakeview*, the Commission has never concluded that a truck scale is, or is part of, a roadway. Neither the statute nor the regulation defines the term roadway. In the absence of a statutory or regulatory definition of the term roadway, the Commission applies the ordinary meaning of the term roadway. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994), *citing Smith v. United States*, 508 U.S. 223, 228 (1993); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008), *citing Jim Walter Res., Inc*., 28 FMSHRC 983, 987–88 (Dec. 2006). *See also Island Creek Coal*, 1997 WL 833381 (Jan. 1997), citing *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997).

The *Random House College Dictionary* (rev. ed.1980) defines a roadway as "the land over which a road is built; a road together with the land at its edge; the part of a road over which vehicles travel." *Webster's Third New International Dictionary* (1993) defines a roadway as "the strip of land through which a road is constructed and which is physically altered; the part of a road over which the vehicular traffic travels." A road is defined as "an open way or public passage for vehicles . . . a track for travel or transportation to and fro . . ." *Id.*; *see*, *e.g.*, *Random House College Dictionary* (rev. ed. 1980) (defining a road as a "long narrow stretch with smoothed or paved surface, made for traveling by motor vehicles . . . between two of more points").

The plain meaning of the word "roadway" encompasses land developed for vehicular traffic for the purpose of traveling from one place to another. Within the plain meaning, structures that further the road's purpose may also be classified as part of a roadway. *See Burgess Mining & Constr. Corp*., 1 FMSHRC 2038, 2044 (Sep. 1980) (ALJ) *rev'd on other grounds*, 3 FMSHRC 296 (Feb. 1981). This definition would include structures such as bridges, ramps, and benches that are continuations of a road and are integral to allowing a vehicle to traverse varied terrain.[12] Equipment, such as a truck scale, does not fall within the plain meaning because it is not integral to the structure or purpose of the road.[13] Thus, I find that the Secretary reaches too far in attempting to expand the plain meaning of the regulatory language to include truck scales.

Seeking to overcome the regulation's plain meaning, the Secretary asserts that the agency's enforcement position as grounded in the PPL interpreting the regulation should be given deference, presumably under *Seminole Rock/Auer*. But *Seminole Rock/Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case is not ambiguous. The Secretary has created the ambiguity. To defer to the Secretary's interpretation of this unambiguous regulation would be to allow MSHA to create a new regulation under the guise of interpreting section 56.9300. Because the regulation is not ambiguous on the issue of whether a truck scale is, or is part of a mine's roadways, *Seminole Rock/Auer* deference is unwarranted. *Cf. Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (noting that agency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) "do not warrant *Chevron*-style deference" when they interpret ambiguous statutes, but do receive deference under *Auer* when interpreting ambiguous regulations).

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[12] In applying section 77.1605(k), which provides that berms or guardrails be provided on the outer bank of elevated roadways in coal mines, the Commission has found ramps, benches, and bridges within the permissible definition of "roadway." *El Paso Rock Quarries*, 3 FMSHRC 35, 36 (Jan. 1981) (bench is an elevated roadway); *Burgess Mining and Constr. Corp*., 3 FMSHRC 296 (Feb. 1981) (bridge is an elevated roadway); *Capitol Aggregates, Inc*., 4 FMSHRC 846 (May 1982) (ramp is an elevated roadway).

[13] The Commission has described a truck scale as mine equipment. *Mineral Coal Sales*, 7 FMSHRC 615 (May 1985).

The regulatory history lends support to the view that the Secretary's regulation never was intended to cover truck scales. During notice and comment for 30 C.F.R. 56 and 57, some commenters asked MSHA to explain the basis for requiring berms and guardrails on elevated roadways to be at mid-axle height. MSHA explained that, "[s]tudies have shown that berms or guardrails at less than mid-axle height are not capable of limiting the force of the equipment or impeding passage over the bank of the elevated roadway." Safety Standards for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmetal Mines, 53 FR 32496-01 (proposed Aug. 25, 1988) (to be codified at 30 C.F.R. pts. 56, 57). The only study MSHA cited in the notice and comment rulemaking as the basis for this conclusion was a manual by the Department of the Interior in which the authors found that the height of a berm on a *haulage road* must be "equal to or greater than the rolling radius of the vehicle's tire" to provide adequate time for a driver, operating at a *moderate vehicle speed*, to apply corrective measures. Walter W. Kaufman & James C. Ault, Bureau of Mines, Information Circular No. 8758, DESIGN OF SURFACE MINE HAULAGE ROADS - A MANUAL (1977). Although the Bureau of Mine's manual appears well-nigh exhaustive concerning the scope and comprehensiveness of its analysis of surface mine roads, truck scales were never mentioned.

Even assuming the regulation is ambiguous, the Secretary's interpretation, although serving a permissible regulatory function**,** is not due deference because it is unreasonable under *Martin* and logically inconsistent with the language of the regulation**.** *Cf. Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Attempting to apply section 56.9300 to truck scales is a bit like trying to fit the proverbial square peg into a round hole. As the *Lakeview* dissent observed, "the entire context of 30 C.F.R. § 56.9300 contemplates travelways or haulage routes - in a word 'roads.'" 33 FMSHRC at 2991. Truck scales do not have banks like roads do. Operators cannot erect earthen berms along the sides of truck scales without preventing access to the scale's inner workings. Thus, guardrails are the only option. If the purpose of a roadway is to provide access from one point to another, truck scales are astonishingly ineffective in this capacity. Not only is travel inhibited by the low speeds that drivers are required to observe, but multiple stops and the delicate nature of the machinery make a truck scale unfit for use as a roadway.[14]

The unreasonableness of the Secretary's post-regulatory attempt to shoehorn truck scales into the language of section 56.9300 is further underscored by record evidence suggesting that mid-axle guardrails appears excessive and unnecessary to achieve the general safety purposes of the regulation.[15] While appropriate for haulage roads, the record in this case indicates that far

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[14] Moreover, unrebutted affidavit evidence from the manufacturer of the Knife River Coffee Lake facility truck scales establishes that guardrails at mid-axle height pose a greater danger to the vehicle by potentially damaging the truck's wheel or lug nuts. (K.R. Ex. 19, para. 9).

[15] While not critical to my finding, it is noteworthy that the Secretary has not shown that extending the term "roadway" to truck scales will enhance miner safety by addressing a real/observed danger to miners. As noted above, since installation of the truck scale at the

(continued...)

less than mid-axle guardrails are needed to prevent a truck traveling at a few miles an hour from over traveling the edge of a truck scale. Indeed, as pointed out, the regulatory height requirement was conceived with the understanding that berms or guardrails of mid-axle height were the minimum needed to help prevent a vehicle traveling on a *haulage road* at a *moderate speed* from overtraveling the roadway's edge. Even the study the Secretary's expert relies on in his analysis makes similar assumptions when contemplating the design and implementation of haulage road berms and guardrails. (*See* Tr. 189-92, *discussing*, G. L. STRECKLEIN & J. LABRA, BUREAU OF MINES, HAULROAD BERM & GUARDRAIL DESIGN STUDY AND DEMONSTRATION 36-38 (1981) *reprinted in* Sec'y Ex. 4 at 18-20. *See also* K.R. Br. at n. 5 (supporting the Court's independent verification that the study does not address truck scales).) If truck scales were reasonably included in the plain meaning of a roadway, it is difficult to fathom why they appear to have been ignored completely in the studies on which the standard was based.[16]

In sum, the Secretary's assertion that the truck scale is a roadway runs counter to the ordinary meaning of the word "roadway" and makes little sense in the context of section 56.9300. The Secretary's creation of an ambiguity where none exists is unreasonable, unnecessary, and overreaching. If the Secretary continues to believe that truck scales need

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[15](...continued)
Paetsch Pit, an estimated 67,661 truck loads have crossed the scale. (Tr. 269, 300; K.R. Ex. 5.) Despite such heavy usage, there has been no reported incident of any truck over traveling the edge of the scale, or overturning upon entering, traveling, or exiting the scale. (Tr. 133, 249-250, 270, 301.) Furthermore, Dr. Smith concluded that "basically the probability is zero. . . of a truck going over the rub rails and then causing - - having an accident with the data that we have." (Tr. 401.) To date, Dr. Smith's opinion is supported by evidence that there have been no reported incidents of a vehicle over traveling the edge of *any* elevated scale, much less one with rub rails, at any location in the United States. (Tr. 70, 133, 204, 207.)

Furthermore, it is noteworthy that under Executive Order 13563 issued on January 18, 2011, agencies should use the least burdensome tools for achieving regulatory ends. Knife River provided credible evidence that it would cost about $38,000 to manufacture and install mid-axle guardrails on the Paetsch pit truck scale. (Tr. 320; K.R. Ex. 20.) If this cost were extrapolated to all Knife River mines, the cost would exceed $1,000,0000 to make the modifications. (Tr. 320-21.) Imposing an onerous burden to install expensive mid-axle guardrails when there is no evidence that drivers are not protected adequately at slow speeds by the rub rails, seems to fall well short of President Obama's mandate.

[16] While not dispositive, I agree with Commissioner Duffy's observation in *Lakeview* that potential hazards occasioned by a truck's movement on and off a scale are addressed in 30 C.F.R. Subpart H. In this regard, 30 C.F.R. § 56.9101 provides: "Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, visibility, and traffic, and the type of equipment used."

mid-axle guardrails, she should draft a regulation to that effect after notice and comment from interested parties. To date, she has not done so.

In light of the foregoing, I find that the section 56.9300 standard is not ambiguous and that the Secretary's interpretation is unreasonable and logically inconsistent with the regulatory language and its history. I find that the truck scale at the Paetsch pit is not a "roadway" or part of a roadway as a matter of fact and as a matter of law. Accordingly, Knife River is not required to install the guardrails or berms prescribed by section 56.9300.

2. Whether the Paetsch pit scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment

a. The Secretary has failed to show that a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger its occupants

Apart from whether the truck scale is part of the mine's roadway under the applicable standard, the Secretary also has the burden to prove by a preponderance of the evidence that the drop-off in question is of sufficient grade or depth to cause a vehicle to overturn or endanger its occupants. *See United States Steel Corp.*, 5 FMSHRC 3 (Jan. 1983); *Sec'y of Labor v. Keystone Coal Mining Corp*., 151 F.3d 1096 (11th Cir. 1998); *Ormet Primary Aluminum Corp*., 23 FMSHRC 1330 (Dec. 2001) (ALJ Zielinski). In *Lakeview*, the Commission faulted the judge for failing to interpret the regulatory language according to its plain meaning by first deciding whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," before considering any existing berms or guardrails.[17] In the context of cross motions for summary decision, the Commission majority remanded for a determination of whether the operator directly contested the Secretary's assertion that the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

In this case, as set forth in detail above, the Secretary's same expert, Terrence Taylor, found that the approximate 41-inch drop-off was sufficient to cause a vehicle to overturn under both a static and a dynamic tip-over analysis. (*See* Sec'y Ex. 4.) He further hypothesized that there was endangerment without tip-over if the front tire went up and over the rub rail, and the undercarriage came to rest on the scale, because "[i]t is reasonable to expect that the sudden impact of the metal axle dropping 10 inches and hitting the hard metal surface would endanger the trucks occupants." (Sec'y Ex. 3, p. 2-3.)

[17] As noted, the judge concluded that the presence of the rub rails, which were not mid-axle height, prevented a vehicle from overturning *or* harming its occupants, and did not decide whether the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Although Taylor's static and dynamic analysis of the risk of a vehicle overturning appears to be mathematically and methodologically sound, Dr. Smith's critique establishes that both analyses are premised on the faulty and unrealistic notion that a truck would find itself in a position where either half of the wheels were on the scale and the other half were on the ground (static analysis) or suspended in air (dynamic analysis). (K.R. Ex. 3, pp. 4-5.) Dr. Smith stated the following in his report critiquing Taylor's analyses:

> Static Tip-over Analysis
> This analysis was done assuming that one side of the truck was on the ground and the other side was at the edge of the scale platform. There was no basis for this analysis as a truck can never get into that position from being on the scale platform. It would have to be driven onto the scale with one side's tires on the scale and the other side's tires on the ground. Since that would never happen, this analysis did not represent any real world possibility and was irrelevant to the subject case.
>
> Dynamic Tip-over Analysis
> This analysis started with the truck in the following configuration; tires on one side of the truck at the edge of the platform and the tires on the other side of the truck suspended in air off the ground (i.e., one side of the truck suspended in air). This analysis looked at the dynamics as the complete side of the truck fell to the ground at once. This analysis starts with a truck configuration that is impossible. Again this analysis did not represent any real world possibility and was irrelevant to the subject case . . . .

Id.

Furthermore, in both his static and dynamic analysis, Taylor did not account for the speed of the vehicle and he assumed that the vehicle began from a tipping point in which half the wheels were completely off the scale. Such an analysis, however, cannot be performed in a vacuum devoid of the reality of the circumstances at the Paetsch pit scale. Prior ALJ decisions applying the standard teach that all relevant factors must be taken into account in determining whether there is a hazard of a vehicle overturning or endangering its occupants. *See Knife River,* 32 FMSHRC 912 (July 2010) (ALJ); *Ormet, supra*, at 1334-1345.

By contrast, Dr. Smith ran a series of simulations based on vehicle speed and the existence of the rub rails and testified that the potential for turnover basically was zero. Consistent with his report, he convincingly testified that a truck could never reach the position that Taylor's tip-over analyses placed it in. (Tr. 402-406.) In addition, although Taylor hypothesized about endangerment if the front wheel went over the rub rail and the undercarriage dropped 10 feet to the scale, Dr. Smith pointed out in his report that there was no analysis from

Taylor to determine if the truck could go over the rail, and there was no analysis to support Taylor's opinion that the occupants would be endangered. (K.R. Ex. 3, p. 5.) Further, Dr. Smith testified that neither he nor Taylor was a biomedical engineer qualified to determine injury causation, however, he did credibly testify that shock from any such fall, at 2-3 mph, may be mitigated by seatbelts and seat suspension. (Tr. 407.)

Based on Dr. Smith's superior credentials and expertise in vehicle movement and dynamics, and the fact that he, unlike Taylor, considered the totality of the conditions at the truck scale in question, I find that his expert opinion regarding the potential for vehicle turnover or occupant endangerment without tip-over to be more reliable than Taylor's. Accordingly, I give more weight to Dr. Smith's expert opinion that no tip-over or endangerment hazard was present from the drop-off in the particular circumstances of this case. *See generally Asarco Mining Company*, 15 FMSHRC 1303, 1307 (July 1993).

Given the indisputably slow speeds at which trucks must cross the scale, the Secretary has not convinced me that the truck would have enough forward momentum after the front right tire over traveled the side of the scale to cause a second wheel to over travel the side of the scale such that the vehicle would tip over or endanger its occupants. Even Taylor conceded that a vehicle would only become positioned such that half its wheels were on the scale and the other half on the ground if a driver missed the entrance to the scale and proceeded forward until a critical tipping point was encountered. Taylor posited that such a scenario was possible from alcohol impairment, a bee in the cab, or a heart attack. While a danger may exist that a driver loses control of his vehicle, straddles the side of the scale, and continues despite an obvious imbalance, section 56.9300 does not speak to such danger or loss of control.[18] Instead, section 56.9300 addresses the provision and maintenance of mid-axle height berms and guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger its occupants.

I find that the Secretary has failed to meet her burden of proving a violation of the applicable standard. Accordingly, the citation is vacated.

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[18] Guard rails and berms are designed to resist a side impact and thus help prevent a vehicle from leaving the roadway at a particularly dangerous location such as a steep drop-off. *See* G. L. STRECKLEIN & J. LABRA, BUREAU OF MINES, HAULROAD BERM & GUARDRAIL DESIGN STUDY AND DEMONSTRATION (1981). They are not intended to correct a driver who, for whatever reason, is driving halfway off the road. Such loss of control is properly addressed under Section 56.9101, but that standard was not cited here.

C. Even assuming a violation, Knife River lawfully abated Citation No. 8599811; therefore, failure to abate Order No. 8599817 is vacated.

Since Citation No. 8599811 is vacated, there is no need to abate. Accordingly, the failure to abate Order No. 8599817 is also vacated. Even assuming a violation, however, I find that Knife River lawfully abated the citation. Accordingly, I would also vacate the failure to abate Order No. 8599817.

Knife River lawfully abated Citation No. 8599811. It removed the truck scale from service by placing concrete barriers in front of the entrance and exit to the scale. I find that the placement of concrete barriers effectively removed the scale from service. Longstanding Commission precedent establishes that the removal of equipment from service is a satisfactory form of abatement with regard to citations issued for "unsafe equipment." *Peabody Coal*, 1 FMSHRC 1494 (Oct. 1979); *Alabama By-Products*, 4 FMSHRC 2128, 2130 (Dec. 1982).

In addition, the Secretary failed to establish that the concrete barriers had been moved or the scale had been used since the underlying citation was issued. Rather, inspector Burns was told by mine employees that the barriers had not been moved since they were put in place, and no vehicles had used the truck scale at the Paetsch pit since the termination date. The Secretary failed to establish otherwise. In these circumstances, even assuming a valid citation, Knife River lawfully abated the citation by placing concrete barriers in front of the entrance and exit to the truck scale, thus removing the scale from service.

IV. ORDER

The truck scale at the Paetsh pit is not a roadway or part of the mine's roadways under section 56.9300. The Secretary failed to prove by a preponderance of the evidence that the scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. It is **ORDERED** that Citation No. 8599811 and failure to abate Order No. 8599817 be **VACATED**. Accordingly, Knife River is not required to install mid-axle berms or guardrails on the Paetsch Pit truck scale.

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

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/tjr

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May 11, 2012

BLEDSOE COAL CORPORATION,	:	CONTEST PROCEEDING
	:	
Contestant,	:	DOCKET NO. KENT 2011-972-R
	:	WRITTEN NOTICE NO. 8333606;
	:	04/18/2011
	:	
	:	DOCKET NO. KENT 2011-973-R
v.	:	ORDER NO. 8353820; 04/18/2011
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	:	DOCKET NO. KENT 2011-974-R
	:	ORDER NO. 8353821; 04/18/2011
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HILDA L. SOLIS, Secretary,	:	DOCKET NO. KENT 2011-975-R
of Labor, United States Department	:	ORDER NO. 8353825; 04/21/2011
of Labor	:	
	:	DOCKET NO. KENT 2011-976-R
	:	ORDER NO. 8353838; 05/03/2011
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	:	DOCKET NO. KENT 2011-977-R
	:	ORDER NO. 8353839; 05/03/2011
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	:	DOCKET NO. KENT 2011-978-R
	:	ORDER NO. 8353855; 05/10/2011
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	:	DOCKET NO. KENT 2011-979-R
	:	ORDER NO. 8353858; 05/12/2011
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	:	DOCKET NO. KENT 2011-980-R
	:	ORDER NO. 8406696; 05/10/2011
	:	
	:	DOCKET NO. KENT 2011-981-R
	:	ORDER NO. 8406699; 05/10/2011
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	:	DOCKET NO. KENT 2011-981-R
	:	ORDER NO. 8406809; 05/11/2011
	:	
	:	MINE I.D. NO. 15-19132
	:	MINE: Abner Branch Rider

ORDER ON THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Moran

Introduction

Pursuant to 30 C.F.R. § 2700.67, on March 6, 2012, the Secretary of Labor filed a motion for partial summary decision, seeking a ruling upholding the issuance of the Notice of Pattern of Violations, No. 8333606, which Notice was issued to the Respondent, Bledsoe Coal Corporation, regarding its Abner Branch Rider Mine, ("mine"), on April 12, 2011. Motion at 1-2. The Secretary notes that it issued Respondent a notice, alleging a potential pattern of violations on November 18, 2010, as well as a withdrawal order under section 104(e)(1), alleging a significant and substantial violation of a mandatory standard, and eight (8) withdrawal orders pursuant to section 104(e)(2). The Secretary contends that, as it followed the requirements for issuance of a Notice of Pattern of Violations, pursuant to 30 C.F.R. Part 104, the Notice should be upheld.
For the reasons which follow, the GRANTS the Secretary's Motion and DIRECTS that the outstanding, identified, non-final S&S citations/orders associated with this litigation be set for prompt hearing.

Findings of Fact and Conclusions of Law

The actions described above were the culmination of several preceding events. The Secretary completed its pattern of violations screening for the mine, which screening encompassed the twelve month period beginning on September 1, 2009 and ending August 31, 2010. As noted above, that screening resulted in the Respondent being notified,[1] on November 18, 2010, pursuant to 30 C.F.R. § 104.4(a), that its mine was identified as having a potential pattern of violations. Nine citations or orders were identified, each pertained to violations of 30 C.F.R. § 75.400, and each of those had become final orders during the twelve month review period.[2] Bledsoe opted to implement a corrective action plan, which was dated January 5, 2011. However, about two months later, on March 18, 2011, in compliance with 30 C.F.R. § 104.4(b), MSHA advised Bledsoe that a potential pattern of violations continued to exist, noting that the mine's S&S violations were double the target violation rate. Ex. 6. The same report, again

[1] The Notice informed Bledsoe that nine citations or orders, each of which, pursuant to 30 C.F.R. § 104.2(c), were issued after October 1, 1990, were considered in the initial screening.

[2] The November 18, 2010 Notice advised the mine that it had been issued "10.98 S&S violations per 100 inspection hours during the 12-month review period . . . [and that] the mine must maintain an S&S rate of 5.49 or lower during the evaluation period [which would constitute] a 50 percent reduction from the . . . review period." A greater reduction, to 3.68 or lower would be required if the mine did not opt to implement a corrective action program. Bledsoe did opt for a corrective action plan.

following section 104.4(b), informed the mine that it had 10 days to submit comments about it to the Administrator for Coal Mine Safety and Health, but comments would not forestall submission of the report to the Administrator.

The Secretary concludes that, as MSHA fully complied with the Part 104 Pattern of Violations provisions at every step of that process, and as the Mine's "history of nine final S&S violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations [pursuant to 30 C.F.R. § 104.3(a)(1)]," the pattern of violations notice, No. 8333606, should be upheld.[3] Sec. Motion at 4-5. In support of that conclusion, the Secretary notes that this Court, in its November 10, 2011 Order on the Contestant's Motion for Summary Decision, observed that Congress left it to the Secretary's expertise to determine when more was needed to be done for enforcement than simply identifying each violation and then acting to have each violation corrected. Instead, when an operator has a pattern of S&S violations of mandatory standards, the provisions of section 104(e) of the Mine Act are to be applied. In enforcing those provisions, the Secretary was directed by Congress to make such rules *as the Secretary deemed necessary* to establish criteria for determining when a pattern of violations of violations of mandatory standards exists and making the determination for the enhanced enforcement provision addressing a pattern of violations. The Secretary took these steps both through the Pattern of Violations provisions at 30 C.F.R. Part 104 and implementing policy. Accordingly, it is the Secretary's position that, as it fully complied with both the statutory provision and with the Part 104 Pattern of Violations provisions in all respects, and as there is no issue of any material fact, the issuance of the Notice of Pattern of Violations No. 833606 should be upheld. Sec. Motion at 4-5.

In its response to the Secretary's Motion, Bledsoe decided to renew its cross-motion for partial summary decision. However, that latter matter was fully addressed in the Court's prior Order. For the reader's convenience, it appears again as an appendix to this Order.

Bledsoe notes that the Secretary has argued that POV Notice No. 8333606 should be upheld as a matter of law as she has "followed all of the procedural requirements set forth in 30 C.F.R. Part 104." Bledsoe Response at 2. Bledsoe contends that "[a]ll that is said by the Secretary to support a substantive finding of a POV in this case is . . . 'the Abner Branch Rider Mine's history of nine final [significant and substantial or 'S&S'] violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations.'" *Id.* at 3, citing the Secretary's Motion at 4.

Mischaracterizing the Secretary's position, Bledsoe asserts that, by the Secretary's argument, "[a]ll the Secretary must show is that she accused Bledsoe of subsequent S&S

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[3] That provision, 30 C.F.R. § 104.3(a)(1), identifies "[a] history of repeated significant and substantial violations of a particular standard" as one of three listed, independent, criterion for identifying a pattern. To state the obvious, MSHA was identifying repeated violations of 30 C.F.R. § 75.400, which pertains to the grave matter of accumulation of combustible materials.

violations." *Id*. (emphasis in original). Underlying that assertion is Bledsoe's claim that the Secretary has not "offer[ed] a legal definition of 'pattern,' [and] ... instead has determined that more than one final S&S violation is sufficient." *Id.*

Bledsoe then transitions to its overriding issue of dissatisfaction, a matter already addressed in the Court's prior Order, asserting that "[i]t is incumbent upon the Secretary to establish criteria to guide Bledsoe – and other operators – on what the law requires."[4] Bledsoe asserts that, per the Court's Order, the Secretary has both unfettered and unreviewable discretion to call "any pattern of more than one S&S accusation a POV." [5] *Id.* at 4-5. Resurrecting its due process claim, it suggests that, as there is no definition of a POV, it would be impossible to determine if a POV is present for Bledsoe. On this basis, Bledsoe renews, with no new grounds, its prior motion for partial summary decision. The Court again directs attention to the Appendix to this Order, which provides its prior decision addressing these contentions.

Short of its wish to have the Secretary's POV provisions cast aside, Bledsoe alternatively maintains that "[a]t the very least, [it] must be allowed to adjudicate whether the violations which placed it on POV status were properly designated S&S." *Id.* at 6. In support of this, departing from the facts here, Bledsoe points to *Rockhouse Energy Co. v. Secretary*, 30 FMSHRC 1125 (December 2008) (ALJ)(*"Rockhouse*"), wherein another ALJ "accelerat[ed] his trial schedule to rule decided similar S&S issues [*sic*] prior to the issuance of a POV notice ..." *Id.* But Bledsoe, in characterizing what another judge had to decide as "similar S&S issues," must be using the phrase "similar S&S issues" in the loosest of senses in trying to apply that case to the facts at hand.[6] The reason is plain. Whereas in *Rockhouse* the mine operator was challenging whether

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[4] Bledsoe, noting that the Court observed that the dictionary definition of a "pattern" involves " a *reliable sample* of traits, acts, or other observable features characterizing an individual [ ] behavior [pattern] . . . ," redescribes the issue as "[w]hether there is a '*reliable pattern*, . . ." asserting that is "a question for which there is no legal answer." Respondent's Response at 3-4 (emphasis added). A *reliable sample* is not synonymous with a *reliable pattern.*

[5] Divorced from the reality of what occurred here, Bledsoe then lifts off into a nightmarish scenario, starting with the idea that the Secretary could call "any pattern of more than one S & S accusation a POV . . .[and] [o]nce a mine has more than one final S&S violation, the Secretary could call this a PPOV." The subsequent issuance of S&S violations "could be factually deficient, contrary to law or even arbitrary, and [yet] the [mine] operator would be subject to a pattern finding." Bledsoe Response at 5. While Bledsoe acknowledges that the Secretary would be required to follow her own internal guidelines, it asserts these could change at any time and without notice. *Id.*

[6] As Bledsoe stretches the applicability of *Rockhouse*, using a case that the Court considers to be very distinguishable, it also took the opportunity to bemoan that in this Court's earlier Order of November 10, 2011, it "was needlessly castigated for not quoting a portion of

(continued...)

some 23 citations issued under Section 104(a) were valid and whether, if valid, they were "S&S," those issues had *not* already been decided. For Bledsoe, though it would like to unring the bell, it cannot. It has settled and paid the matters constituting the violations the Secretary has used for its pattern case.

Having considered the Secretary's Motion and Bledsoe's Response, the Court posed questions to the parties to better understand their positions. These were useful to the Court's resolution of the Motion. Based in part upon those responses, the Court makes the following observations and findings. In Exhibit 1 to the Secretary's Motion, the Secretary did identify, with particularity, to Bledsoe, under the page entitled "Screening Criteria for Pattern of Violations" at the "Final Order Criteria" box, that there were at least five (5) S&S citations /orders of the same standard that became final orders of the Commission during the 12 month period being reviewed of September 1, 2009 through August 31, 2010. In fact, MSHA identified that nine (9) such citations/orders were so involved. There is no dispute that each of these 9 violations involved the same standard, that each became final orders of the Commission and that each of them became final during the review period, as just cited above.[7]

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[6](...continued)
[the] language contained in 30 U.S.C. Section 814(e), although it repeatedly cited to the statute, the full text of which is readily available." Response at 6-7. Bledsoe claims it was "needlessly castigated" because, after all, it made *reference to the cite for* the full statutory provision. By the full provision being cited, Bledsoe means it gave a full listing to the cited provision and one would not have to guess, for example, the chapter or section involved and therefore anyone could go look up the provision and there they would discover *all* of its words. While that much is true, as Bledsoe has elected to recast its approach as innocent, it is necessary to revisit what occurred in Bledsoe's argument and its renewed protestation over the Court's dim view of it. The provision at issue provides, *in full*, "(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814 (e)(4). In contrast, Bledsoe, citing to the same provision advised that "Congress mandated the Secretary, under Section 104(e)(4) of the Mine Act, to "make such rules**"** to establish the criteria for determining when a pattern of violations exists." Bledsoe Motion at 3-4. (emphasis in Bledsoe's motion). Apparently to save toner ink, Bledsoe omitted the *four* unhelpful words "as he deems necessary" from the 27 word provision. Four pages later in its argument, Bledsoe reasserted this claim, asserting that "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists," again omitting the "as he deems necessary" language. That omission is no small matter though, as Bledsoe takes the implication of its selective reading further by advising that in directing the Secretary "to make rules" "Congress, in unambiguous language directed the Secretary to use notice and comment rulemaking.

[7] The Court found it unclear why Citation number 8333031, issued 4/15/2008, Citation number 7528749, issued 7/30/2009 and Citation number 7528752, issued 8/3/2009 were
(continued...)

The Court also noted that, within the Secretary's Exhibit 1, attached to the Secretary's Motion, five (5) pages were included, listing some 159 citations. Thirty-one (31) of those listed citations cited section 75.400 and Citation numbers 8356674, 8356676, 8362103, 8362416, 8362419 and 8362424 were among the thirty-one citations citing that section.[8] The Secretary explained the inclusion of these documents stemmed from the fact that they were included in MSHA's November 18, 2010 letter to the Respondent. The five page list of 159 citations represents all of the violations issued to the mine during the review period and, of those, 79 were were S&S.[9] The five page list of 159 citations supports the Secretary's determination that the mine met the initial screening criteria, per 30 C.F.R. § 104.2. As shown by the "Screening Criteria Results for Pattern of Violations," ("SCR for POV"), which was included in November 18, 2010 letter from MSHA to the Bledsoe Mine, Initial Criteria 1 at item 1 requires that a mine

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[7] (...continued)
included among the 9 citations identified by MSHA when they seemed to be before the commencement of the September 1, 2009 review period. The answer was that the test for inclusion considers citations that *became final* during the September 1, 2009 through August 31, 2010 time frame. The Court had overlooked that the "Pattern Criteria" provision, at 30 C.F.R. § 104.3, in fact provides that in identifying mines with a potential patten of violations, two prerequisites must be present: only citations and orders issued after October 1, 1990 are considered *and they must have become final.* The nine citations identified in the Final Order Criteria meet both those requirements: each was issued after October 1, 1990 and each became *final* during the review period. There is no dispute about these facts.

[8] The Court also inquired about the relevance of the 31 citations which cited the proscription of accumulations of combustible materials, per 30 C.F.R. § 75.400, among the total number of 159 citations. Those 31 citations concerning § 75.400 included six of the nine citations which became final during the review period. As noted above, the other three became final during the review period, being issued *after* October 1, 1990 and becoming *final* during the review period but they were not *issued* during the twelve month review period. One will recall that, as long as a citation/order is issued *after* October 1, 1990, the other determining factor for inclusion is that the citation/order becomes *final* during the review period. Each of those three did become final during the review period and, as previously noted, there is no factual dispute about that. Accordingly, while representing a complete record of the Section 75.400 violations cited during the review period, the 31 citations are not germane to the Secretary's motion, other than reflecting six of the nine S&S violations which became final. Those nine, it will be recalled, met the "Final Order Criteria," requiring that at least 5 such S&S citations/orders became final orders of the Commission during the one year review period. The Court notes that there is no factual dispute about this matter either.

[9] The same 5 pages include a running total of the S&S violations, (described as "S&S Count" within the "Cumulative During Review Period" categories) as reflected in the next to the last column on the right hand side of each page. The S&S Count begins with Citation No. 8356674, which was issued on 11/19/2009; it was the 6th citation issued to the mine during the date span reflected on the 5 pages reflecting all of the citations issued during the review period.

have at least 50 citations/orders that were "S&S" and Bledsoe had 79. In each of the three other categories for Initial Criteria 1, Bledsoe's Abner Branch Mine met those requirements.[10]

The Court also inquired as to the particular pattern criteria MSHA relied upon when it informed Bledsoe on November 18, 2010 that a Potential Pattern of Violations existed at its Abner Branch Mine. A related question, the Court asked whether, when MSHA informed the mine on March 18, 2011that a PPOV continued to exist, that determination was based upon *all* S&S violations or only S&S violations involving 30 C.F.R. § 75.400. The Secretary advised that the November 18, 2010 letter relied upon Section 104.2 *in toto*, as that Section identifies the factors to be considered in the Initial Screening review period. Once, as happened here, that Initial Screening did not eliminate the mine, MSHA advanced to the Pattern Criteria provision, as set forth at Section 104.3. In turning to Section 104.3, MSHA examined the three criteria identified at that provision, which includes "[a] history of repeated significant and substantial violations of a particular standard." 30 C.F.R. § 104.3(a)(1). That "particular standard" here was 30 C.F.R. § 75.400. That determination was then reflected in MSHA's November 18, 2010 letter to the mine which letter included the Agency's "Screening Criteria Results for Pattern of Violations" (i.e. the "SCR for POV," referred to above). Accordingly, the Court finds that MSHA followed its rules completely; first finding that the mine was captured within the Initial Screening, per 30 C.F.R. Section 104.2, then identifying the applicable Pattern Criteria, per 30 C.F.R. Section 104.3, and then issuing the notice, per 30 C.F.R. Section 104.4, on March 18, 2011, that the mine failed to meet its target rate. Again, completely complying with its 30 C.F.R. Pattern of Violations provisions, the MSHA District Manager, finding that Bledsoe did not meet its target rate,[11] and that no mitigating circumstances existed to explain that failure,[12] submitted

[10] For example, in category 2, it exceeded the rate of eight or more S&S citations/orders issued per 100 inspection hours by having a rate of 10.98.

[11] MSHA's November 18, 2010 letter to the mine advised that it had to meet an S&S target rate of 5.49, *or lower*, per 100 inspection hours. As noted in MSHA's March 18, 2011 letter to the mine, Bledsoe did not come even close to this rate. Instead, its rate was more than *double* the maximum rate allowed, at 11.54 S&S violations per 100 inspection hours. In noting that the mine failed to achieve the target rate, MSHA's review took into account all S&S violations issued per 100 inspection hours.

[12] It should be noted that Bledsoe's Counsel has not argued that there were any such mitigating circumstances that should have been considered to explain its failure to meet the target rate of S&S violations.

his report to the Administrator for Coal Mine Safety and Health and noted that the mine had 10 days to submit comments to the Administrator about MSHA's finding that a Potential Pattern of Violations continued to exist.[13]

MSHA has noted in its Supplement to Motion for Partial Summary Decision (Sec's Supplement) that for the 18 alleged violations, each of which is also alleged to be S&S, none are final. That is, each of the 18 alleged violations, referenced in its March 18, 2011 letter to Bledsoe, are contested and pending litigation. Supplement at 6 and Exhibit 6. The Secretary takes the position that none of those 18 would need to be upheld for the Respondent to continue to be under a pattern. As expressed in the Sec's Supplement, the mine met the pattern criteria per the District Manager's November 18, 2010 letter to Bledsoe. However, the Secretary goes on to state that "[*t*]*o avoid* the consequences that may result from establishing such a pattern, under 30 C.F.R. § 104.4(a)(4) the mine was provided with an opportunity to institute a program to avoid repeated significant and substantial violations. The District Manager allowed a nine-week period, from January 11, 2011 to March 12, 2011, for determining whether the program effectively reduced the occurrence of significant and substantial violations at the mine. . . . that program was aimed at reducing the occurrence of significant and substantial violations at the mine without limitation to specific mandatory standards. The program failed." Sec's Supplement at 7. Thus, by the Secretary's vantage point, because the mine "failed to effectively reduce the occurrence of significant and substantial violations during the period provided under 30 C.F.R. § 104.4(a)(4), the Secretary issued 104(e) Notice No. 8333606." *Id.*

Although the Secretary notes, and the Court agrees, that "[t]here is no regulatory requirement that significant and substantial violations issued during the corrective-action-program period must be final before the Secretary may determine whether the program effectively reduced the occurrence significant and substantial violations at the mine," that can only carry the Secretary's position until the alleged violations with the disputed significant and substantial findings have been adjudicated. Any other position would make no sense at all. For example, if none of the 18 S&S violations were found, upon being litigated, to be, in fact, "S&S," the Secretary could hardly assert that the mine failed to meet its target rate. While the Secretary adds that the pattern provision under the Mine Act does not even require "that the mine be provided with an opportunity to institute a program to avoid repeated significant and substantial violations before the Secretary may issue a 104(e) pattern notice," the fact of the matter is that *MSHA does provide such an opportunity*. Sec's Supplement at 7. That *opportunity* would be meaningless if, under the example just given, a mine, despite showing that it *in fact had met or exceeded its target rate*, would remain under the pattern, regardless.

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[13] The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. Accordingly, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours.

Finally, the Court inquired as to the impact on the other ten (10) dockets[14] if it were to rule in favor of the Secretary's Motion for Partial Summary Decision. The Secretary advises that a hearing would be needed for each of dockets.

Bledsoe too responded to questions posed by the Court and it renewed its cross-motion for summary judgment in the same document. ("Bledsoe Response") In its Response, Bledsoe contends that the Secretary "argues that following the procedures set forth in 30 C.F.R. Part 104 is all that is needed for an adjudication of a POV." Bledsoe Response at 2 (emphasis in Response). Of course, the Secretary does not merely claim that procedural fealty alone can carry the day. Among other things, there have to be violations, which have become final and which became final during a particular review period. Bledsoe continues its argument, asserting that "the statute and the regulations remain silent as to what constitutes a POV," but that too is an exaggeration, as the regulations do explain the pattern criteria and the steps which follow on the road to the issuance of a notice of a pattern of violations from the Administrator. Continuing its usage of hyperbole, Bledsoe claims that the Secretary "has determined that more than one final S&S violation is sufficient." *Id.* at 3. The Secretary made no such claim. Instead, the Secretary gathered the facts pertaining to violations which became *final* during the review period and applied those final determinations to the regulations, noting along the way the Agency's meticulous adherence to the procedural steps under the Pattern of Violations regulations at Part 104.

So too, Bledsoe takes references to Congress' statements about a pattern, wherein that body expressed that "a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations," and the Court's statement from that Congressional remark about patterns that "Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated," and transforms them into "the ALJ's ruling" claiming that it is a "more than one" standard. In its subsequently submitted "SUPPLMENTAL [*sic*] MEMORANDUM", Bledsoe repeats this claim: "Bledsoe is fully aware that the ALJ has ruled that more than one S&S violation may be sufficient to establish a pattern" and that this judge-created standard "subjects every mine in the country to a POV finding . . . [by] hold[ing] that any mine which receives more than one S&S violation over a two year period may be subject to a POV finding based on whatever criteria the Secretary chooses to apply at a given time." SUPPL[E]MENTAL MEMORANDUM at 3. The Bledsoe-created "more than one" standard, blossoms into a claim that it allows the Secretary to "call any pattern of more than one accusation a POV." BLEDSOE RESPONSE TO SECRETARY'S MOTION at 4-5.[15]

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[14] These are Docket Numbers KENT 2011-1345, KENT 2011-1220, KENT 2012-284 and KENT 2012-381.

[15] Though it started with the "more than one" seed, then nurtured it into a flower, Bledsoe (continued...)

In Bledsoe's "SUPPL[E]MENTAL MEMORANDUM IN RESPONSE TO THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION," it responded to two questions posed by the Court in reaction to the Motion and Bledsoe's initial response thereto.[16] The Court asked if Bledsoe believed it should be entitled to relitigate all S&S violations, including those which have become final orders. As to final orders, Bledsoe concedes that it cannot relitigate S&S violations which have become final. However, Bledsoe, notes that, of the 79 citations designated as "S&S" in the period from November 2, 2009 through August 25, 2010, it challenged 53 of them, with the 26 others becoming final orders. Bledsoe Suppl[e]mental Memorandum at 2-3. Bledsoe notes that "**[**a]ll 79 were the basis for the PPOV notice issued by the Secretary." *Id*. at 3.

In one aspect the Court does agree with Bledsoe. This relates to any S&S citations/orders which it has contested and have not since become final orders. As noted in a more detailed fashion below, any such non-final citations/orders which were a part of the basis for MSHA's determination to issue its Section 104(e) Notice, No. 8333606, because they were part of the Agency's determination that Bledsoe failed to meet its target rate, must be tried promptly because there is the possibility that some number of those violations could be found by the Court as non-S&S violations. A sufficient number of such non-S&S findings raises the possibility that Bledsoe's S&S rate could be at or below 5.49 per 100 inspection hours. Only a hearing and a decision on those non-final matters can resolve that. In the meantime, just as with a section 104(d)(1) citation or order, that is subsequently found, after a hearing, to lack the special findings of being S&S and unwarrantable, or simply unwarrantable, as the case may be, the section 104(e) Notice, No. 8333606 remains intact. Should the requisite number of violations be found to be "non-S&S," and therefore establish that Bledsoe did achieve at least its target rate, the section 104(e) would be unwound, just as in the case of (d)(1) citations and orders found to be lacking.[17]

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[15](...continued)
then cultivates an entire garden, claiming that "[o]nce a mine has more than one final S&S vioilation, the Secretary could call this a PPOV [and following that it] "could issue as many S&S violations as her inspectors could write." Moving to the hysterical, in both senses of the word, Bledsoe asserts "[i]n no time, every underground coal mine in the country will be on a POV." *Id.* at 5. Really.

[16] The Court's second question to Bledsoe requires little time to address. The Court asked Bledsoe whether, given its position that there is no definition of what constitutes a POV, does it maintain that MSHA must embark on rulemaking again. Bledsoe answered in the affirmative, asserting that the Secretary must engage in rulemaking to define a pattern of violations. Bledsoe Suppl[e]mental Memorandum at 4. The Court, based on its prior Order on Contestant's Motion for Partial Summary Decision and this Order, finds that the Secretary's Rulemaking for Part 104, Pattern of Violations passes scrutiny.

[17] The analogy to the "chain" created under section 104(d) of the Mine Act is well
(continued...)

CONCLUSION

For the reasons set forth above, the Secretary's Motion for Partial Summary Decision is GRANTED. However, as noted at footnote 13, "The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. At the hearing, these will be tried first. Accordingly, as discussed earlier, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours." This is potentially important for Bledsoe, as a finding that some, yet to be calculated, number of violations, either were not violations or at least were not "significant and substantial" violations, could reduce its S&S violation rate to at or below 5.49 per 100 inspection hours. Therefore these alleged violations need to be set for hearing immediately. The parties are directed to email the Court immediately to establish a date and time for a conference call so that the prompt hearing for these matters can be finalized.

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

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[17](...continued)
understood and apt here. Placing a mine operator under the "increasingly severe sanctions" through that provision does not have to await a final determination before such sanctions become effective. *See, e.g., Secretary v. Weirich Brothers*, 27 FMSHRC 379, 2005 WL 1198587 (April 2005), and *Secretary v. Lodestar Energy*, 25 FMSHRC 343, 2003 WL 21665294 (July 2003), noting that, where S&S and unwarrantable findings are not sustained, the citations or orders issued under section 104(d) are to appropriately modified.

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. , Suite 9500
Washington, D.C. 20001
(202) 434-9933

BLEDSOE COAL CORPORATION,	:	CONTEST PROCEEDING
	:	
Contestant	:	DOCKET NO. KENT 2011-972-R
	:	Written Notice NO. 8333606; 04/18/2011
	:	
	:	DOCKET NO. KENT 2011-973-R
v.	:	ORDER NO. 8353820; 04/18/2011
	:	
	:	DOCKET NO. KENT 2011-974-R
	:	ORDER NO. 8353821; 04/18/2011
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HILDA L. SOLIS, Secretary,	:	DOCKET NO. KENT 2011-975-R
of Labor, United States Department	:	ORDER NO. 8353825; 04/21/2011
of Labor	:	
	:	DOCKET NO. KENT 2011-976-R
	:	ORDER NO. 8353838; 05/03/2011
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	:	DOCKET NO. KENT 2011-977-R
	:	ORDER NO. 8353839; 05/03/2011
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	:	DOCKET NO. KENT 2011-978-R
	:	ORDER NO. 8353855; 05/10/2011
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	:	DOCKET NO. KENT 2011-979-R
	:	ORDER NO. 8353858; 05/12/2011
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	:	DOCKET NO. KENT 2011-980-R
	:	ORDER NO. 8406696; 05/10/2011
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	:	DOCKET NO. KENT 2011-981-R
	:	ORDER NO. 8406699; 05/10/2011
	:	
	:	MINE I.D. NO. 15-19132
	:	MINE: Abner Branch Rider

Before: Judge William Moran

ORDER ON CONTESTANT'S MOTION FOR PARTIAL SUMMARY DECISION

On August 17, 2011, Contestant Bledsoe Coal Corporation ("Bledsoe") filed its Motion for partial summary decision ("Motion") seeking the vacation of each order issued by the Mine Safety and Health Administration ("MSHA" or "Agency") associated with the Agency's issuance of a notice of a pattern of violations ("POV") on April 12, 2011. Bledsoe assails the Agency's decision on the grounds that it was never subjected to notice and comment rulemaking, that it lacked fair notice and that the criteria it used were an unreasonable interpretation of the Mine Act and regulations. For the reasons which follow, each of Bledsoe's claims are rejected.[18]

In an unfortunate practice of selectively quoting, and by that process, being misleading as to the Mine Act's requirements regarding a pattern of violations of mandatory health or safety standards, Bledsoe asserts "Congress mandated the Secretary, under Section 104(e)(4) of the Mine Act, to "make such rules" to establish the criteria for determining when a pattern of violations exists." Motion at 3-4 (emphasis in motion). The Mine Act states no such thing. Instead, the provision provides, *in full*, that "The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists."[19]

Although once would be too often, Bledsoe repeats its mischaracterization, which mischaracterization is *not* about some ancillary matter, but involves a fundamental aspect of the issue. Bledsoe's own words put this on full display, as it asserts: "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern exists, but in so doing, Congress, in unambiguous language, directed the Secretary to use notice and comment rulemaking in accordance with the Administrative Procedure Act." Bledsoe Motion at 8. And yet again, not much later in its Motion: "Congress required the Secretary to use notice-and-comment rulemaking to establish POV criteria." *Id.* at 11. To borrow, and slightly alter, an expression, "a mischaracterization, stated often enough, does not become an accurate characterization. That is, proof by repeated assertion does not make something so.

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[18] Simultaneously being issued today is the Court's ruling on the Secretary's Motion to Dismiss for Lack of Jurisdiction in which the Court DENIES the Secretary's Motion. For ease of reference and because the two orders need to be considered together, a copy of that Order appears as an Appendix to this Order.

[19] It is a curious thing, the practice of advocates to parse out words and apparently assume that no one will notice that only part of the story has been told. In the Court's view, it is better, and ethically superior, to acknowledge the troublesome language and deal with it forthrightly, either by arguing that it means something other than the words suggest or by demonstrating, if possible, that notwithstanding the nettlesome words, the Secretary must make rules even though the statute suggests that discretion is involved.

Accordingly, to keep the facts straight, it bears repeating, with emphasis upon the critical phrase omitted by the Contestant, to bring attention to the words of the statutory provision:

> The Secretary shall make such rules *as he deems necessary* to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

Thus, as evident by the italicized language, any rules are only as the *Secretary deems necessary*. With that power and discretion, one obvious option for the Secretary was that it could have been decided that no such rules were necessary.

The parameters which may constitute a Pattern of Violations

As the Secretary has observed, the dictionary defines a "pattern" in a manner which is consistent with the common understanding of the word, by describing it as "a reliable sample of traits, acts, or other observable features characterizing an individual [] behavior [pattern] . . . ." In line with that sense, the Senate Committee spoke to that provision of the Mine Act, expressing that it would be shown where a mine has "'an inspection history of recurrent violations' or 'continuing violations,' and that a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations.'" Response at n. 2, citing S. Rep. No. 95-151, pp. 32-33. Thus, Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated.

That Congress decided to leave it to the Secretary to develop the parameters for a pattern is not simply surmise. Both the statutory provision itself and the legislative history make this clear. Regarding the latter, the same Senate Report expresses an intent for the Secretary to be afforded "broad discretion in establishing criteria for determining when a pattern of violations exists." Response at 6, citing the same S. Rep. at 33. The Senate, rather than setting a number of conditions and requirements for the pattern tool to be employed, did the opposite. It noted that the criteria for identifying a pattern would "necessarily have to be broad enough to encompass the varied mining activities within the Act's coverage." *Id.* The Senate went further in explaining its design, stating that a pattern can be composed of violations of *different* standards and was certainly not limited to violations of particular standards. Although it acknowledged the obvious, that a pattern, by definition must be more than a single, isolated, violation, that did not mean that "a prescribed number of violations" had to occur, nor that the violations had to come from "predetermined" that is, previously identified, standards. Last, the Senate noted that, while a "pattern" represents something more than an isolated violation, it does not require some intent or state of mind on the part of the mine where a pattern is found to exist. *Id.* Thus, if the pattern is present, that is sufficient, even if no intentional disregard of safety or health concerns is evident. In short, with intent not a prerequisite, a number, as long as it is a number greater than one, potentially can be enough, dependent upon the circumstances, to establish a pattern.

As the Secretary notes, from the Mine Act's legislative history, the provision was intended to "provide an effective enforcement tool" in situations where the mine operator has demonstrated

disregard for miners' safety and health by having a pattern of violations. Its use was contemplated where a mine has permitted continued safety and health standard violations, and it has been concluded that simply abating violations as they occur is not doing the job, and that a next step is necessary to "restore the mine to effective safe and health conditions." Response at 5, citing S. Rep. No. 95-181, pp. 32-33. (1977).

Apart from whether the Secretary was obligated to promulgate a pattern regulation, the fact is that it did so, utilizing the notice and comment rulemaking procedures under the Administrative Procedure Act. This result of this process, appearing at 30 C.F.R. Part 104, begins by examining the compliance records of mines annually. Other factors, such as whether a mine has demonstrated a lack of good faith in correcting significant and substantial violations, the non 104(e) enforcement measures that have been applied, and whether the mine's accident, injury or illness record reflects a serious problem with managing safety or health matters, are examined, together with any mitigating considerations. Where a mine is not ruled out after the initial screening, then a mine with recurring significant and substantial violations is evaluated by application of the pattern criteria. These are set forth at 30 C.F.R. § 104.3(a)(1)- (3).[20] Again, the review works by determining, at that second stage, if the mine under review may be eliminated from a pattern designation. If a mine remains a subject of concern, the third phase is applied. In that posture, the mine is notified of MSHA's concern and that it has been identified as having a potential pattern of violations issue.[21] Even then, in what can only be described as an

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[20] § 104.3 Pattern criteria. (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 of this part reveals that the operator may habitually allow the recurrence of violations of mandatory safety standards or health standards which significantly and substantially contribute to the cause and effect of mine safety or health hazards. These criteria are (1) A history of repeated significant and substantial violations of a particular standard; (2) A history of repeated significant and substantial violations of standards related to the same hazard; or (3) A history of repeated significant and substantial violations caused by unwarrantable failure to comply. (b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential pattern of violations under this section. 55 FR 31136, July 31, 1990.

[21] The Proposed Rule noted that the intention behind section 104(e) is plain; it is intended to address "mines with a record of repeated S & S violations" upon the Secretary's determination that the Act's other enforcement mechanisms have not been effective in achieving compliance with the safety and health standards. The Rule noted that, in accomplishing that next step, "[t]he Secretary has broad discretion in determining [the] criteria [for determining when a pattern exists]." 54 FR 23156-01 at * 23156.

Truly, the Rule's operation allows, effectively, an individualized notice and comment procedure, upon the Agency's notification to a particular mine that the mine is under review for a possible pattern of violation issuance. This process ensures that a given mine will have had the

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overabundance of due process, the mine is not faced with a section 104(e) enforcement action. Instead the mine has the opportunity: to examine the documents MSHA has relied upon to arrive at that stage of review; to provide additional information to the Agency; to request a conference with MSHA; and to launch a program to avoid such repeated significant and substantial violations.[22] As the Secretary appropriately observes, Section 104(e)(1) does not require that these extraordinary lengths be taken before a notice under that provision can be issued. Thus, it is a great understatement on the Secretary's part to describe the rulemaking as providing "ample notice" before issuance of the section 104(e)(1) notice. A mine operator is provided notice "writ large" under the rule and this occurs in the context of requiring the Secretary to provide only a notice that a pattern of violations exists.[23] Again, that determination by the Secretary, that a mine

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[21](...continued)
opportunity for full input into the Agency's review of the appropriateness for that specific mine to be issued a notice of a pattern under section 104(e).

Certainly the Agency's final rule reflected full consideration of all comments made to the proposal, together with the Agency's rationale for its responses to those comments. In short, the rule does not operate in any automatic function; input from the mine involved is considered before the Administrator makes the final determination. Further, while the "Initial screening" considers non-final citations and orders, the "pattern criteria" used to identify mines with a potential pattern takes into account only those that have become final citations or orders. 55 FR 31128-01 at * 31136.

[22] Section 104.4, Issuance of notice, provides: (a) When a potential pattern of violations is identified, the District Manager shall notify the mine operator in writing. A copy of the notification shall be provided to the representative of miners at the mine. The notification shall specify the basis for identifying the mine as having a potential pattern of violations and give the mine operator a reasonable opportunity, not to exceed 20 days from the date of notification, to take the following steps: (1) Review all documents upon which the pattern of violations evaluation is based. (2) Provide additional information. (3) Submit a written request for a conference with the District Manager. The District Manager shall hold any such conference within 10 days of a request. The representative of miners at the mine shall be provided an opportunity to participate in the conference. (4) Institute a program to avoid repeated significant and substantial violations at the mine. The District Manager may allow an additional period, not to exceed 90 days, for determining whether the program effectively reduces the occurrence of significant and substantial violations at the mine. The representative of miners shall be provided an opportunity to discuss the program with the District Manager. 30 C.F.R. § 104.4.

[23] Accordingly, Bledsoe's claim that the Secretary did not give "fair notice" of the criteria to determine a POV is hollow. When challenging those citations/orders which have not been settled, Bledsoe could, in theory, challenge whether it received "fair notice" of the particular standard therein cited, as distinct from the rejected claim that it had no notice of the criteria used to determine a POV. In the same vein, claims that "rulemaking by program policy manual and
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has "a pattern of violations of mandatory health or safety standards," requires making rules for establishing the criteria for determining when a pattern exists, only as the Secretary *deems necessary*. Section 104(e)(4).

Even after the completion of all that process, more is provided, as the District Manager, upon concluding at the end of the day that a potential pattern exists, then sends a report concerning the evaluation to the applicable MSHA Administrator at which point the mine has yet another opportunity for comment. It is not until all that has transpired that the Administrator makes the decision whether the mine is to be issued a notice of a pattern of violations. 30 C.F.R. § 104.4(c). If there is a problem to be identified with the procedure developed by MSHA, it is that it is far too generous and prolonged. It is hard to imagine, given the Senate Report statements about this enhanced enforcement tool and the design for its use, that Congress intended such a protracted process.[24]

Moving from the established framework for determining whether to proceed with a pattern of violations to applying that procedure in the present case, the Secretary notes that it conducted such a screening for Bledsoe's Abner Branch Rider Mine, examining a 12 month period which ended on August 31, 2010, and then, following the final rule's procedure, informed Bledsoe there was a potential pattern. Bledsoe was advised at that time that 9 citations or orders pertaining to violations of 30 C.F.R. § 75.400, which had all become final orders were part of this matter. Meetings followed and Bledsoe, utilizing the Rule's procedures, submitted a corrective action plan. That plan, again pursuant to the Rule, was evaluated by the District Manager, who advised the Respondent that he would be required to make a report to the Administrator and that occurred on March 18, 2011. Nearly four weeks later, on April 12, 2011, the Administrator for Coal Mine Safety and Health notified Bledsoe that he had determined the existence of a pattern of violations at the mine. The District Manager then issued, that same day, a Section 104(e)(1) notice, Number 8333606, which is the subject of this litigation.

In arguing that Bledsoe's arguments should be rejected, the Secretary first addresses the claims about inadequacy of the screening process, and its objections that the regulation does not "specify the time period of a mine's compliance history that will be examined during the initial screening" and that it is not limited to considering only final orders in that initial screening process. The Secretary's response is convincing, as it notes that Section 104(e) has no such requirement for a particular time period to be examined. The implicit suggestion, that MSHA should have selected a fixed time period, would have been arbitrary. The Secretary properly

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[23](...continued)
website" and by "press release" do not deserve further comment.

[24] While one might think that the final rule would be the final word on the subject, MSHA has further addressed the subject in its Program Policy Manual. Suffice it to say that while the PPM provides helpful explanatory guidance about the final rule for Agency personnel, it does not amend, alter, or otherwise change that Rule.

notes that the legislative history recognized that a one-size-fits-all approach would be jejune.[25] Further, as this reasoned choice by the Secretary is not unreasonable, nor arbitrary or capricious, the deference principles articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) apply. Sec. Response at 23.

In the same vein, the Secretary observes that the statutory provision is also silent on the issue of whether non-final citations and orders may be considered.[26] The Secretary makes two key points on this issue:

> Limiting pattern consideration to final orders would undermine Section 104(e)'s effectiveness by eliminating consideration of current or recent mine conditions and practices – precisely the matters that are most relevant in determining whether the mine currently should be considered for enhanced enforcement measures – and focusing consideration instead on mine conditions and practices that are more remote in time.

Sec. Response at 24-25.

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[25] As the Secretary states: "In promulgating § 104.2 - the initial screening regulation - the Secretary expressly declined to impose a particular period to be examined in every case, recognizing that 'interruptions in mining operations, changes in mine management or ownership, or other factors could indicate that this period should be longer or shorter.' 55 Fed. Reg. 31,130 (July 31, 1990). And in promulgating the pattern criteria in § 104.3, the Secretary expressly rejected the suggestion that 'only citations and orders issued within certain time periods . . . be considered in applying the pattern criteria' because such a rule 'would unduly restrict the Agency's ability to enforce section 104(e). . . .' *Id*. at 31,132-3." Sec. Response at 23. Further, the Secretary observes that "Congress expressly delegated to the Secretary the authority to make rules to implement Section 104(e) [and that the same Section] is silent with respect to the compliance-history period to be considered when determining whether the mine has a pattern of violations. *Id.*

[26] The Secretary looks to the legislative history, urging that it "suggests that Congress did not intend to require the Secretary to limit her consideration to final orders. Section 104(e) was enacted in response to the Scotia mine disaster and the ensuing investigation which revealed that the mine had an 'inspection history of recurrent violations.' S. Rep. No. 95 181, p. 32. Congress thus focused Section 104(e) on a mine's 'inspection history' rather than on a mine's final order history." Sec. Response at 24. In the Court's view, this is certainly a rational interpretation of the legislative history and therefore it supports the Secretary's approach here, per *Chevron.*

The Contestant's position would severely hamper the enforcement tool that Section 104(e) surely is, as "citations and orders frequently do not become final until months or years after they are issued."[27] *Id.* at 24.

Second, the Secretary aptly compares the pattern of violation application with the unwarrantable failure sequence of Section 104(d). This is not a stretch by any means, as the Senate Report itself made such a comparison, observing that the POV "sequence parallels the current unwarrantable failure sequence." S. Rep. No. 95-181, p. 33. Borrowing from that Senate Report, the Secretary notes that the comparison was expressly stated. Particularly pertinent here in that comparison is the point that "[i]t is beyond debate that a closure order under Section 104(d)(1) may be based upon a Section 104(d)(1) citation that is not final, and a closure order under Section 104(d)(2) may be based upon a Section 104(d)(1) order that is not final." *Id.* at 25.

Thus, the Court agrees with the Secretary's point that, by Congress making such a comparison, it is reflective that POV determinations also need not be based upon final orders. Further, clearly, under a *Chevron* analysis, the Secretary's decision to include non-final citations and orders, does not run counter to the statute, nor can it be characterized as arbitrary, unreasonable or capricious.

Turning to Contestant's claim[28] that the POV Procedures Summary and Screening Criteria are "rule making through website" in violation of Section 104(e) of the Mine Act and the notice-and-comment provisions of the APA, the Secretary makes the same point that the Court noted earlier, namely that, "Section 104(e)(4) of the Mine Act does not 'require[] the Secretary to use notice-and-comment rulemaking to establish POV criteria' . . . . Section 104(e)(4) provides only that the Secretary 'shall make such rules as he deems necessary'; it does not require any particular rule making procedure." *Id.* at 26, referencing Contestant's Motion at 11.

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[27] One could fairly expect that if mine operators had their way and only final orders could be considered before a pattern could be invoked, the defense would then be raised by some that such information was now stale and useless in assessing the mine's current operational procedures, given the passage of years since the conditions were initially cited. Thus, if it were to prevail that such pre-final orders were "too soon" to be considered, and MSHA were left to consider only final orders, those would then be characterized as "too late." Often, the approach is really about delay. For example, back in 1980, when the task of identifying mines with a pattern of violations was first raised as a proposed rule, the "concerns" raised caused the Agency to withdraw its proposal with the result that it was not until nearly nine (9) years later before it was proposed again.

[28] Contestant's Motion at 12.

The Secretary also makes note that, under the Administrative Procedure Act, rules may be valid even though not promulgated after notice under 5 U.S.C. § 553(b),[29] and that, as "rules," they are exempt from the APA's notice-and-comment provisions because such provisions "do not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice [ ].'"[30] *Id.* at 26-27.

These two observations also make sense when placed in the context of the use for the "POV Procedures Summary and Screening Criteria." That critical context is that the POV Procedures "describe the *internal* procedures MSHA personnel – and only those who answer to the Administrator – follow in reviewing mine violation histories under Section 104(e) of the Mine Act and Part 104; they pertain to the procedural aspects of the review of mine violation histories. They are not law; they do not bind the public." *Id.* at 27. (emphasis added).

Further, as the Secretary also notes, although the POV Procedures "may bind MSHA personnel to the extent personnel must follow supervisory direction, they do not bind the Administrator in any case. *They address MSHA's conduct* in reviewing mine violation histories *in preparation for the Administrator's exercise of discretion regarding possible enforcement action*; they do not address operator conduct. [Accordingly,] [t]hey help 'direct the analysis [of whether the mine has a pattern of violations] but not necessarily the answer.'" *Id.* at 27.[31] (emphasis added). The Secretary observes that this is consistent with "MSHA's Procedure Instruction Letter [which was] held exempt from notice-and-comment rule making in *National Mining Ass'n. v. Secretary of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009)."[32] Similarly, the Secretary points out that "the POV Procedures Summary and Screening Criteria address 'the general procedures District Managers are to consider' in evaluating a mine's violation history under Section 104(e) of the Mine Act and Part 104; but the agency – the District Managers and ultimately the

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[29] 5 U.S.C. § 553(b)(3)(A), (B).

[30] 5 U.S.C. § 553(b)(3)(A)

[31] Citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983). As the 11th Circuit observed in that case, "[a]s long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." Citing *American Trucking Associations, Inc. v. ICC*, 659 F.2d at 463, among other cases. In *Ryder*, the Court recognized that various criteria had been enumerated but that any presumptions remained rebuttable and that the review will involve scrutinizing the actual operation. That is *exactly* what occurs here. Also as in *Ryder*, the process of issuance of a section 104 (e) notice follows "an intensely factual determination informed by [the] relevant criteria."

[32] As the 11th Circuit emphasized, *National Mining Ass'n. v. Secretary of Labor*, the obligation to publish a proposed rule pertains to the promulgation of new or revised *mandatory* standards. No new "across-the-board rules" have been created by the POV Procedures.

Administrator – is 'free to consider individual facts' when evaluating each specific mine." (quoting *Ryder Truck Lines*, 716 F.2d at 1377)." Sec. Response at 27-28.[33]

Thus, the Court agrees with the Secretary that Part 104 informs the mining community of the pattern criteria used to identify a potential pattern of violations at a given mine and the procedures MSHA will follow upon making such identification, culminating in the Administrator's decision as to whether a notice of a pattern of violations will be issued.[34]

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[33] The Secretary cites a host of cases presenting similar situations: the Occupational Safety and Health Administration's per-instance-penalty policy held exempt from notice-and-comment rule making in *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1132-33 (D.C. Cir. 2001), the POV Procedures Summary and Screening Criteria do not "'encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior.'" (quoting *American Hosp. Ass'n. v. Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987)); the Department of Health and Human Services ("HHS") Provider Reimbursement Manual provision held exempt from notice-and-comment rule making in *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992), the POV Procedures Summary and Screening Criteria are "not intended to substantively change existing rights and duties." In *Sentara-Hampton Gen. Hosp*., the Court explained that explaining ambiguous language or reminding parties of existing duties, that is not creating new law. *Id.* Thus, the POV procedures only address the exercise of enforcement discretion under 30 C.F.R. Part 104 and not "enforcement of new obligations." Accordingly, they do not bring about substantive change. See also *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-27 (D.C. Cir. 1994) (holding exempt FCC's "hard look" rules that guided agency's review of license applications and resulted in elimination of some applications); the HHS Manual IM85-3 policy held exempt from notice-and-comment rule making in *American Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1051-52 (D.C. Cir. 1987), the POV Procedures Summary and Screening Criteria "target" the "focus" of MSHA's "enforcement efforts," do not impose new burdens on operators, and are well within MSHA's "discretionary enforcement authority;" and the Federal Savings and Loan Insurance Corporation's directives held exempt from notice-and-comment rule making in *Guardian Fed. Sav. and Loan Ass'n. v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978), the POV Procedures Summary and Screening Criteria preserve the enforcement discretion of the Administrator."

[34] Having concluded that the Secretary was not required to do as much as it did, the Court agrees that more was not needed beyond the issuance of Part 104. As the Secretary notes, the Administrative Procedure Act "does not require that all the specific applications of a rule evolve by further, more precise rules." Sec. Response at 30, citing *Shays v. Federal Election Comm'n*., 528 F.3d 914, 930 (D.C. Cir. 2008) (quoting *Shalala v. Guernsey Mem'l. Hosp.*, 514 U.S. 87, 96 (1995)).

Drummond is not instructive

Bledsoe points to *Secretary v. Drummond Company, Inc.*, 14 FMSHRC 661, 682 (May 1992) for authority in support of its inaccurate claim that "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists . . . ." Motion at 8.

Drummond challenged the Secretary's interim excessive-history civil penalty program and the Commission found that the program was inconsistent with and therefore modified the existing 30 C.F.R. Part 100 penalty regulations. However, as the Secretary correctly observes, " nothing in the POV Procedures Summary or Screening Criteria is inconsistent with or modifies 30 C.F.R. Part 104 or any other regulation." *Id.* at 30.

The Court would add that the circumstances were very different in that case as *Drummond* focused exclusively on the penalty computation regulations which were in existence and formulated through the notice and comment process.[35] Placed in context, in that litigation, the complaint was that penalties were being computed, not in accordance with Part 100 but rather upon the Secretary of Labor's Program Policy Letter, which was a program established outside the notice and comment process of the Administrative Procedure Act. As the Commission expressed it, the challenge from the mine operators in *Drummond* was that the Secretary was failing to act within the framework of its own Part 100 regulations. *Id.* at *672.

The Secretary's action here would seem to fit within the APA definition of a "Rule,"[36] but the present question is whether there is any deficiency in its application. There was, following the proposed rule, the opportunity for comment from the affected public. It is also true that the notice and comment process is not applicable where interpretive rules, general statements of policy, or rules of agency organization, procedure or practice are involved. 5 U.S.C. § 553 (b)(3)(A). While notice and comment is intended to accomplish public participation and fairness, here Congress' expressed intent was to leave it to the Secretary's discretion as to whether such rules were needed. In short, it was left to the Secretary, not the public, to ultimately decide the parameters of a pattern. Further, consistent with the conclusion that the pattern rule is a statement

[35] Based on the Court's other comments in this Order, Bledsoe's claim that MSHA has engaged in "rule-making through website postings" needs no further comment. Bledsoe Motion at 12-13.

[36] 5 U.S.C. § 551(4) defines "Rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

of policy, it clearly leaves the Agency, through the Administrator, with discretion in its decision making. In fact, it is the ultimate in that regard, as the Administrator, not the final rule, makes the final decision whether to proceed with a pattern notice.[37]

Regarding Bledsoe's claim that there was retroactive rulemaking, the Secretary responds that the Pattern provision was promulgated decades before the notice of pattern issued here. The Court agrees that, by that rulemaking, Sections 104.2 (a)(1) and 104.3(a) gave Bledsoe notice of the parameters upon which a pattern could be formulated. Therefore, Bledsoe's protestation that it was caught unaware of the effect of not challenging 26 of the citations which make up the 79 citations during the period from September 1, 2009 through August 31, 2010, rings hollow. There are two reasons for this: first, "Bledsoe was not entitled to know and the Secretary was not obligated to supply information about the internal procedures adopted to guide the agency's exercise of Section 104(e) enforcement discretion." Second, and of significance, as a "pattern does not necessarily mean a prescribed number of violations[38], . . . Bledsoe had no reason to expect that it would ever know that a certain number of S&S violations would subject it to review for a potential pattern or pattern of violations."[39] *Id*. at 34-35.

In sum, the Secretary reiterates that the POV Procedures Summary and Screening Criteria were not required to undergo notice and comment rulemaking. Instead, they serve as guidance for MSHA in the exercise of its discretionary enforcement authority and as such they are not binding on the public or the Administrator. Thus, the Secretary emphasizes that it sufficiently "informed the public through § 104.3(a) that a history of repeated S&S violations: (1) of a particular standard; (2) of standards related to the same hazard; or (3) caused by unwarrantable

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[37] It must again be noted that once the Administrator makes that determination, it is hardly the end of the story. A mine operator then has the opportunity to challenge the violations constituting the pattern.

[38] Though referenced earlier in this Order, the Senate spoke to this subject at S. Rep. No. 95-181, p. 33.

[39] In the same vein, the Secretary points out that *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), involving as it did, the retro-active application of a substantive, legislative rule that was intended to have the force and effect of law, is inapposite, as the POV Procedures Summary and Screening Criteria are procedural.

failure to comply, would identify it as a mine with a potential pattern of violations."[40] Sec. Response at 32. The Court agrees.

There is one aspect of Bledsoe's argument with which the Court agrees, at least in theory. That is Bledsoe's assertion that the "practical effect of a POV notice is that a mine is subject to closure every time an S & S citation is issued. [It notes that] [t]hese citations may be challenged by the operator; however there will still be a closure upon issuance. This allows the Secretary, based on nothing more than allegations, to repeatedly close a mine in perpetuity. In fact, even if all such citations are later vacated, the operator has no remedy to prevent such closures." Bledsoe Motion at 8. In the Court's view, this observation is really an argument in support of Bledsoe's Response to the Secretary's Motion to Dismiss for Lack of Jurisdiction. As noted at the outset of this Order, the Court has DENIED the Secretary's Motion. *See* n.1, *supra.*

For the foregoing reasons, Contestant Bledsoe's Motion for Partial Summary Decision is DENIED. The parties are directed to contact the Court via its email address for the purpose of arranging a hearing date so that this matter can proceed forward.

SO ORDERED.

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

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[40] The Court further agrees that the cases cited by Bledsoe, cases – *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000), and *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982) – involved challenges to the Secretary's interpretation of mandatory standards that required or prohibited certain conduct by the mine operator and that *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) – involved the FCC's interpretation of a regulation that required certain conduct by a regulated party. It is a key distinction that the POV Procedures Summary and Screening Criteria "merely instruct agency personnel in screening and reviewing mines for potential patterns of violations" as opposed to requiring or prohibiting certain conduct by operators. Sec. Response at 33.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 14, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-1547
Petitioner,	:	A.C. No. 42-00079-22558
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Mine ID: 42-00079
Respondent.	:	Mine: Emery Mine

DECISION

Appearances: Alicia Truman, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Consolidation Coal Company ("Consolidation") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah. In lieu of filing post-hearing briefs, the parties presented closing arguments at the hearing. Consolidation operates the Emery Mine, a large underground coal mine, in Emery County, Utah. This case involves one 104(a) citation issued at the Emery Mine ("the mine") on April 14, 2010.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector James Pruitt has been employed by MSHA for over four years. Prior to joining MSHA, Pruitt worked in the mining industry for a number years, during which he held various positions, including general laborer, equipment operator, fire boss, and safety director.

On April 14, 2010 Inspector Pruitt issued Citation No. 8460813 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.220(a)(1). The citation alleges the following:

> The operator failed to comply with the approved roof control plan by providing roof supports on 5 foot by 5 foot centers. An area of roof was unsupported for 9 feet 10 inches by 8 feet 5 inches in the #7 cross cut between entries #2 to #3 in the 2nd Right section (MMU 001-0). The roof bolt was missing from the pattern. A small rib cutter was present along the rib line in the cross cut and also in the #2 entry leading to the cross cut, requiring additional support measures to be taken. This standard was cited 18 times in two years at this mine.

(Ex. G-2). Pruitt determined that a fatal injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary specially assessed this violation pursuant to 30 C.F.R. § 100.5 and has proposed a penalty of $41,000.

A. Summary of Relevant Testimony

Inspector James Pruitt testified that he was at the Emery Mine on April 14, 2010, to conduct an E02 spot inspection pursuant to Section 103(i) of the Mine Act. (Tr. 24). He reviewed the examination books and the uniform mine file. (Tr. 24, 50). There was no mention of a missing roof bolt in the examination books. (Tr. 50). He had previously spent six months at the mine conducting E01quarterly inspections, during which he became familiar with the historical data and conditions at the mine. (Tr. 23, 25). Lester Jorgensen, the mine superintendent, and Randy Crane, the miners' representative, traveled with Pruitt during his April 14, 2010 inspection. (Tr. 25).

According to Pruitt, the inspection party traveled to the Second Right Section and, when they arrived, the continuous miner was actively mining on right hand side of the section. (Tr. 26, 83). Pruitt began his imminent danger run on the right hand side of the section, and worked his way toward the left hand side of the section via the last open crosscut.[1] (Tr. 30). At that particular time, the mine had been developed just inby Crosscut No. 7, which was the last open crosscut. (Tr. 27). While traveling between Entry Nos. 2 and 3 via Crosscut No. 7, Pruitt stopped in an intersection to take an air reading and, while there, Pruitt noticed a roof bolt missing. (Tr. 28, 30). The crosscut was 19 feet wide and required at least 4 rows of bolts to cover the span from one rib to the other. (Tr. 62-63; Sec'y Ex. 3 p. 3). He agreed that there were roughly 30 bolts in the crosscut and probably a couple of thousand bolts in the immediate

[1] Entry No. 2 was the last entry on the left side of the section. Entry No. 1 had not been mined at the time the citation was issued. (Tr. 67).

area inby the loading point. (Tr. 80-81). He explained that, while he was not focused on the roof at the time, he noticed the condition because it was obvious to him that a bolt was missing from the pattern. (Tr. 30-31, 89). Pruitt explained that the mine's roof control plan requires that bolts be installed in the roof in no more than five foot centers. (Tr. 28). Pruitt, using a tape measure, determined that the missing bolt resulted in an area between bolts that measured 8 foot 5 inches by 9 foot 10 inches. (Tr. 29-30, 90-91; Sec'y Ex. 5). On cross-examination, Pruitt agreed that the other bolts in the entry were spaced closer than what was required by the plan and that the decreased spacing helped with support. (Tr. 91-92). Moreover, he did not observe any problems with other bolts in the immediate area. (Tr. 97). He tested the roof around the hole and agreed that it was not sagging or drummy. (Tr. 78).

Pruitt testified that, after noticing the missing bolt, he informed the operator that he was going to issue a citation. (Tr. 33). He then began an examination of the area with the hope that he would be able to determine whether the bolt was missing entirely or had broken off. (Tr. 33-34). Pruitt agreed that bolts and plates can be damaged or broken if they are hit by shuttle car canopies or the head of the continuous miner. (Tr. 80). Pruitt explained that he believed the area under the hole was safe enough at that particular time. (Tr. 79). The inspector sounded the roof, walked under the hole, took off his hard hat, shined his cap-light up into the hole, and stuck his walking stick in the hole in an effort to determine if there was anything inside the hole. He was unable to determine whether the bolt was missing or had broken. (Tr. 34, 77-79). After inspecting the hole, the citation was terminated by installing a jack in the area of the missing bolt. (Tr. 59, 77-78). It was his understanding that the jack would eventually be replaced by a roof bolt so that travel through the crosscut would not be impeded. (Tr. 59).

Pruitt explained that, due to previous roof control problems in this section of the mine, the roof bolters had been installing 8 foot torque tension bolts and wire mesh on the roof. (Tr. 31, 35). He described the bolts as consisting of two parts and a resin component that is designed to cement the layers of roof together to form a beam across the entries. (Tr. 76, 78). With regard to the mesh, he stated that the mesh did not overlap and there were continuous gaps of between five and ten feet. (Tr. 31, 73). Pruitt was adamant that there was no mesh supporting the roof in the area of the missing bolt. (Tr. 31, 73, 99). He explained that, had there been mesh, it would have obscured his view of the hole, which it did not, and when he probed the hole with his walking stick he would have noticed the mesh if it had been there. He did not note or depict the mesh in his inspection notes, which he would have done had there been mesh in the area, and he had just spent six months in the mine conducting E01 inspections during which he observed how mesh was installed throughout the sections. (Tr. 31-32, 73-74). According to Pruitt, mesh is only capable of controlling the immediate roof. (Tr. 72, 74-75).

Pruitt marked the likelihood of an injury as "reasonably likely" based on a number of factors. (Tr. 35-36). First, Crosscut No. 7 was the last open crosscut, and would have been used by a number of individuals (i.e., continuous miner operators and their helpers, shuttle car operators, scoop operators, roof bolters, examiners, and miners installing ventilation controls). (Tr. 36). Many of the individuals would have been traveling on foot, while others would have been in equipment with canopies. (Tr. 37, 82). As a result, the level of exposure was high.

(Tr. 36). On cross-examination, he acknowledged that examiners on foot would only be in the area for the short time it takes to walk through and look at the crosscut, and that once a more inby crosscut was developed, the new crosscut would become the principal travelway for those mining at the face and Crosscut No. 7 would be used much less frequently. (Tr. 82-83). Second, according to Pruitt, there was a cutter along the rib line in the crosscut. (Tr. 35-36). Pruitt explained that a cutter is a large crack or separation of the roof from the rib where they meet. (Tr. 37-38). A cutter is an indication of some type of settling or deterioration of the roof. (Tr. 37-38). This particular cutter was on the adjacent rib line closest to the area of the missing bolt and was approximately seven feet away. (Tr. 38). Pruitt testified that the cutter was approximately 20 to 25 feet long, and went along the rib and then turned out into the entry. (Tr. 38). He documented his observation with a drawing in his inspection notes. (Tr. 39-39; Sec'y Ex. 3 p. 9). Pruitt acknowledged that he did not require the mine to install timbers or jacks along the cutter in the crosscut. (Tr. 79-80). Third, there was a second, larger cutter nearby in Entry No. 2 along the rib line that was coming to the intersection. (Tr. 36). The mine had installed timbers near that cutter. (Tr. 39-40, 76). He expressed concern because the two cutters were "working toward each other." (Tr. 40). More specifically, he was concerned that a "channel zone" and cantilever effect may be created.[2] (Tr. 40).

Fourth, there had been a previous roof fall, approximately two to three feet thick, nearby in Entry No. 2, between Crosscut Nos. 6 and 7, i.e., just outby the second cutter. (Tr. 39-40, 64, 75). That roof fall occurred before the freshly cut area had been bolted. (Tr. 40, 75). According to Pruitt, the roof fall in Entry No. 2 was an indication of the potential for the roof to fall in the area of the missing bolt. (Tr. 42). Fifth, this mine has a history of roof problems and falls. (Tr. 43). When looked at together, the various conditions in the area indicated a deteriorated roof, and he was concerned about it getting worse. (Tr. 40-41). Further, assuming continued mining without correcting the condition, the roof would continue to deteriorate. (Tr. 44).

Pruitt explained that roof bolts help to create a beam across the expanse of the roof. (Tr. 41). By failing to place one bolt pursuant to the plan, the entire beam across the expanse was compromised. (Tr. 41). A missing bolt gives a starting point for deterioration of the roof to begin. (Tr. 42). Pruitt did concede that, in the subject area, he did not see any other signs of weight being placed on the bolts that were in place or any sagging of the roof. (Tr. 44). However, he explained that failing to follow just one element of a roof control plan can cause a catastrophic failure. (Tr. 45).

Pruitt determined that any injury sustained was reasonably likely to be fatal. (Tr. 45-46). Given the two to three feet that had fallen out of the roof in Entry No. 2, he believed that a fall in

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[2] Pruitt explained that cantilever effect occurs when support is removed from one end of a roof expanse, thereby creating a levering effect that relies upon only friction and pressure between the rocks to keep the roof supported. According to Pruitt, when this occurs, the roof will eventually slip and fall out. (Tr. 40-41).

the subject area would be substantial enough to cause a fatal injury. (Tr. 45-46). Moreover, there was a significant level of exposure of miners walking through the area and the rib cutters indicated the "potential" for a "massive separation of rock that could come down." (Tr. 46). Pruitt found that only one person would be exposed to this condition. (Tr. 46-47).

Pruitt marked the alleged violation as S&S. Consistent with his earlier testimony, he believed that it was reasonably likely that an injury would occur and that the injury would be serious. (Tr. 47). He testified that his S&S finding would not change even if there were mesh over the hole. (Tr. 47). Mesh only controls the immediate roof and is not able to prevent a fall of much weight from causing an injury. (Tr. 48). His primary concern was the two rib cutters that were working their way toward each other. (Tr. 47). As the cutters continue to work toward each other they would create a complete separation at the intersection, which in turn would cause a cantilevering effect, thereby making the area even more dangerous. (Tr. 48). According to Pruitt, the missing bolt could be causing the cutters since there was nothing there to properly tie the roof together. (Tr. 48). Further, while a missing bolt is dangerous enough, a broken bolt would have signaled to him that there were already stresses in the area that caused the bolt to break. (Tr. 101)

Pruitt determined that the alleged violation was a result of Consolidation's high negligence. (Tr. 48-49). He testified that he had previously issued citations to the mine for violations of the same standard and the mine had a history of roof falls. (Tr. 48-49, 88; Sec'y Exs. 7 and 9). He agreed that he did not look at each specific fall in the history and the mine had been taking steps to address its roof fall problems. (Tr. 93-94). Nevertheless, roof falls are the "second greatest killer out there" and this mine's number of falls placed it on notice that it had a roof control problem. (Tr. 56). In January of 2010, Pruitt issued a citation for a similar condition where there were missing and damaged roof bolt plates and loose rib bolt plates. (Tr. 53; Sec'y Ex. 90). When he issued the January citation, he discussed with management the need to be more observant about roof conditions. (Tr. 49, 54). Further, in February of 2010 he issued a citation for 12 to 13 missing roof bolts in an area of the mine. (Tr. 52; Sec'y Ex. 7). At the time he issued the February citation he told Dave Turner, a maintenance man at the mine, that further conditions of this nature would warrant increased enforcement. (Tr. 49, 54, 55, 88; Sec'y Ex. 6 p. 6). Moreover, the mine had been issued 18 citations for violations of the roof control plan and he is aware of other MSHA inspectors and specialists that had discussed roof control issues with mine management. (Tr. 51, 55-56; Sec'y Ex. 8).

Pruitt explained that the area in question was frequently examined by mine personnel and the condition had existed for at least longer than one shift and could have been present for close to a week. (Tr. 49-51). However, he could not be sure when the area had been mined and bolted. (Tr. 106). An examiner would have traveled across all twelve of the faces through the last open crosscut while looking at the roof, checking for methane, and looking for any other hazards. (Tr. 81-82). Pruitt believed that three preshift exams and two onshift exams would have been conducted. (Tr. 49-50). Moreover, the condition was obvious. (Tr. 49). Pruitt was not looking for roof bolt violations at the time, yet he noticed this one when he stopped to take an air reading in the crosscut. *Id.* He testified that he did not see anything in the area around the

missing bolt that lead him to believe that a bolt had been knocked, damaged, or hit by a piece of equipment. (Tr. 50). Pruitt testified that the cutters and the roof fall near the subject area indicated that the area should have been watched more closely for continued roof deterioration. (Tr. 51).

Sidney Hansen also testified on behalf of the Secretary. Hansen is a licensed professional engineer in Colorado and is currently the MSHA roof control supervisor for District 9. (Tr. 109-111). Hansen has been with MSHA since 1986 and has worked in technical support on both ventilation and ground control, as well as in enforcement. (Tr. 110). Prior to joining MSHA, Hansen worked in the mining industry at multiple mines. (Tr. 111). Hansen has a bachelor's degree in mine engineering from Colorado School of Mines.

Hansen personally inspected the Emery Mine in the past and has been involved in reviewing the mine's roof control plans. (Tr. 113-114). He explained that, based on the mine's history, the mine has had issues with unintentional roof falls. (Tr. 114). He referenced 15 reportable roof falls in the 5 years prior to the issuance of the subject citation. (Tr. 114, 131). Most of those falls occurred due to a bed separation above the anchorage point, but Hansen could not recall whether any injuries resulted. (Tr. 131). Further, he testified that, while a majority of injuries suffered as a result of roof falls are sustained by roof bolters, the majority of reportable roof falls do not involve any injuries. (Tr. 144). Hansen explained that the mine had previously experienced severe roof control problems that necessitated a complete revision of the roof control plan before the mine could move forward. (Tr. 129). Nevertheless, he agreed that the mine does not lead MSHA District 9 in reportable roof falls and that there are other mines with higher rates of falls. (Tr. 131-135). Moreover, the mine began operating under a revised roof control plan in November of 2009. (Tr. 133). The new plan required, at a minimum, that the mine use 5 foot bolts. (Tr. 132). Hansen did not personally witness the condition that is the subject of this case, nor has he ever been to Crosscut No. 7, and all of the information he relied upon in his review of the matter is based upon the inspector's notes and his discussions with the inspector. (Tr. 114, 129).

According to Hansen, roof bolts help to bind the layers of strata together, thereby making them stronger than the individual layers and helping prevent horizontal movement. (Tr. 119, 135). Each bolt is expected to hold a load. (Tr. 118). When a bolt is missing, the surrounding bolts have to take the suspended weight that the missing bolt would have taken. (Tr. 119). A missing bolt hampers beam building and can cause the remaining bolts to shear and break. (Tr. 119). Assuming equal distribution of the load, the surrounding bolts would experience a 25 percent increase in load. (Tr. 115). The impact of such an increase could be that the surrounding bolts would fail or fall out of the strata they are anchored into. (Tr. 115-116). The force exerted by the plates on the roof radiates outward from the plate into the roof in a conical shape. (Tr. 120, 137). The closer bolts are spaced together, the more overlap of the "zones of influence" of the bolts and, hence, the more strength of the roof. (Tr. 137) Hansen testified that, if a bolt had failed during installation, the mine would have known about it immediately. (Tr. 144).

Hansen opined that the nearby fall of roof was evidence that the roof in the area had trouble supporting itself. (Tr. 116, 127). Although the eight-foot bolts were used to compensate for that condition, the longer bolts do not lessen the impact of a missing bolt. (Tr. 116, 127, 134). The bolts are designed to work as a system, and a missing bolt requires the surrounding bolts to take more load than the system is designed to handle. (Tr. 116).

Hansen testified that he was made aware that there was cutter in the crosscut near the missing bolt. (Tr. 120). According to him, when rectangular openings are cut into stratified deposits, the corners of the cut will develop shear stress. (Tr. 120-122). If there are weak layers in the rock then a cutter can occur where the rib line meets the roof. (Tr. 120-121). As the cutter propagates upward it may or may not go above the bolt horizon, i.e., the extent of the anchor. *Id*. Cutters can vary in appearance, severity, and depth. (Tr. 128). A separation in the roof bed may occur. (Tr. 122). When a separation in the roof bed occurs above the bolt horizon, the bolts may not show any signs of taking too much of a load, yet there could still be a fall. (Tr. 120-123, 126). Roof cutters are an indication that the installed roof support system may be inadequate because the roof is in a state of degradation. (Tr. 121). Given enough time, a cutter could continue to develop higher and cause a fall. (Tr. 121). Hansen explained that a cantilevering roof occurs when only one side of the roof is connected, but the other is not. (Tr. 122; Ex. G-12). In that case, the suspension of the roof is dependent on the bolts to carry the load and the strength of the cantilevered beam. (Tr. 123-124). Hansen stated that, even if the cutter had been on the opposite side of the crosscut, he would not change his opinion regarding the impact of the cutter. (Tr. 124). Moreover, the fact that there was another cutter in the area was evidence that there was a broader problem that was not localized at just the missing bolt. (Tr. 125).

Hansen testified that sounding the roof only tells whether there is a problem with the immediate slab and that a massive failure higher up in the roof would not render hollow sounds. (Tr. 126). Hansen agreed that it would be difficult to determine if there was separation in the roof layers in the subject area. (Tr. 141). He also stated that the presence of mesh, while a positive measure, would not prevent a roof fall involving a bed separation above the bolt horizon. (Tr. 126, 134). Mesh only controls the immediate skin of the roof. (Tr. 126).

Joseph Lester Jorgensen testified for Consolidation. Jorgensen is currently the general mine foreman at Emery Mine and is in charge of all underground activities. (Tr. 152). Jorgensen has extensive mining experience and has held various other positions, including section foreman, operation superintendent, shift foreman, section foreman, construction foreman, roof bolter, faceman, fire boss, and shuttle car operator. (Tr. 153).

Jorgensen testified that, prior to April 14, 2010, the mine had made an effort to improve roof control. (Tr. 155). He acknowledged that the mine had been having problems with loose roof bolt plates and plates damaged by machinery. (Tr. 155). Management conducted several safety meetings and spoke with the roof bolters and the bosses about how to prevent such conditions. (Tr. 155, 171). The mine switched to longer, eight-foot, "combination bolts" in Entry Nos. 2 and 3. (Tr. 155-156, 158, 161). The bolts, which are produced by a leading manufacturer of roof bolts, consist of a "resin top" with a coupler, and a "torque bottom."

(Tr. 156; Consol Ex. 6). The bolts are installed by drilling a hole, placing resin in the hole, placing the top part of the bolt into the hole and allowing the resin to set up, attaching the bottom of the bolt via the coupler, and torqueing the bolt to put tension on the mine roof. (Tr. 156-157, 175). Jorgensen agreed that using the longer bolts does not take away from the responsibility of the mine to keep a close eye on the bolts once they are installed. (Tr. 176).

Jorgensen testified that he and Randy Crane, the mine's union representative, traveled with Inspector Pruitt on April 14, 2010. (Tr. 158, 160). When they arrived at the section, Pruitt began his inspection at the No. 13 face, i.e., the right side of the section which was being actively mined at the time, and then worked his way across the section, via Crosscut No. 7, to the No. 2 face. (Tr. 159, 167). As they passed through Crosscut No. 7 from Entry No. 3 to Entry No. 2, the inspector did not comment about the missing roof bolt. (Tr. 159). It was only after coming out of the No. 2 face and back to the No. 3 face that the inspector noticed the bolt missing from Crosscut No. 7 and pointed it out Jorgensen. (Tr. 160). According to Jorgensen, the inspector took off his hard hat, walked under the hole, and shined his light up in the hole in an attempt to see if part of a bolt still remained in the hole. (Tr. 163, 173). Neither Jorgensen nor the inspector were able to see anything. (Tr. 163). In addition, they attempted to stick something in the hole to see if they could feel anything, but they still could not tell if part of a bolt remained in the hole. (Tr. 165). Jorgensen did not feel that there was a risk of anything falling and injuring someone while they were standing under the hole. (Tr. 163, 165-166). The roof in the area was fully meshed and the mesh, which is put up under the plates, was tied into the bolts on both sides of the hole. (Tr. 163-164). Moreover, Jorgensen testified that the entirety of Crosscut No. 7 was fully meshed, including quite a bit of overlap, and there were no gaps. (Tr. 160). The mesh is made up of heavy gauge wire formed into three or four inch squares. (Tr. 175). The roof bolters are trained to overlap the mesh. (Tr. 161). Mesh supports small to medium size pieces of roof that would otherwise fall from between the bolts and potentially hit miners or machinery. (Tr. 161, 169, 176).

Jorgensen testified that there were no other missing bolts in the area, nor were there problems with any of the bolts that were in the roof. (Tr. 161). He explained that, if there were too much weight on the bolts, the plates would have started to "mushroom" and show signs of stress. (Tr. 161). He opined that the one missing bolt was not an obvious condition. (Tr. 162). Moreover, the roof around the bolt hole was "flat, smooth, hard" and had "[n]o fractures whatsoever." (Tr. 163).

Jorgensen acknowledged that there was a small rib fracture on the outby rib in the crosscut, but the fracture did not cut up into the top. (Tr. 162-163). The fracture, which he did not think qualified as a cutter, was not affected by the missing bolt since it was on the opposite side of the crosscut. (Tr. 166). If the crack line had gotten worse and gone higher up into the top, then the mine would have placed timbers to support the area. (Tr. 166). The inspector did not require that timbers be put under the alleged cutter in the crosscut. (Tr. 167). Jorgensen conceded that the crack in the crosscut was a warning sign and that the mine should keep a close eye on such cracks to make sure nothing serious is going on. (Tr. 180-181). According to Jorgensen, cutters can change over time and if one becomes worse, then that is when the mine

should take action. (Tr. 184). He agreed that there was a cutter with timber support in Entry No. 2 around the corner from the crosscut and that it was a sign that the mine needed to keep an eye on the roof in the area. (Tr. 181). He further agreed that there was bad roof in this section of the mine, but the bad roof was outby the subject area and not in Crosscut No. 7 between Entry Nos. 2 and 3. (Tr. 182). Jorgensen was not aware of a roof fall in Entry No. 2. (Tr. 181). According to Jorgensen, there was nothing wrong with the inby rib in Crosscut No. 7. (Tr. 162). He saw nothing in the area that indicated that the roof was reasonably likely to fail. (Tr. 167, 169). He admitted that the mine did have a history of unintentional roof falls and there have been instances where there were no signs of the bolts taking weight before a fall. (Tr. 177-178).

Jorgensen testified that the mine would have continued using Crosscut No. 7 to travel between Entry Nos. 2 and 3 until Crosscut No. 7 was no longer the last open crosscut, i.e., when Crosscut No. 8 was developed. (Tr. 167). Once Crosscut No. 8 was developed, Crosscut No. 7 would probably be used as a buggy road, or not at all. (Tr. 167). The blocks in the mine are 55 feet wide by 105 feet long. (Tr. 168). Entry No. 2 had already been mined approximately 40 feet beyond Crosscut No. 7, so it was likely that the miners would have to go back to that face via Crosscut No. 7 two more times before the mine would be able to develop Crosscut No. 8. (Tr. 168). According to Jorgensen, the shuttle cars in the section have canopies that are designed to protect the operators from roof problems. (Tr. 168).

Jorgensen testified that it was never determined if a bolt had broken or never been installed in the bolt hole. (Tr. 179-180). Jorgensen was present when the citation was terminated by installing a jack under the bolt hole. (Tr. 164-165). After the day in question, and at the direction of the safety director, Jorgensen prepared notes regarding what happened the day the citation was issued. (Tr. 172, 178; Consol Ex. 2). Jorgensen's notes depict a small crack on the outby rib and no cutter on the inby rib. (Tr. 173). At the time he wrote his notes, there was not a controversy about the mesh, so he did not depict it in his drawing. (Tr. 174).

Randy Crane also testified for Consolidation. Crane is currently an examiner at the mine and has worked there off and on since 1978, but estimates that he has 16 years of mining experience at the mine. (Tr. 187-188). On the day of the subject inspection, Crane traveled with the inspection party as the union representative. (Tr. 189). Crane testified that the missing bolt was located in the middle of Crosscut No. 7 in the second row of bolts from the left rib as he traveled from Entry No. 2 to Entry No. 3. (Tr. 196-197). According to Crane, the crosscut was fully meshed. (Tr. 191). Crane, as a fire boss who is trained to look for such conditions, was not sure why he missed the condition the first time he walked through the crosscut, but testified that it could have been the rock dust in the area or the fact that the area had not been cleaned at that point. (Tr. 192, 202

Crane explained that, in safety meetings over the prior six months, the mine had been placing special emphasis on preventing damaged, missing, and improperly installed roof bolts. (Tr. 192-193, 202). A number of the roof bolters at the mine were new, so the mine was constantly addressing this issue. (Tr. 193). He agreed that if the mine had correctly conducted

its examinations, then an examiner would have noticed a missing bolt. (Tr. 202). However, there are other conditions besides the roof that an examiner needs to look for and he might fail to see a single missing bolt. (Tr. 203-204).

Crane testified that, after noticing the missing bolt, Inspector Pruitt walked over to the hole, took off his hard hat, and shined his light up the hole. (Tr. 194). There was a discussion among the party members about a cutter in the area. (Tr. 195). Crane's recollection was that the cutter was roughly 12 feet long along the rib and went around the corner into the entry and that there were at least three rows of bolts between the cutter and the missing bolt. (Tr. 195). The area was beginning to flake apart at the corners, but the break was very thin. (Tr. 196). Crane did not believe that the cutter created a danger since he barely noticed it. *Id*. Moreover, he did not think that the missing bolt made it reasonably likely that the roof would fall. (Tr. 196).

Crane testified that the roof in the subject area "appeared to be sound." (Tr. 193). He is aware of situations where a bolt has lost its grip and fallen out of the hole and onto the ground, but that was not the case here. (Tr. 193). No bolt was on the ground. (Tr. 193). Given that the crosscut had not be cleaned, he does not believe that it was traveled after it was bolted, which may have only been a short time before they arrived. (Tr. 205).

Brett Newby also testified for Consolidation. Newby has worked on and off at the mine since 1976. (Tr. 206). Newby was the outby foreman at the mine in April of 2010, but at times would fill in for section bosses on days that they could not be there. (Tr. 206). On April 14, 2010, he was the acting production foreman at the mine. (Tr. 207). After learning of the missing bolt and citation, he traveled to the area. *Id*. Newby did not have his sounding stick, so he sounded the roof with a shovel and determined that the roof was solid. (Tr. 208). Newby and a general laborer installed the jack to terminate the citation. (Tr. 207). There was mesh in the area of the hole. (Tr. 208). A small cutter that was just beginning to flake was located on the outby rib. (Tr. 209). There were no signs that the roof in the crosscut was going to fail, i.e., there were no damaged, hanging, or sagging plates that would indicate they were taking too much weight and there was no popping, cracking or crumbling that would signal a problem. (Tr. 210). He explained that an examiner is looking for hazards like bad roof, but is also looking for gasses and watching for ventilation problems. (Tr. 210-211). Newby acknowledged that roof falls can be unpredictable and that conditions can quickly change if the mine is not addressing them. (Tr. 212). He further agreed that, if he were in an active area of a mine where there were possible indications of roof control problems, he would examine the area and, if he saw a cutter, he would give the area a closer look. (Tr. 213).

Finally Scott Malmgren testified for Consolidation. Malmgren has worked at the mine for approximately seven years and is currently a safety supervisor, but has 22 years of mining experience at other mines. (Tr. 214-215). Malmgren was not in the subject section of the mine on April 14, 2010. (Tr. 225). On November 15, 2010, i.e., well after the citation was issued, Malmgren went back to the subject area and took photos of Crosscut No. 7 between Entry Nos. 2 and 3. (Tr. 215; Consol Ex. 8). The photos do not show the entire crosscut. (Tr. 225). He looked for an empty bolt hole, but was unable to find one and he does not know if the pictures

captured the cited location. (Tr. 215, 225). He explained that it was possible that the plate on the new bolt covered the hole. (Tr. 216). There was mesh in the crosscut and the bolts in the area were on the outside of the mesh, which meant that the mesh was put up before the bolts. (Tr. 216-217). He noted that there was one area where the bolts were under the mesh, but that was where the mesh had to go in a different direction, so it was necessary for those who installed the mesh to pin it. (Tr. 218). There were no gaps in the mesh and it was overlapped in areas. (Tr. 217). Malmgren testified generally that the absence of one bolt will have little effect on an area. (Tr. 224). Further, he stated that the mine had conducted safety meetings prior to April 14, 2010, during which the issue of damaged and loose bolts was addressed. (Tr. 218-220; Consol Ex. 9).

B. Summary of the Parties' Arguments

1. Secretary of Labor

The Secretary argues that Consolidation violated section 75.220(a)(1) when it failed to comply with its approved roof control plan. Specifically, the Secretary asserts that a missing roof bolt resulted in an area of unsupported roof which "greatly exceed[ed]" that which was permitted by the mine's approved roof control plan. (Tr. 227). Roof control plans specify the minimum requirements necessary. (Tr. 228). If a mine fails to install proper support specified by its approved roof control plan, then "the roof is inadequately supported and the safety of all miners [is] . . . put in jeopardy." (Tr. 228). The Secretary asserts that Consolidation does not dispute that a bolt was missing and that it was not in compliance with its roof control plan. (Tr. 227).

Next, the Secretary argues that the violation was of a S&S nature. (Tr. 227). First, the missing bolt resulted in non-compliance with the mine's approved roof control plan and, in turn, was a violation of the cited mandatory standard. (Tr. 228). Second, this violation "contributed to the discrete safety hazard of a roof fall." (Tr. 229). Third, based upon the following factors, an injury was reasonably likely to occur: (1) while only one bolt was missing, that one missing bolt disrupted the entire pattern designed for the subject area; (2) many miners would have been exposed to the hazard while traveling in shuttle cars and on foot in the subject area since it was the last open crosscut at the time the citation was issued; (3) conditions in the area, namely a roof cutter in the same crosscut as the missing bolt, a second cutter in the No. 2 Entry, and the prior occurrence of a roof fall in Entry No. 2 before the area had been bolted, led the inspector to believe that the roof was already deteriorating due to the strain of the weight of the unsupported section of roof[3]; and (4) this mine has "an extensive history of roof falls," and, while those falls

[3] The Secretary relies on two Commission ALJ cases in support of this factor. First, she states that ALJ Barbour, in upholding a violation to be S&S, found that the presence of cutters indicated increased pressure on the roof and, in turn, the roof's instability. (Tr. 230) (citing *Harlan Cumberland Coal*, 19 FMSHRC 911 (May 1997) (ALJ)). Second, the Secretary states that ALJ Moran, in upholding a violation to be S&S, found that the presence of a "slip or cutter" (continued...)

may have been in other areas of the mine and occurred some time ago, the existence of those falls can impact the S&S finding in this case.[4] (Tr. 229-232). Moreover, while no injuries have occurred as a result of roof falls at this mine, that fact is not determinative as to whether a fall in the future is reasonably likely to cause an injury.[5] (Tr. 232-233). Fourth, there was a reasonable likelihood that any injury sustained would be fatal. (Tr. 234). Roof falls are one of the most serious hazards in underground coal mining and historically have been a leading cause of fatal accidents. (Tr. 234-235).

The Secretary asserts that the mine exhibited high negligence given that it "should have known of the violation" and the fact that there were no mitigating circumstances. (Tr. 235). Specifically, the Secretary argues that the use of longer bolts than what were required by the plan does not amount to a mitigating circumstance in a situation where there was no bolt installed. (Tr. 235). The condition was very obvious. (Tr. 235). The area in question was "very active" at the time and was subject to "multiple examinations per day." (Tr. 235). Moreover, warning signs in the area, such as the cutter in the same crosscut and the cutter in Entry No. 2, were an indication that the mine needed to closely monitor the roof. (Tr. 236). Despite the obvious nature of the condition, and the warning signs in the area, the Respondent "still managed to completely miss the missing bolt." (Tr. 236).

This mine was on notice that it needed to pay closer attention to roof-related issues. (Tr. 236). During the two years prior to this violation, the mine had received eighteen citations under the cited standard, three of which were issued in the three months prior to the subject citation. (Tr. 236). The most recent of those eighteen citations was issued in February of 2010 by the same inspector who issued the subject citation. (Tr. 236). When he issued the prior violation he gave mine personnel explicit notice that any further issues would amount to aggravated conduct. (Tr. 237). A different inspector issued a second citation for violation of the same standard in

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[3](...continued)
near an area with overwide bolt spacing supported the inspector's concern that there could be a roof fall. (Tr. 230-231) (citing *Highland Mining Company*, 33 FMSHRC 657 (Mar. 2011) (ALJ)). In the case at hand, while the inspector could not say when a roof fall would occur, based on the cutters, he believed that a fall would occur during the course of continued mining. (Tr. 230).

[4] The Secretary states that ALJ Rae, in upholding a violation to be S&S, considered a mine's history of having a number of roof falls. (Tr. 232) (citing *Centre Crown Mining*, 33 FMSHRC 428 (Feb. 2011) (ALJ)). There, like in this case, according to the Secretary, only a single bolt was missing, yet ALJ Rae found that the violative condition was reasonably likely to result in an injury due to a rock fall. (Tr. 232).

[5] The Secretary states that the Commission, in *Elk Run Coal Company*, 27 FMSHRC 899 (Dec. 2005), stated "that the absence of an injury-producing event when a cited condition has occurred, does not preclude [an] S&S determination." (Tr. 232).

February of 2010, and, in the body of the citation, stated that the operator had been placed on notice. (Tr. 237). Finally, this mine's history of roof falls, which includes falls in other sections of the mine, placed this mine on notice that greater efforts were required for compliance. (Tr. 238)

2. Consolidation

Consolidation argues that it is unclear whether a bolt was ever put in the drill hole that the inspector observed. (Tr. 240). A bolt could have been put in the hole and fallen out, or been damaged and had part of the bolt fall out while part of it remained in the hole. (Tr. 240). Nevertheless, it conceded that the missing bolt violated its roof control plan.

Consolidation argues that the citation was "overwritten and overassessed." (Tr. 240). Consolidation points to a citation issued by a roof control specialist just two months prior on February 2, 2010, which also involved a single bolt, but was found to be non-S&S. (Tr. 240). The Commission has made clear that establishing that an injury *could happen* does not satisfy the third element of the S&S test. (Tr. 245). Here, the roof in the subject area was sound and the cutter in the crosscut, which was so minor that the inspector required nothing to be done about it, was on the outby rib away from the missing bolt. (Tr. 245). Moreover, the inspector himself thought the area directly underneath the hole to be safe enough to stand under without a hard hat on. (Tr. 247). Further, any exposure of miners in the area to the condition would be limited to the very brief time it takes to pass through. (Tr. 248). Furthermore, assuming continued mining operations, the subject area in Crosscut No. 7 would see little, if any, traffic once the next crosscut was developed. (Tr. 248).

With regard to the negligence designation, Consolidation argues that it was improperly assessed by the inspector as "high". (Tr. 241). There were a number of mitigating circumstances, including: (1) this was only one bolt out of thousands in the mine; (2) at least a number of people thought the cited condition was not obvious, including the inspector who initially walked by the condition and did not notice it; (3) the mine was using longer roof bolts than what were required by the roof plan; and (4) the mine was using mesh, which provided additional roof support, in the area. (Tr. 241). Further, while the history of violations shows 18 violations over the previous 15 months, given that this is the 5th most frequently cited standard, there is no way to do a comparison as to whether the history is excessive or not. (Tr. 244). In addition, an examiner is required to look for a wide range of hazards and must also take air readings.

The Secretary's argument that the mine was "on notice " is flawed. First, it is not clear what "on notice" means or how many citations are necessary before a mine is on notice. (Tr. 241). Second, the Secretary cannot expect that providing notice to a maintenance worker at the mine amounts to putting the mine on notice. (Tr. 242). One of the times the Secretary alleges notice to have been given involved a non-S&S citation where, after the issuance, the mine held safety meetings during which the issue was addressed with the mine personnel. (Tr. 242-243). Consolidation argues that MSHA cannot put the mine on notice about things that do not rise to

the level of S&S because it "wastes the resources of this industry, focusing on things that are not significant and substantial." (Tr. 244). Further, while this mine may have a history of roof falls, it is "certainly not the leading roof fall mine in the district." (Tr. 245).

Finally, Consolidation argues that the proposed specially assessed penalty is "egregious" and has no basis. (Tr. 250). The violation was not found to be unwarrantable. (Tr. 250). If MSHA's own formula is applied to the violation as written, which Consolidation does not agree with, then the total penalty is only $12,000. (Tr. 251)

C. Discussion and Analysis

1. The Violation

Consolidation does not dispute the fact of violation. The missing roof bolt clearly violated the mine's approved roof control plan and, in turn, amounted to a violation of section 75.220(a)(1), which requires that "[e]ach mine operator . . . 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). I find that a violation did occur. There are a number of factual disputes, as discussed below, that will need to be resolved in analyzing the gravity of the violation and Consolidation's negligence.

2. Significant and Substantial and Gravity

A violation is significant and substantial ("S&S") if the violation is "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. §814(d)(1). There must be "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). Under the National Gypsum definition, "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 violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (De. 1987) (approving *Mathies* criteria).

In order to meet the requirements of the third, and most difficult to establish, element of the *Mathias* formula, the Commission has provided the following guidance:

> We have explained further that the third element of the Mathias formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in

> which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc. 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining CO., Inc., 6 FMSHRC 1573- 1574 (July 1984).

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

I find that a preponderance of the evidence establishes the following facts. The No. 7 crosscut had been created a short time before Inspector Pruitt arrived. This finding is established by the testimony of Crane and the fact that the crosscut had not yet been cleaned up. I find that, when the crosscut was roof-bolted, mesh was installed at the same time, which covered most if not all of the area. Although Inspector Pruitt did not notice the mesh, the other witnesses testified that the mesh was present. He could have noticed the missing roof bolt with the mesh present. In addition, the photograph shows that the wire mesh was installed under the roof bolts and plates. (Ex. R-8). Nevertheless, it is possible that there was a gap in the mesh at the location of the hole. Although wire mesh will protect miners if a small amount of material from the roof falls, it will not hold up large slabs of coal or rock. As a consequence, the mesh would not have protected miners from the type of roof failure of concern to Inspector Pruitt. He was concerned about the presence of the two cutters that were "working toward each other." (Tr. 40). The inspector believed that a large area of the roof could fall without warning. It is unlikely that mesh would protect miners in the event of such a large roof fall.

Inspector Pruitt's testimony painted a picture of a possible catastrophic failure of the roof. As detailed above, he testified that the roof could fall at any time, injuring or killing a miner in the area, given the history of roof falls, a recent roof fall nearby, the two cutters, and the missing roof bolt. Yet, he walked under the roof where the bolt was missing, removed his hard hat, shined his cap light into the hole, and then stuck his walking stick into the hole. He took these actions before the roof jack was installed. He testified that he needed to determine if a bolt had never been installed or whether an installed bolt had broken or fallen out, yet he said that his findings on gravity and negligence were not dependent on such a determination.

I find that the Secretary established the first two elements of the *Mathies* S&S test as well as the fourth element. The violation created a discrete safety hazard and, if there were an injury caused by a roof fall, the injury would be of a reasonably serious nature or would be fatal. As is typical, the close question is whether there existed a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury.

A number of facts must be considered when determining whether the Secretary established the third S&S element. First, the evaluation is made taking into consideration the length of time that the condition existed prior to the issuance of the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005). It is not required that the Secretary establish that it was more probable than not that an injury would have occurred as a result of the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 2009). In addition, an inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc.*, 52 F3d. 133, 125-36 (7th Cir. 1995).

I find that the Secretary established the third element of the *Mathies* S&S test. I find that the condition had not existed for long. I cannot determine whether a roof bolt was never installed or whether it was broken off by a piece of equipment, although it is noteworthy that a broken roof bolt was not found on the floor and the area had not been completely cleaned up from the development of the crosscut. The evidence shows that the No. 7 Crosscut would not have been used for travel much longer, assuming continued normal mining operations. I credit the testimony of Inspector Pruitt as to the conditions he observed, including the location and condition of the two cutters. I also credit his testimony as to the likelihood of a major roof fall in the crosscut. Although the inspector's actions in walking under the unsupported roof is troublesome, the "fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood for injury existed." *Halfway, Inc.,* 8 FMSHRC 8, 12 (Jan. 1986). Conditions in the area could have quickly deteriorated later that day with the result that a major roof fall was reasonably likely. Roof falls are a major cause of fatal accidents in underground coal mines. The Commission has stated that mine roofs are inherently dangerous and that even a good roof can fall without warning. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan 1984). In this case, given the factors relied upon by Inspector Pruitt, discussed above, including the presence of two cutters, the recent incident in which the roof fell before bolts were installed, and the history of roof falls at the mine, I find that the violation *contributed* to a hazard that was reasonably likely to result in a serious injury or a fatality. The violation was serious.

3. Negligence

I find that the Secretary did not establish that Consolidation was highly negligent and I find that its negligence was moderate instead. Although MSHA inspectors had warned Consolidation's miners and management that it needed to more closely watch the roof, one missing bolt out of hundreds in the area was relatively easy to miss. Consolidation had installed supplemental roof support at the larger cutter and it is clear that the cutter in Crosscut No. 7 had just started to develop. Inspector Pruitt did not require Consolidation to add additional roof support at this cutter. Consolidation was using longer roof bolts than was required by the mine's roof control plan in recognition that it needed to take additional measures to secure the mine roof. Consolidation also installed wire mesh in the area, which provided additional roof support. The fact that it had received about 15 citations for violations of section 75.220(a)(1) over the previous 15 months does not support a finding of high negligence, especially when 12 of these

were designated as non-S&S by MSHA. (Ex. G-1). Other than the single missing roof bolt, there is no evidence that Consolidation was not taking reasonable and sufficient measures to control the roof in the area.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Emery Mine is a large mine and Consolidation Coal Company is a large mine operator. The Emery Mine had a history of about 282 paid violations in the 15 months prior to April14, 2010, of which 44 were designated as S&S. Consolidation did not assert that the penalty proposed by the Secretary would have an adverse effect on its ability to continue in business. Consolidation abated the cited condition in good faith. The gravity and negligence findings are set forth above.

The citation was specially assessed by the Secretary under 30 C.F.R. § 100.5. Taking into consideration the six penalty criteria set forth in the Mine Act, discussed above, including the reduction in the level of negligence, I find that a penalty of $18,000 is appropriate.

III. ORDER

For the reasons set forth above, the citation is **MODIFIED** as set forth in this decision. Consolidation Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $18,000.00 within 40 days of the date of this decision.[6]

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

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

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RWM

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May 16, 2012

SECRETARY OF LABOR, MSHA, on behalf of SEAN TADLOCK, Complainant,	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. LAKE 2012-511-D
	:	VINC-CD 2012-01
v.	:	
	:	
BIG RIDGE, INC., Respondent.	:	Willow Lake Portal
	:	Mine ID 11-03054

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Complainant,
Daniel W. Wolff, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Sean Tadlock pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Big Ridge, Incorporated, to reinstate Tadlock as an employee, pending completion of a formal investigation and final order on the complaint of discrimination he has filed with the Secretary's Mine Safety and Health Administration ("MSHA"). A hearing on the application was held in Benton, Illinois, on May 10, 2012. Big Ridge filed a post-hearing brief. For the reasons set forth below, I grant the application and order Tadlock's temporary reinstatement.

Findings of Fact and Conclusions of Law

Big Ridge operates a large underground coal mine named the Willow Lake Portal, located in Saline County, Illinois. Tadlock began working as a miner for Big Ridge on March 22, 2010. Prior to that, he had worked at the Willow Lake mine for approximately 90 days, while he was employed by a contract labor provider. He performed a variety of jobs, including rock dusting and operating a ram car loading coal from a continuous miner and transporting it to a belt feeder. Tadlock worked the midnight shift, from 11:00 p.m. to 7:00 a.m.[1]

[1] References to work days for the midnight shift can be confusing. Some references are to the "punch-in" date, i.e., the date of the 11:00 p.m. start of the shift, while other references may be to the "punch-out" date, the date on which the bulk of the hours were worked.

(continued...)

On February 16, 2012, Tadlock's employment was terminated effective February 11, 2012. On March 13, 2012, Tadlock telephoned MSHA's Vincennes District Office and spoke to Adron Wilson, a supervisory special investigator. He then provided a formal statement regarding his termination and, on March 14, 2012, filed a complaint of discrimination with MSHA alleging that his termination was the result of his refusing to work for an unsafe foreman. The complaint was investigated and found not to be frivolous. On April 19, 2012, the Secretary filed an Application for Temporary Reinstatement on Tadlock's behalf. Big Ridge timely requested a hearing on the Application.

The Secretary's Witnesses - Sean Tadlock

Tadlock testified that on or about January 5, 2012, Larry Perry, the shift leader on Tadlock's unit, criticized him for taking too long to change a battery in his ram car, when the delay was another miner's fault. Tadlock replied, questioning why Perry was not doing required air and methane checks, and why he did not address Tadlock's complaints about oil leaking into the operator's compartment of his ram car. Tr. 20-23. There was approximately 3/4 of an inch of oil on the floor of the cab, which caused his feet to slip off the pedals, and posed a hazard when he attempted to enter or exit the car. Perry told him to do his own job and not worry about Perry's. The issue of whether Perry was doing required methane and air checks had been called to Tadlock's attention by another miner, who had remarked to the effect "when have you seen Perry doing air or methane checks?" Tr. 24.

Tadlock did not work on Friday, January 6. A fellow miner called him while he was off and told him that Perry had been in the office talking about catching Tadlock sleeping in his ram car in the return air course, and that Tadlock was "off" Unit #1. Tr. 27-28. When he next reported for work, Keith Hawkins, the third-shift mine manager, told him that he was going to be working outby for a while. Tadlock said that he had heard that Perry had said he had caught him sleeping. Hawkins told him not to worry about it because he wouldn't be going back to Unit #1. Tadlock then questioned whether the move had anything to do with his calling Perry an unsafe face boss. Tr. 28-29. Hawkins replied that he was reading too much into it, and that he was not being punished. Over the following week or two, Tadlock had several conversations with Hawkins about the move, during most of which the subject of his complaint to Perry came up. Tr. 31. Tadlock's outby assignments included rock dusting and shoveling accumulations of coal that had fallen off conveyor belts. He stayed on the third shift, and did not lose any overtime hours. Tr. 29.

On February 10, 2012, Tadlock was working outby with Andrew Atchison, a contract worker with limited experience. They were assigned to shovel coal from belt spillages in the North Main 2 and North Main 3 areas of the mine, and to repair a stopping in the North Main 4

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[1](...continued)
Generally, references to dates herein will be to the date on which the hours of 12:00 midnight to 7:00 a.m. were worked.

area. Around 3:30 a.m. they decided to take their 30-minute lunch break. Tadlock wanted to warm his lunch up in a microwave oven and decided to travel to the area of Unit #4, which was approximately five miles from where they had been working. They drove up to the West Main road and proceeded down to where a new Unit #5 was being installed, next to Unit #4.

Hawkins and Thomas Myers, the assistant mine manger, were in that area supervising the set-up of the new unit and the evacuation of a miner who had been injured on Unit #1. They observed Tadlock and Atchison approaching on their man-trip and instructed them to pull over and park so as to free the road up for the evacuation of the injured miner. Hawkins walked down to where they had stopped and asked them what they were doing in the area, and Tadlock replied that he was going to Unit #4 to heat up his lunch in a microwave oven. Hawkins told Tadlock that he needed him to take the man-trip up to Unit #1, and that he would have to help out that crew as best he could.[2] Tadlock replied that he hoped Perry wasn't working the unit, because he would not work for an unsafe face boss. Tr. 34-35. Hawkins told him that Perry was working, and that he should get his stuff and proceed to the working section. Tadlock refused to go to the unit, and Hawkins took him out of the mine and told him to go home. Tr. 35-36.

When he reported for work on Sunday night for Monday February 13, he was told that he had to see Robert Gossman, the human resources manager. The following morning, he returned to the mine and met with Gossman, who informed him that there was an issue with "points" that had to be dealt with before they got to the insubordination. Tr. 40. As reflected in its Policies and Procedures Manual, Big Ridge's "Absentee Program" provided that if a miner had five or more "occurrences," or unexcused absences, within a 12-month period, he would receive a verbal warning; at six occurrences a written warning was issued; and at seven occurrences he was subject to automatic discharge. Ex. R-2. Tadlock believed that he had accumulated only 6 and one-half occurrences, and was not subject to dismissal under the absentee program.[3] Tr. 39.

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[2] In order to remain in production, there must be transportation available for every miner on a unit. A Unit #1 man-trip was used to take the injured miner out, which meant that the unit could not mine coal until the man-trip returned , or another one was made available.

[3] On October 19, 2011, after missing work from October 14-18, Tadlock was given a written warning that he had accumulated six active occurrences, dating from an occurrence on November 2-3, 2010. Ex. R-12. Tadlock next missed work on November 9, 10 and 11, 2011. By then, the November 2-3, 2010, incident was more than 12 months old and did not count for disciplinary purposes. On November 16, 2011, Tadlock was given a paper titled "5 Occurrences" memorializing a verbal warning. Ex. S-5. He was also given another written warning stating that he had reached 6 and one-half occurrences on November 10. Ex. R-4. When Tadlock met with Gossman, he believed that he had 6 and one-half occurrences, based upon the November 16, 2011, written warning, and his belief that his subsequent absences were covered by personal or other days.

Over the next several days, Gossman reviewed time and attendance records with Tadlock, who had retrieved his personal notebook on which he recorded his absences and days worked. Gossman had found what he believed to be errors in prior record keeping, and had determined that Tadlock had accumulated as many as 8 and one-half points, subjecting him to automatic termination. As Tadlock explained, dismissal under the absentee program was something that was difficult, if not impossible, to challenge. Tr. 38-39. Tadlock garnered the assistance of a former union representative, Greg Fort, and continued to meet with Gossman. In the end, each person had his own total of occurrences. Tadlock felt that he had only six and one-half, but acknowledged that Gossman had "given him the benefit of the doubt." Tr. 42. They shook hands, and Tadlock left, having been discharged. Tadlock believed that he had not accumulated seven occurrences, and that he had been discharged because of his complaints about safety. Tr. 43. Fort later told him that there were other miners with as many as 12-17 occurrences who were still working.[4] Tr. 44.

Robert Bretzman

Robert Bretzman is an MSHA special investigator assigned to matters that arise under sections 105 or 110 of the Act, involving allegations of discrimination or personal liability of an agent of an operator. He interviewed several individuals that had knowledge or information pertinent to Tadlock's discrimination allegation, including at least two who did not testify at the hearing. He determined that Tadlock was terminated, in part, because he made a safety complaint. Tr. 79-80. He confirmed that Tadlock had noted oil leaks on pre-operation check lists for his ram car, that it would have been proper to take a complaint involving maintenance of equipment initially to the face boss, and that his discussions with Gossman had left him unclear about why there had been two warnings about occurrences given to Tadlock on November 16, 2011. Tr. 85. He also confirmed that Tadlock would have had to drive "pretty fast" to get to Unit #4 in ten minutes as he had claimed, and that Atchinson had told him something to the effect that Tadlock had said that if they were designated to fill in on Unit #1 for the injured miner that he would say that Perry was unsafe in order to avoid the assignment. Tr. 89-91.

Big Ridge's Witnesses - Andrew Atchison

Atchison had served in the military for almost ten years, and began working as a miner in August 2011. He is employed by the Dave Stanley Corporation, which provides personnel to mine operators in a contract basis. On February 10, 2012, he was working at the Willow Lake mine and was paired with Tadlock to work on outby projects. They were assigned to shovel

[4] Gossman denied that miners who exceeded seven occurrences were allowed to continue working. He explained that a miner might accumulate more than seven occurrences if he applied for Family Medical Leave. Big Ridge did not classify as occurrences absences that occurred while the application was pending. If the application was denied, intervening absences would be counted, which could result in a miner having a significant number of occurrences and being terminated. Tr. 221-22.

spilled coal and repair a stopping. They shoveled coal on the Main North belt line, and decided to take their lunch break about 3:00 a.m. Tadlock had mentioned, in general conversations, that he did not like Perry, but did not specify exactly why, other than an incident involving a ram car in a return. Tr. 101-02. Tadlock stated that he wanted to warm up his lunch, and intended to go to a microwave oven in Unit #4. Atchison told him that he didn't think that was a good idea, because it involved a 25-30 minute drive, and all the supervisors were in that area installing the new Unit #5. Tr. 104-05. Since he was a "red hat," an inexperienced miner, he did not protest too strenuously, even though they passed a microwave oven not far from where they had been working. Tr. 106-07.

When they got to the Unit #5 area, Hawkins or Myers flagged them down and told them get off the road because there was an injured miner being brought out. Myers approached and asked them; "Why in the world are you guys up here?" Tr. 108. Tadlock responded that they were going to heat up his lunch - it was lunchtime. Hawkins came over about ten minutes later and asked why they were up there, and questioned why they had come that far to heat a lunch when there was an oven close to where they were assigned to work. Atchison stayed out of the conversation. He protested to Tadlock that the bosses had caught them up there, and that they were probably going to be put to work on Unit #1 where the miner had been injured. That unit could not produce coal without equipment sufficient to transport all of the crew, and the man trip used to transport the injured miner meant that the unit had to be shut down until it returned or another man trip was made available. Tr. 110-111. Tadlock replied that he was not going to work for Perry, "I don't like him, and I'm not going." Tr. 111. Atchison replied that they were not going to have a choice - they were going to be sent up to Unit #1. Tadlock responded that "they will just have to take me out first. I will tell them Larry Perry isn't safe and I have caught him not doing air checks or something. I don't care. I'm not working. I'm not going." Tr. 111. Atchison thought that Tadlock was stating that he would make up a reason for not working for Perry, because his disliked him. He had never heard anything about Perry being unsafe. Tr. 111-12.

Hawkins then came back over to them and stated that he needed one of them to go up to Unit #1 and take the man-trip up there. Tadlock replied that he was not going up to Unit #1, using some "colorful words." Tr. 113. Hawkins questioned Tadlock about his refusal to go to Perry's unit, and Tadlock confirmed his refusal and told Hawkins "You can take me out first." Tr. 114. Hawkins then instructed Tadlock to get on his man-trip and took him out of the mine. Atchison was adamant that Tadlock never said anything to Hawkins about Perry being unsafe. Tr. 115-16.

Thomas Myers

Myers was the assistant mine manager on the third shift at the Willow Lake mine. He was with Hawkins in the area of the new Unit #5 when the roads were being cleared to facilitate the transport of a miner who had been injured on Unit #1. They heard, then saw, Tadlock and Atchison approaching on a man trip and Hawkins instructed them to pull over and park it. Hawkins walked down to where they had parked, about 250 feet away, and spoke to them.

Myers followed a few minutes later, and as he approached, Hawkins said that "They are going all the way to Number 4 Unit to heat their lunch." Tr. 129. Myers responded "You got to be kidding." Tr. 129. Myers estimated the distance that Tadlock and Atchison intended to travel at five miles, which would have taken at least 35 minutes. Tr. 133-34. Hawkins observed that the left side of Unit #1 could not run coal without the man trip that had been used to transport the injured miner, and that he was going to send Tadlock with the man trip up to the unit. He then told Tadlock to take the man trip up to Unit #1 so that they could continue to run coal, and to help out any way he could. Tr. 134-35. Tadlock replied that he did not want to work for Perry, and Hawkins confirmed that he would be working for Perry. Tadlock replied that he would not work for Perry; that he would go home. Tr. 135. Hawkins replied that he could work for Perry or he could go home, to which Tadlock replied that he would go home. Tr. 135. Hawkins then took Tadlock out of the mine.

Myers was present during the entire conversation. He did not hear Tadlock say anything about safety, and had never heard him say anything about Perry being unsafe or about safety on his unit. Tr. 135-37. After they had finished their shift, they went to the office and talked to Gossman about what happened. They considered Tadlock's actions to be insubordination, which was grounds for termination. Gossman said that he would look into it, and asked them to prepare written statements about the incident, which they did.

Keith Hawkins

Hawkins was the mine manager on the third shift on February 10, 2012. He was responsible for work assignments, including Tadlock's assignment to do shoveling and general outby work. Tr. 147. Hawkins was at Unit #5 on February 10 when he saw a man-trip approach. He motioned for it to pull over and park in order to clear the road for evacuation of an injured miner. He then noticed that it was Tadlock and Atchinson, and he walked over and inquired what they were doing on that side of the mine. Tadlock told him that he was going to heat his lunch in Unit #4. Hawkins told him that he couldn't plan on having a place to heat his lunch and that there were other microwave ovens closer to where they were working. Tadlock didn't "take it too well."[5] Tr. 149. The man-trip carrying the injured miner then came out, and Hawkins told Tadlock that he needed him to take the man-trip up to Unit #1 and help them, so that they could go on with their production. Tr. 149. Tadlock stated that he wasn't going to go and inquired who the boss was. Hawkins answered that Perry was the boss, and Tadlock said

[5] Tadlock replied that he ought to have the right to eat his lunch wherever he wanted to, to which Hawkins replied that wasn't "the way we do it." Tr. 166. He noted that it would have taken Tadlock 30-40 minutes to make the trip each way, and after eating and socializing a little, he would have lost two and one-half hours of work time. Tr. 166.

that he wasn't going to go. Hawkins said that he was either going to go to the unit, or he would be taken out. Tr. 150. Tadlock said he wasn't going, and was instructed to get his things, and was transported by Hawkins out of the mine.[6]

Hawkins testified that Tadlock did not mention anything about Perry being unsafe, failing to take air checks or making him operate unsafe ram cars. Tr. 150-51. He also stated that Tadlock had never had any conversations with him about Perry being unsafe, and had never heard anything from anyone else about Perry being unsafe. Tr. 151-52. Hawkins kept a notebook and recorded events of interest that occurred during the work day. He recorded the February 10 incident, and did not include a mention of Tadlock making safety complaints about Perry. Tr. 152-53; Ex. R- 13.

Hawkins and Tadlock followed the injured miner out of the mine. Hawkins checked on the miner, and Tadlock showered and left. Hawkins and Myers spoke with Gossman, and each prepared a written statement on the incident at Gossman's request. Tr. 154; Ex. R-6. When Tadlock reported for work on Sunday night, Hawkins told him that he could not work until he spoke with Gossman, which was Gossman's instructions to him. Tadlock then left the mine.

Hawkins explained that Tadlock's transfer from Unit #1 to outby work occurred as a result of reports that Tadlock was not staying on his production run, but was pulling his ram car off into the return. Tr. 158. Hawkins moved people around all the time. As he explained, if someone wasn't fitting into the production run, whether a miner or a boss, he would move him to a different unit or outby. Hawkins denied that Tadlock had ever inquired of him whether the reassignment had anything to do with him complaining about Perry's safety. Tr. 161.

Larry Perry

Perry was the Unit #1 shift leader on the midnight shift. He was responsible for the left side of the unit and a crew of six miners. He took air flow readings in the intake and the return; and gas checks every 20 minutes in all working areas and the intake. Tadlock worked for him as a ram car operator, transporting coal from the continuous miner to the feeder. Perry denied that Tadlock had spoken to him in January about not taking air readings and operating unsafe equipment. Tadlock had never voiced such complaints in his presence. Tr. 174-75. He believed that because of Tadlock's work duties he would have no knowledge of whether the required checks were bring done. Tr. 173. Equipment operators performed pre-operational checks and would bring any concerns to his attention. If it was a leak, he would send them to maintenance. Operators could also take a piece of equipment directly to maintenance if he was not available, e.g., taking an air reading in the return. Tr. 175-76.

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[6] Hawkins sent Atchison up to Unit #1 with the man-trip. As an inexperienced miner, there was not much he could do to help, but the presence of the man-trip allowed the unit to go back into production. Tr. 165.

Perry got along fine with Tadlock, at least until he was transferred from the unit. Perry did have some problems with Tadlock's performance. As many as two or three times per day, he would find that Tadlock had taken his ram car over to the return to rest, leaving the other two cars to load the coal. Tr. 183-84. He spoke to Tadlock, telling him the work was at the face, and it wasn't fair to the other ram car operators to make them carry the bulk of the load. Eventually, Perry spoke to Hawkins about Tadlock, and he was moved off of Unit #1 to outby labor. Tr. 179-80. Perry was concerned that Tadlock was talking about him, calling him a back stabber and having him kicked off the unit. Perry confronted Tadlock in the "diesel barn," and asked him why he was doing that. Tadlock apologized, and said that he was just upset. Perry was "aggravated and upset" that he was being "falsely accused" by Tadlock of not taking gas and air readings and allowing oil leaks on equipment. Tr. 168.

Robert Gossman

Gossman is senior manager of human resources at the Willow Creek mine. He is responsible for personnel matters, including the termination of employees. On the morning of February 10, Hawkins and Myers came into the office and related the work refusal incident with Tadlock. Consistent with establish procedure, he asked them to document it, and they prepared statements. They did not state that Tadlock had said anything about not wanting to work for Perry because he was unsafe. Tr. 200-01. Gossman told Hawkins that Tadlock should not work again until he was finished his investigation and had spoken to Tadlock. Tr. 201. He always reviews attendance records, because they tell him a lot about the employee. Gossman knew that Tadlock "rode the attendance system right at the brink" and would often miss another day as soon as one of his prior occurrences dropped out of the 12-month period. Tr. 202.

He explained that under Big Ridge's "no-fault" absentee program, essentially any day that a miner was scheduled to work, but did not, counted as an "occurrence," unless he had an allowance day to cover it. Each miner was allowed three personal days and one floating vacation day in a calendar year. Miners that worked the midnight shift worked a schedule that included more days than other work crews. Consequently, they got one non-scheduled day off that they could take during a month, not a paid day, just a day that they could take off without being charged an occurrence. Tr. 194-95.

If a miner accumulates five occurrences within a 12-month period, he is given a verbal warning, which is documented. If he reaches six occurrences, he is given a written warning. At seven occurrences, he is automatically terminated. Tr. 196; Ex. R-2. Absence records are updated weekly, so there is often a lag time between a miner's absence and any warning that might be triggered by it.

He did a review of Tadlock's attendance in the time-keeping system and came up with eight or nine occurrences. He asked Melissa Robie, who normally updates the system, to review available records, including absence reports filled out by supervisors. She concluded that there was a day in June 2011 that had been missed that should have been an occurrence. It hadn't been noted as one because Tadlock had failed to report for work and had not called in, and his

supervisor missed it and had not filled out an absence report. Tr. 202-03. There was another instance where Tadlock had missed two days in a row, which had been recorded as one occurrence, but which should have been recorded as two occurrences because Tadlock had given a reason different than a continuation of a personal illness for one of the days. Tr. 203. There was another day, February 8, 2012, that Tadlock had missed, but which had not yet been updated on attendance records. Tr. 203-04. Tadlock's occurrences "went from six and one-half to eight and one-half or nine pretty quickly." Tr. 204. Gossman did not pursue the insubordination charge, because he "didn't need to." Tr. 204. He knew that Tadlock did not have any personal days, or a floating vacation day to substitute for any of the occurrences because he had taken those days early in January. Consequently, he had "pointed out" on absences. Tr. 204-05.

He first talked to Tadlock about 1:30 in the afternoon on Monday, February 13, when Tadlock returned to the mine after leaving on Sunday night at Hawkins' instruction. Gossman told Tadlock that he had more than seven occurrences, and Tadlock said that he didn't think so. Gossman went through the paperwork that he had available at the time, including some of the back-up documents, e.g., absence reports. Tr. 208; Ex. R-9. Tadlock thought that he had worked on some of the days in question and said that he kept attendance notes in a book at home. Gossman gave him a note listing the days in question, and asked him to get the book and come back the next morning, so that they could go through the records and eliminate any misunderstandings. Tr. 209. Tadlock called the next morning and advised that he wanted to bring Fort with him. Fort had been a union representative, but there was no union at the mine at the time. Gossman said that her could bring Fort with him, as long as he understood that Fort was not a union representative. Tr. 211-12. He had Robie prepare a calendar showing Tadlock's status on each day of the month for October 2011 through February 2012. Tr. 211-12; Ex. R-5.

Gossman believed that Tadlock agreed that he had missed a day, possibly June 6, 2011, and that it should have been counted as an occurrence. Tr. 212-13. They also went over the mis-characterized days, November 9, 10 and 11. The absence reports show that on November 9 he left early because he was sick. On the 10th he reported that he was caring for a sick family member, and on the 11th he again reported sick.[7] Ex. R-9. Gossman explained that those days should have counted as two occurrences, but that they had originally been counted as only one.[8] Tr. 214.

[7] The reports for the 10th and 11th respectively were made on the 9th and 10th, because the notifications were received at or before the start of the shift, i.e., the day prior to when the bulk of the shift hours would have been worked. Ex. R-9.

[8] Gossman related that the half-day personal illness on the 9th should have blended into the personal illness day on the 11th, even though they were not on consecutive days. Tr. 214, 244-45.

Gossman Fort and Tadlock went over the attendance records, both Big Ridge's and Tadlock's, and tried to reach consensus on the number of occurrences. However, even though none of the days missed in January counted as occurrences, Tadlock disputed that he had used all of his personal days, one of which should have been available to cover an unexcused absence. He had not brought his book for 2012 with him, however, so they adjourned so that he could bring it in the following day. Tr. 216. They again went over the records on February 15, and Gossman related that he showed Tadlock that, even if the February 8 absence and the February 10 early departure were not counted, he still had seven and one-half or eight occurrences. Tr. 220. Tadlock put his head down and said, "I did this to myself, didn't I." Tr. 220. Gossman agreed and asked whether Tadlock understood where he had gotten the numbers, and Tadlock replied that he did. Gossman believed that, at that point, they were all in agreement that Tadlock had pointed out. Tr. 220-21. They stood, shook hands, and Tadlock departed. Tadlock was formally terminated on February 16, effective February 11, the day after the last day worked. Tr. 223; Ex. R-8.

The Applicable Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

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

"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." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd,* 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *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 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of 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 (April 1981).

A miner's ability to complain about safety issues is a fundamental right afforded and protected by the Act. Complaints made to an operator or its agent of "an alleged danger or safety or health violation," is specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). The Secretary presented evidence that Tadlock engaged in activity protected under the Act. Tadlock testified that he complained about unsafe mining practices, both to his immediate supervisor, Perry, and to the mine manager, Hawkins, when he questioned why he was being moved from Unit #1to outby work. He further testified that he repeated his assertions to Hawkins when he refused to go to Unit #1 on February 10, 2012. He suffered adverse action when his employment was terminated, not having worked after being told to leave the mine on February 10, immediately after his latest claimed engagement in protected activity.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.* Here, the adverse action immediately followed claimed protected activity. It is also arguable that Tadlock's reassignment to outby work evidenced hostility toward his claimed complaints of unsafe mining practices to Perry.

As stated in its closing argument, and post-hearing brief, Big Ridge advances three arguments in contending that the Secretary has failed to establish that Tadlock's complaint of discrimination is not frivolous. First, it argues that the evidence conclusively establishes that it had an objective, legitimate non-discriminatory reason for terminating Tadlock, i.e., that he had

exceeded seven occurrences under the absentee program. Consequently, Tadlock cannot, as a matter of law, prevail on the merits of any future discrimination complaint, and he has no right to temporary reinstatement now, even if Big Ridge had been motivated in part by a discriminatory purpose. Second, there is no evidence that Gossman, who made the determination to terminate Tadlock and who was identified in Tadlock's MSHA complaint as the person responsible for the discriminatory action, had any knowledge of Tadlock's claimed protected activity. Third, "even under the arguably narrow latitude that this Court has to weigh the credibility of witnesses," Tadlock's claims are "so sensational" that his testimony should be disregarded as not credible. Resp. Br. at 2.

Unfortunately for Big Ridge, its arguments run afoul of established precedent defining the limited scope of a Temporary Reinstatement Proceeding. Its first argument rests on the premise that it established conclusively that Tadlock was terminated for a legitimate non-discriminatory reason, an affirmative defense upon which it would prevail in any subsequent proceeding on the merits. While the defense may not be as strong as Big Ridge believes,[9] the short answer to this argument is that reaching the merits of a, yet unfiled, discrimination claim would be well beyond the scope of this proceeding, which is limited to a determination of whether the Secretary has established that the claim made by Tadlock is not frivolous.

Big Ridge's second argument is also precluded by established precedent. While there was no direct evidence that Gossman was informed of Tadlock's claims of protected activity, a reasonable inference could be drawn that he was so informed in his discussions with Hawkins and Myers about the insubordination incident. That aside, the short answer to this argument is that "in a temporary reinstatement proceeding the Secretary is not required to prove that [the adverse action decision maker] had knowledge of [the miner's] protected activity. Rather, she [i]s required to show only that [the miner's] complaint was not frivolous." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 718 (July 1999).

Big Ridge's third argument also is easily disposed of. In essence, it argues that Tadlock's testimony regarding his claims of protected activity should be found not credible. Big Ridge introduced evidence that raised serious challenges to Tadlock's credibility. Its witnesses uniformly refuted Tadlock's assertions that he engaged in protected activity. Atchison testified that Tadlock's remarks gave him the distinct impression that he would fabricate an assertion of

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[9] There was ambiguity to at least some of the claimed occurrences. Gossman explained that while he understood that Tadlock and Fort agreed that Tadlock had pointed out, there apparently was no agreement as to the actual number of occurrences. Tr. 257. The calendar prepared by Robie does not appear to reflect that Tadlock took any of his monthly third shift extra days, and it is unclear whether one or more of those days could have been available to cover an absence. Ex. R-5. The record also does not reflect how Big Ridge dealt with situations where a miner had been given a written warning that later proved to have been erroneous.

protected activity in order to avoid working for Perry. However, the Commission has repeatedly instructed that judges should not resolve conflicts in testimony at this preliminary stage of a discrimination proceeding.

The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.,* 920 F.2d at 744. "It is 'not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.'" *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC.*, 31 FMSHRC 1085, 1088 (Oct. 2009) (*quoting Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). *See also Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary's prima facie case, are simply not appropriate at this stage in the proceeding). Congress intended that the benefit of the doubt be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources*, 920 F.2d at 748, n.11.

The U.S. Court of Appeals for the Eleventh Circuit has described the test for whether the Secretary has established that a claim of discrimination was not frivolous as follows:

> If the evidence produced by the Secretary viewed in the light most favorable to the claimants, together with all inferences that can be made in favor of claimants, would reasonably support a finding that claimants had established a prima facie case, the claim cannot be said to be frivolous.

Drummond Company, Inc. v. FMSHRC and Secretary of Labor on behalf of Owens, (11th Circuit No. 02-14394, May 9, 2003) (unpublished opinion at 6). I find that to be an appropriate statement of the law.

Here, the Secretary produced evidence, in the form of testimony by Tadlock, that he engaged in protected activity on several occasions, and that following his protected activity his work assignment was changed, and his employment was terminated. Viewed in the light most favorable to Tadlock, that evidence would reasonably support a finding that he engaged in protected activity. He clearly suffered adverse action. As previously noted, given the proximity in time between Tadlock's claimed protected activity, his change of work assignment and his termination, an inference could be drawn that the adverse action was motivated at least in part by his protected activity.

I find that the Secretary has established that Tadlock's claim of discrimination is not frivolous.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Big Ridge, Inc., is **ORDERED to reinstate** Tadlock to the position that he held prior to February 11, 2012, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

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

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May 16, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-780-M
Petitioner,	:	A.C. No. 01-00003-191878-01 B96
	:	
	:	Docket No. SE 2009-781-M
v.	:	A.C. No. 01-00003-191878-02 B96
	:	
	:	Docket No. SE 2009-885-M
	:	A.C. No. 01-00003-194678-01 B96
	:	
CCC GROUP, INC.,	:	Mine ID: 01-00003
Respondent.	:	Mine: O'Neal Quarry & Mill

DECISION

Appearances: Winfield Murray, Les Brody, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Petitioner;
William H. Howe, Howe, Anderson & Steyer, PC., Washington, D.C., for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor (the "Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against CCC Group, Inc. ("CCC") at the O'Neal Quarry & Mill (the "mine"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The three dockets captioned above include seven alleged violations with a total proposed penalty of $174,629.00. At hearing, the parties reached a settlement agreement regarding four of the seven citations/orders. The terms of the agreement are addressed below. Three citations/orders remain at issue. The parties presented testimony and documentary evidence at a hearing commencing on February 8, 2012, in Birmingham, Alabama.

The subject citations were issued in May, June and July of 2009, and in each citation/order Respondent was cited for a violation of 30 C.F.R. § 56.16009, a mandatory safety standard for metal and non-metal surface mines that requires that "[p]ersons shall stay clear of suspended loads." Inspector Richard L. Tucker issued the first two citations, while Inspector Harold Wilkes issued the third. Each of the three citations was designated as significant and

substantial ("S&S") and an unwarrantable failure. The first and third citations were issued in conjunction with imminent danger orders that are final orders of the Commission and are not at issue in this case. In each instance, steel beams, weighing 600 pounds, were being hoisted by a crane. The citations/orders, as issued, reflect that workers were allegedly under the load and/or within the arc, or swing, of the beam.

I. BACKGROUND

Based upon careful consideration of the testimony and documentary evidence provided at hearing, my observation of the witnesses during their testimony, and my review of the exhibits, transcripts, and briefs submitted by the parties, I make the following findings.

The O'Neal Quarry and Mill, a multi-bench open pit limestone quarry owned and operated by Chemical Lime Company of Alabama, Inc., is located near Calera, Shelby County, Alabama. Limestone is drilled and blasted, then loaded into haul trucks and transported to the plant where it is crushed, sized, and separated according to chemical composition. CCC constructs buildings as a part of its business and was a contractor at the mine. The citations at issue relate to the construction activities of CCC at the mine, specifically the erection of a steel beam structure. The parties stipulated that the O'Neal Quarry and Mill is a mine as defined by the Act, that the mine is subject to the Mine Act, that CCC is subject to the provisions of the Mine Act and that the ALJ has jurisdiction. Jt. Ex. 1.

CCC was engaged in the construction of a steel beam structure adjacent to the silos at the mine. The construction required the hoisting of beams, often at a forty-five degree angle. (Tr. 86); Sec'y Ex. 1. The project had been ongoing for a month or two before the first "hoisting" citation was issued in April, 2009. The first citation, not at issue in this case, was eventually settled and CCC paid a modified penalty. The citation was issued because a miner was not clear of a suspended load; specifically, a 600 pound beam that was being hoisted by a crane. In May of 2009, Inspector Richard Tucker was at the mine when he observed a miner cross a tape barricade and walk under a suspended load; again, a 600 pound beam being hoisted by a crane. At the same time, Tucker observed two men in an elevated man-bucket, under the suspended beam, pushing the beam with their hands. As a result, Tucker issued an imminent danger order and a citation. The following month, in June of 2009, Tucker received photographs from CCC that demonstrated that CCC had engaged in the same conduct. After questioning CCC's safety supervisor, Tucker issued a third citation for not being clear of a suspended load. Finally, in July of 2009, CCC was cited a fourth time for not being clear of a suspended load when Inspector Harold Wilkes observed a miner standing next to a suspended load, using his hands to direct the load.

CCC asserts that in all situations, men were clear of the suspended loads and were not directly under the suspended beams at issue in the respective citations/orders. Witnesses for CCC explained the company's procedure for lifting the steel beams and putting them into position on the structure.

With regard to the May and June 2009 citations/orders, the beams, while on the ground, were rigged onto the crane's line at a 45 degree angle so that the beam was oriented in the position that it would eventually be attached to the structure. In both instances, the rigging was done by an experienced person who then signaled, either by radio or hand signal, to the crane operator to lift the load. Two men, Josh Phillips and John Carroll, were in a man-bucket near the position where the beam was to be placed, but approximately ten feet away from the structure. The beam was raised over the structure and then lowered into place. Phillips, from the man-bucket, used radio and/or hand signals to communicate with the crane operator and guide the beam. Phillips, at some point, moved the man-bucket to the beam so he and the other miner could position the beam by pushing it with their hands, and then install the bolts to hold the beam in place. According to Jimmy Allen Hodges, CCC's project superintendent, the beam could not be placed without the miners placing their hands on it to move it into place and install the bolts. (Tr. 88-90). In contrast, MSHA asserts that the beam must be in position before it is touched and bolted.

CCC witnesses testified that they were clear of the load, both when it was lifted and lowered into place, and when using their hands to move the beam and position it. CCC did not use tag lines when positioning the beams, and instead relied on the miners to use their hands to move and direct the beam into place. The inspector's testimony reveals that the man-bucket was within 2-3 feet of the beam while it was moving, even from overhead.[1] In most instances the man-bucket was not ten feet away from the beam as the beam was being lowered as alleged by CCC. Further, the beam was put in place by hand, and not by the crane operator or by use of a tag line. The testimony of all CCC witnesses focused primarily on whether the beam was directly overhead during the process. The CCC witnesses did not acknowledge that there was a separate danger of the beam swinging and the miners being within the arc, or swing, of the beam. Hodges, the project manager for CCC, indicated that tag lines are always on the beam, but they are only used in the event the beam begins to swing out of control. Phillips, the operator of the man-bucket, and Person, the safety supervisor, agreed. It is also agreed, that for the citation issued in May, 2009, a CCC miner walked under the barricade tape and was under the suspended beam, in addition to the men in the man basket who were, at the very least, within the arc of the swing of the load.

Josh Phillips, an iron worker for CCC for eight years, worked in the man-basket along with another miner, John Carroll. Phillips was directing the installation of the beam when the May and June citations were issued. When the July citation was issued, he was on the ground moving a beam with his hands while standing in its direct path. Phillips explained the procedure he used for rigging the beams and moving them it into place. He utilized a radio and/or hand signals to communicate with the crane operator as the load was being moved. At some point during the process, Phillips moved the beams into place with his hands and then bolted the

[1] While there is some disagreement as to the safety of the procedure utilized by CCC, it appears that the procedure may have been acceptable to MSHA if the men had not positioned the beam with their hands, but instead used tag lines to pull the beam into the proper position. Since the violations relate to any number of occurrences where the men were not clear of the load, the fact that they used their hands to put the beams in place is only one of the issues.

beams to the structure. Although Phillips avers that he stays back from the beam until it is in place, the inspector's testimony and the photographs entered into evidence demonstrate otherwise. In both the May and June citations, the beams were within feet of the bucket in the photos, and in some instances the beam was above the bucket, at least partially. Phillips agreed that the bucket was only 2-3 feet away from the suspended beams as he moved the beams into place with his hands, but he argues that the bucket remained back about ten feet while the beams were being lowered to his position. However, Phillips also testified that when he moves beams into place, he likes the beams to be at eye level for better control, and often signals the crane operator to lower the load from its position overhead. Consequently, the beams are above the bucket at some point during the placement. Phillips testified that the suspended beams remain between the building and the bucket and, if a beam fell, it would not fall onto the bucket. However, he did not address what would happen if the beam started to spin while only a few feet from the man-bucket, with no one holding the tag line. Phillips disagrees with MSHA that tag lines should be used and believes that having two tag lines to direct the beam into place is more dangerous than the method he utilizes. His method eliminates the need for a second worker who would be stationed high on the structure in order to guide the beam into place with a tag line.

Connie Person, the safety supervisor for CCC at this worksite, testified that she has worked for CCC for eleven years. According to her testimony, in May of 2009, she was called to the operation area because an inspector alleged that the men in the man-bucket were under the beam. She approached the area and subsequently determined that the man-bucket was not operating under the suspended load. She recalled that the inspector explained several alternative methods to move the beam into place but did not agree with the assessment of the inspector. (Tr. 157-158). The procedure CCC was using had been used in other locations and she considered it a safe way to operate. After the May citation was issued, Person was instructed by the company to re-enact the procedure and take photographs to submit to her supervisor, which she did. The photographs demonstrate that in doing so, she was often directly under the suspended load. Subsequently, after submitting the photos to MSHA, CCC received the June citation for workers not being clear of the load during the re-enactment. (Tr.160). Finally, when the third citation was issued in July, Person had just walked away from the area when the beam shifted and Phillips attempted to redirect it with his hands. Person testified that Phillips was near the end of the beam and since it was not above his head, she saw no violation. As the miner in charge of safety and training, Person held a meeting after each citation was issued and reinforced the fact that men should not be under a suspended load or cross into the flagged area. (Tr. 170).

Person, like the other CCC's witnesses testified that she was aware of the various citations issued, beginning in April and ending in July, but disagreed that there was a violation in each case. CCC also agreed that, in April, a miner walked under the beam as it was being hoisted and, as a result, CCC was issued a citation that led to CCC using a louder horn to warn workers away. Nevertheless, Inspector Tucker observed the same conduct when he issued the citation in May.

Inspector Tucker and Inspector Wilkes testified to the facts as explained in the "condition or practice" in each citation. I find both Inspectors to be knowledgeable and credible witnesses. The photographs bolster their testimony, and demonstrate that they observed miners, either on

the ground or in the man-bucket, who were not clear of the loads. There is little dispute of fact in this case, except perhaps as to the distance the miners were from the beam during certain portions of the beam placement. I find that the man-bucket at issue in the May and June citations was 2-3 feet away from the beam when the beam was moving and being pushed into place. In addition, the citation issued in May describes a CCC miner who walked under the barricade and into the area where there was a hoisted beam overhead. Tucker testified that in June he observed the men in the man-bucket in the same position, albeit in photographs, as the position he cited in May.

There may or may not have been tag lines on the beams, but CCC witnesses agree that the tag lines were used only in the event that the beam began to spin or move out of control. In order to place beams safely into their intended location on the structure, Inspector Tucker explained that a tag line on each side of the beam would be a safe alternative, and that the miner on one side can push, while a miner on the other side can pull the beam without being in the radius of its movement until it is in place. CCC insists that a tag line is not practical given that a miner would have to climb the stairs to the area where the beam is being hoisted, and then, with safety measures in place, pull the beam into the correct location. In any event, the method employed by CCC exposed miners in the man-bucket to the arc or swing area of the beam, and in many instances, the man-bucket was located partially or fully under the beam as the beam was lowered from above.

II. DISCUSSION

The three citations/orders at issue involve alleged violations 30 C.F.R § 56.16009, which requires that "[p]ersons shall stay clear of suspended loads." The Secretary's regulations do not define "clear" "suspended" or "loads." Moreover, the Commissioners have not yet addressed the standard at issue. "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). In *Haines & Kibblehouse, Inc.*, 30 FMSHRC 504 (June 2008) (ALJ), Commission Judge Barbour provided a thorough analysis of the ordinary meaning of the terms in the subject standard, the standard's goal, and what is required of an operator to comply with the standard.[2]

> Section 56.16009 is straightforward. "Persons shall stay clear of suspended loads." A "load" is defined as "a mass or weight supported by something." *Webster's Third New International Dictionary* (2002) at 1325. The noun "load" is modified by the adjective "suspended," and when used as an adjective "suspended" is defined as being "held in suspension." *Id*. at 2303. Thus, a "suspended load" is a mass or weight supported by something that is being held in suspension. To be held in suspension is to be in the "state of being hung." *Id*. "Hung" is the past tense of "hang,"

[2] While I am not bound by the decisions of other administrative law judges, in appropriate circumstances, their decisions may provide guidance.

> which is defined as "to fasten so as to allow free motion within given limits on a point of suspension." *Id*. at 1029. Thus, I conclude a "suspended load" is a mass or weight fastened to allow free motion within the given limits of its point of suspension or support, and this is the same meaning I would reach if I interpreted the standard by applying "suspend" as a verb instead of "suspended" as an adjective.
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> The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius. The logic is simple and irrefutable. When persons are outside the limits of a load's point of suspension, they will not be struck and injured or struck and killed when the load moves freely.
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> [S]ection 56.16009, like many of the standards promulgated under the Mine Act, contains the *sub silentio* requirement the operator ascertain the specific prohibition of the standard and determine whether a hazard exists. Since it is clear the hazard against which the standard is directed is that of a person being struck by a hanging load, the question is whether a reasonably prudent person familiar with the industry and the protective purposes of the standard would have recognized that under the circumstances [the operator was required to relocate its employees to a different and safer location such that they were clear of the suspended load]

Haines at 516-517. Further, Commission Judge Morris interpreted the standard to include not only the limit of the load from the point of suspension, i.e., the arc or swing, as Judge Barbour did, but also the area under the load and the "area which the load would strike in falling, or after impact, in toppling over, and that area encompassed by the possible spilling of any contends [sic]. The position of the miner in relation to the suspended load is the pivotal factor which determines whether the standard has been violated." *Anaconda Co.*, 3 FMSHRC 859, 861 (Apr. 1981) (ALJ).

There is no dispute that the beams cited by Tucker and Wilkes are suspended loads within the meaning of the standard. Once the crane lifts the beams off of the ground, and before the beams are placed and secured, they are suspended in the air and, hence, considered a suspended load.

The primary issue in this case is whether persons were "clear" of the suspended loads. The cited standard is aimed at preventing a miner from being struck by a suspended load. I agree with the earlier ALJ decisions and find that, in order to comply with the cited standard and be "clear" of the suspended loads, miners must not only be outside the limit of the point of suspension, i.e., the limit of the arc or swing of the load, should the load move/spin, but also must not be underneath the load or in the area that would be affected should the load fall. While Section 56.16009 does not explicitly require the use of taglines or prohibit the use of one's hands to position a load, "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" would certainly not expect to be in compliance with the standard when miners are present within the arc of the load, directly under the load, or in the area that would be affected should the load fall. *See Ideal Cement Co*., 12 FMSHRC 2409, 2416 (Nov. 1990).

Each of the three violations at issue were designated by the respective inspector as significant and substantial. A S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The Secretary further alleges that the violations were the result of high negligence or reckless disregard on the part of CCC, and, in some cases, amounted to an unwarrantable failure to comply with the mandatory standard. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9

FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353.

a. Docket No. SE 2009-780-M

Citation No. 6084023

On May 28, 2009, Inspector Richard Tucker issued Citation No. 6084023 as a 104(d)(1) citation to CCC for a violation of Section 56.16009 of the Secretary's regulations. The citation alleges that:

> Three miners were not clear of a suspended load. The miners were working in a man lift under and traveling below an area that the 75 ton crane was using to move a 600 LB beam with one strap 'unbalanced' from stock area to installation point. Miners struck by a 600 lb beam falling up to 60 ft would likely receive fatal crushing injuries. The Supervisor Richard Evans and Jimmy Hodges engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This violation is one of the factors cited in imminent danger order No. 6084023[[3]] dated 5/28/2009. Therefore no abatement time was set.

The inspector found that a fatal injury was highly likely to occur, that the violation was significant and substantial, that three persons would be affected, and that the violation was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of $70,000.

[3] The imminent danger Order No. was incorrectly recorded in the body of the citation. The correct number is Order No. 6084022

Based upon my discussion of the facts and applicable law set forth above, I find that the persons in the man-bucket, and the individual on the ground who walked into the barricaded area, were not clear of the suspended load. I credit Inspector Tucker's testimony that the suspended beam was either partially or fully above both individuals in the man-bucket and the individual on the ground that entered the barricaded area. Moreover, the individuals in the man-bucket were within the arc, or swing, of the beam. Accordingly, I find that the Secretary has established a violation of the cited standard.

I also find that the Secretary has established that the violation was S&S. I have found a violation of the cited standard and I find further that the violation will lead to an accident, which in turn will result in a reasonably serious injury. The violation contributed to a discrete safety hazard, the hazard of being either under or within the arc of the suspended 600 pound beam which is likely to move, be out of control, or come loose from the rigging and fall, thereby striking the miners in the man-bucket or falling on the miner in the barricaded area below. It is common for beams to swing or spin while being hoisted and put into place, and with miners within a few feet of a heavy beam moving out of control, it is likely that the beam will strike the miner or the bucket and the miner will suffer an injury. The evidence supports a finding that it is likely that the beam will spin out of control, strike the man-bucket and cause injury to the miners in the man-bucket. Lifting the beams from the ground and swinging them into place on the building required numerous lifts and failing to guard against the hazard of a swinging beam by moving the men outside the beam's possible path makes the resulting accident reasonably likely to occur. Moreover, a miner hit by the 600 pound beam could suffer a serious injury in a number of different ways. A swinging beam could impact the miner and cause injury, pinch a body part between the beam and another object, knock the miner from the man-bucket, or hit the man-bucket and cause a failure of the lift arm. Given the weight of the beam, the distance of its movement, the close proximity of the miners in the bucket, and the bucket's 500 pound weight limit, the Secretary established it was reasonably likely the nature of any resulting injury would be serious, if not fatal. I find that the violation is significant and substantial.

Inspector Tucker found the violation was the result of CCC's high negligence. Tucker explained that he "had conducted safety meetings with every person at this – job site[,]" including Hodges and Person who was the onsite safety supervisor. (Tr. 28). In addition, Tucker, on "multiple occasions," stopped work he observed being done CCC employees when he thought the miners were about to be placed in a hazardous position. He explained, more than once, alternative methods to lift and move the beams without exposing workers to the load. After the first citation in April, CCC continued to argue with Tucker and assert that OSHA law applied. (Tr. 32). CCC denies that it was put on notice that the process exposed workers to the moving load, or that Chemical Lime advised CCC to change its practice to conform to MSHA standards. In this regard, I credit the testimony of Tucker and find that CCC was put on the notice that greater compliance efforts were needed and that CCC's negligence was high.

Tucker determined that this violation was the result of aggravated conduct on the part of the operator and that it amounted to an unwarrantable failure to comply with the standard. Tucker credibly testified that the unwarrantable designation was based upon several factors,

including the fact that an identical citation had been issued to CCC the previous month and, following that citation, there were discussions with CCC regarding the proper method to place the beams that would keep the miners clear of the arc, or swing, of the load, as well as keeping the miners out from under the load. The day the subject citation was issued, Tucker described the condition as obvious. He observed a miner lift the barricade tape and walk into the area as the beam was being lifted and moved into place, and also saw men in the bucket above, who were within feet of the moving beam, place their hands on the beam to move it into place. He saw no tag line.

Tucker could not say for certain how long the condition existed, but he explained that, at one point, after instructing CCC on the proper method for installing the beam, he observed them use tag lines and do it in a safe manner. He observed that "they did it properly, they used tag lines, pulled the beams into place, they knew how to do it. But do I have faith that they did it for every lift after that? No." (Tr. 43). Nevertheless, based upon the attitude of Person, other supervisors, and Phillips, Tucker believed that the mine returned to its own practice after he left the property and that, from the time he issued the first citation in April until this citation in May, the mine continued to use the practice they preferred, i.e., having men within 2-3 feet of the swinging beam push the beam into place with their hands. Tucker also explained that the mine had been put on the notice that greater efforts were required to comply through the many meetings and trainings. He did not believe that CCC took the cited condition seriously and, while the project supervisors and safety supervisor had been informed that they were violating the standard, they continued the practice. CCC presented no mitigating evidence to counter the unwarrantable failure allegation. Instead, the mine continued to insist that the method it uses is preferable to the tag line method suggested by MSHA, and that its miners were never in danger of being hit by the beam. I disagree.

Several additional factors stand out in regard to the unwarrantable failure designation. I find that the violative condition was not only obvious and extensive, but it posed a high degree of danger in the two distinct areas covered by this citation. First, the miner who moved the barricade and walked into the area looked up and saw the beam above his head. Second, the miners in the bucket were only 2-3 feet from a moving beam that was at least partially above them at points during the operation, and were moving the beam into place with their hands. The evidence establishes that the 600 pound beam was hanging from a crane and being moved, both across the area where men were working, and next to the men in the bucket. The load was held only by a single strap and two employees working in a confined area were in its direct path. The serious injuries that would have been suffered by those working under the load further confirm the high degree of danger presented by the violative condition. All of these factors establish that the operator exhibited aggravated conduct in committing the violation and the unwarrantable failure designation is appropriate.

b. Docket No. SE 2009-781-M

Citation No. 6084030

On June 15, 2009, Inspector Richard Tucker issued Citation No. 6084030 as a 104(a) citation to CCC for an alleged violation of Section 56.16009 of the Secretary's regulations. The citation alleges that:

> Two miners were not clear of a suspended load. The miners were working in a man lift under an area that the 75 ton crane was using to move a 600 LB beam with one strap 'unbalanced' from stock area to installation point. Miners struck by a 600 lb beam falling up to 60 ft would likely receive fatal crushing injuries.

The inspector found that a fatal injury was highly likely to occur, that the violation was S&S, that two persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. At hearing the Secretary moved to conform the pleadings to the proof and modify the citation to a 104(d)(1) order with high negligence. The motion was granted. The Secretary has proposed a civil penalty in the amount of $31,988.

Inspector Tucker issued Citation No. 6084030 based upon a series of photographs provided by CCC. (Tr. 33). After the citations for failure to stay clear of a suspended load were issued in April and again in May of 2009, off-site CCC management decided to demonstrate the method they use to install the beams and discuss the violations with MSHA. To that end, the safety supervisor took photographs of miners engaged in the same process and sent them to the CCC main office. CCC Ex. G. The main office then forwarded some of the photographs to the MSHA district office. The photographs eventually found their way back to Inspector Tucker. According to Tucker, the photos were evidence of a violation of 30 C.F.R. § 56.16009 due to the fact that "[t]he load is still above the miners' heads [and] . . . [t]wo photos showed them grabbing the load directly and having direct contact with the load, and no photos showed them tending the tag line." (Tr. 37-38). There is no dispute that the activities taking place in the photos submitted by CCC are identical to those discussed above. In fact, CCC conducted the exercise that resulted in the photos in such a manner so as to recreate exactly what was cited in Citation No. 6084023. Accordingly, for many of the same reason discussed above, I find that a violation occurred.

With regard to the inspector's S&S designation, I have already found a violation of the cited standard. Moreover, the violation contributed to a discrete safety hazard, the hazard of the suspended beam striking the miners in the man-bucket. It is common for beams to swing while being hoisted and put into place. I find that it is reasonably likely that a miner in a man-bucket that is within the beam's arc would be hit by a swinging beam. Moreover, a miner hit by the 600 pound beam could suffer a serious injury in a number of different ways. A swinging beam could impact the miner and cause injury, pinch a body part between the beam and another object, knock the miner from the man-bucket, or hit the man-bucket and cause a failure of the lift arm. Given the weight of the beam, the distance of its movement, the close proximity of the miners in

the bucket, and the bucket's 500 pound weight limit, the Secretary established it was reasonably likely the nature of any resulting injury would be serious, if not fatal. I find that the violation is significant and substantial.

Tucker originally designated the violation as being the result of moderate negligence because he did not actually see the violation, and instead only viewed the condition in the photographs presented by the operator. At hearing, Tucker testified that the violation should have been designated as high negligence and an unwarrantable failure to comply, just as Citation No. 6084023 had been. While it is true that the safety supervisor who took the photographs exhibited a high degree of negligence, she was told to do so by Gary Klatt, the corporate safety director. Klatt testified that he believed that the persons on the job at CCC were following company policy, and that as long as no worker was under the load, there was not a violation. In this regard, Klatt was credible when he testified that he did not realize there was a violation or that taking the photograph would place men in an unsafe position. I find that Person and Hodges were highly negligent and, therefore, the citation should be designated as such. At the same time, I find that, given the testimony of Klatt, there are mitigating circumstances to negate a finding of unwarrantable failure. I believe that Klatt would not have taken photographs of an obvious violation if he believed the miners were in any danger, and he was not adequately advised by Person. I granted the Secretary's motion to modify the citation to a 104(d)(1) citation, but I find that its original designation as a 104(a) citation is more appropriate. Accordingly, I modify the citation to a 104(a) citation with high negligence, and vacate the unwarrantable failure designation.

c. Docket No. SE 2009-885-M

Citation No. 6513337

On July 15, 2009 Inspector Harold Wilkes issued Citation No. 6513337 as a 104(a) citation to CCC for an alleged violation of Section 56.16007(a) of the Secretary's regulations. The citation alleges that:

> An Iron Worker/Rigger was not using a tag line while positioning a hoisted I-beam. The man was pushing the beam with his hands. The beam was approximately 27 feet in length and 8 inches wide (by measurement) and was approximately four feet above the ground. The beam was being hoisted by a terex 55 ton crane. A tag line was attached to the end he was pushing; a tag line was not attached to the other end. The worker was standing near the end of the raised beam; in the event the I-beam fell or was inadvertently lowered serious injuries would likely occur. Injuries would likely be crushing to the feet and legs.

> This condition was a factor that contributed to the issuance of imminent danger Order No. 6513336 dated 07/15/2009. Therefore no abatement time set.

The inspector found that a permanently disabling injury was reasonably likely to occur, that the violation was S&S, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. Subsequently, after learning of the earlier violations, Inspector Wilkes modified the citation to a 104(d)(1) order for an alleged violation of Section 56.16009. He further modified the order to reflect that it was the result of the operator's reckless disregard and unwarrantable failure to comply with the mandatory standard. At hearing the Secretary moved to conform the pleadings to the proof and modify the order to a 104(d)(2) order with high negligence. The motion was granted. The Secretary has proposed a civil penalty in the amount of $63,071.

On July 15, 2009, while conducting an inspection at the mine, Inspector Wilkes observed a miner standing next to a large I-Beam. The miner, Phillips, was one of the individuals who had been operating the man-bucket at the time of the May and June violations, discussed above. Phillips had rigged the beam and, at the time Wilkes observed the scene, the beam was suspended about four feet off of the ground. As the beam began to move in the direction of the barricade, Phillips placed both his hands on the beam and pushed it way from the barricade. I credit Wilkes testimony that Phillips' arms were not extended and his body was "directly next to the beam." (Tr. 64). While a tagline was on one end of the beam, Phillips did not use the line. Phillips was in the arc of the swinging beam. While Phillips testified that the beam was never above his head, there is no dispute as to the facts, and I find that the beam was in a position to hit him or fall onto his feet or legs. Phillips was not clear of the suspended load, as is required by the cited standard. Accordingly, I find that the Secretary has established a violation of the cited standard.

With regard to the inspector's S&S designation, I have already found a violation of the cited standard. Moreover, the violation contributed to a discrete safety hazard, the hazard of the suspended beam striking the miner whose hands were on the beam. As noted above, it is likely that a beam will move or be out of control, and a man standing next to a 600 pound beam, with only his hands to move it back into place, is likely to suffer an injury. Therefore, I find the violation, that of being within the arc or swing of a 600 pound beam is reasonably likely to lead to an injury. The Secretary has suggested that an equipment failure, the failure of the rigging, or the crane operator experiencing a sudden heart attack, were reasonably likely to occur, thereby causing the beam to swing out of control or fall. The Secretary has also set forth the more plausible argument that beams often are out of control when being moved and, in fact, this beam had moved outside the barricaded area and Phillips was attempting to control its movement when he pushed it with his hands. Phillips' position relative to the beam placed him in danger and made it reasonably likely that he would he would be struck and suffer an injury. While a beam striking a person at four feet above the ground may not be fatal, it is reasonably likely to lead to a serious injury. Therefore, I agree that the violation is significant and substantial.

Wilkes testified that he based his unwarrantable failure designation on the number of citations and orders that CCC had been issued for the violations of the same standard. (Tr. 71). I agree that the violation is the result of high negligence given the involvement of Phillips in other violations and the continued insistence by MSHA that he stay clear of suspended loads. However, I find that, while this violation does involve a suspended load, it presents a sufficiently different set of facts from the other violations discussed at hearing to render the Secretary's unwarrantable failure designation inappropriate. Moreover, while the condition may have been obvious, it existed for only a short period of time, was not particularly extensive, was immediately abated, and, although the violation is significant and substantial, the evidence does not demonstrate that it presented a high degree of danger. Accordingly, I find sufficient mitigating facts to vacate the unwarrantable failure designation.

III. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) 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. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once 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 of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size (i.e., large operator) and ability to continue in business. Jt. Ex. 1 The history shows a number of violations prior to the citations/orders that were issued in this case, including a number of citations for failing to stay clear of a suspended load. Sec'y Ex. 7. The negligence and gravity of the respective violations are discussed above. I note that given the attitude and lack of interest by the safety supervisor, the high negligence findings are warranted and are the basis for the increase in penalties. The citations were abated in a timely manner. The following

penalties are appropriate in this case, given the statutory criteria.

Citation No. 6084023 $70,000
Citation No. 6084030 $45,000
Citation No. 6513337 $65,000

At hearing, the parties reached a settlement agreement regarding four other citations and orders included in Docket No. SE 2009-781-M. The originally proposed penalty for those four violations was $9,570.00. The parties have agreed to settle those citations and orders for a total modified amount of $3,618.00. The individual amounts and modifications are as follows.

Citation No. 6084017 modify from moderate negligence to low with a penalty of $541.00
Citation No. 6084019 modify to lost workdays with penalty of $1,995.00
Citation No. 6084020 modify to low negligence with a penalty of $541.00
Citation No. 8084021 modify to low negligence with a penalty of $541.00

I accept the representations of the parties and find the settlement to be reasonable.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of $183,618 for the citations decided after hearing and those that were settled at hearing. CCC Group, Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of $183,618 within 30 days of the date of this decision.

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

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

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May 25, 2012

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of ROBERT NICKOSON,	:	Docket No. WEVA 2012-1069-D
Complainant,	:	MSHA Case No. HOPE-CD-2012-05
	:	
v.	:	
	:	Mine: Mammoth Coal Processing
MAMMOTH COAL COMPANY,	:	Plant and River Tipple
Respondent.	:	Mine ID: 46-03317

DECISION AND ORDER
REINSTATING ROBERT NICKOSON

Appearances: Ahn LyJordan, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Blvd, 22nd Floor West, Arlington, VA representing the Secretary of Labor on behalf of Robert Nickoson

Thomas Kleeh, Esq., and Daniel Fassio, Esq., Steptoe & Johnson, PLLC, Chase Tower, Eighth Floor, P.O. Box 1588, Charleston, WV for Respondent.

Before: Judge Andrews

On April 30, 2012, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 801, et. seq., and 29 U.S.C. § 2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Robert Nickoson ("Nickoson" or "Complainant") to his former position with Mammoth Coal Company ("Mammoth" or "Respondent"), at the Mammoth Coal Processing Plant and River Tipple, pending final hearing and disposition of the case.

On February 3, 2012, Nickoson filed a Discrimination Complaint alleging, in effect, that his termination on January 23, 2012, as a MEO & Plant Mechanic was motivated by his

protected activity.[1] In the Secretary's application, she represents that the complaint was not frivolously brought, and requests an Order directing Respondent to immediately reinstate Nickoson to his former position, or a comparable position, within the same commuting area and at the same rate of pay and benefits he received prior to his discharge, pending a final Commission order on his complaint.

Respondent filed a request for hearing on May 8, 2012. An expedited hearing was held in Charleston, West Virginia on May 21, 2012. The Secretary presented the testimony of the Complainant, and Respondent did have the opportunity to cross-examine the Secretary's witness and present testimony and documentary evidence in support of its position. *See* 29 C.F.R. § 2700.45(d). At the hearing, the parties agreed that any temporary reinstatement should be economic only.

STIPULATIONS OF FACT

The parties agree and stipulate as follows:

1. 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 Federal Mine Safety and Health Act of 1977 (the "Act").

2. Mammoth Coal Processing Plant was a "person" as defined in Section 3(f) of the Act at the time the relevant events took place.

3. Mr. Robert Nickoson was a "miner" as defined in Section 3(g) of the Act at the time the relevant events took place.

4. Mr. Nickoson was employed by Mammoth Coal Company as a mechanic and equipment operator beginning on January 2009 and was discharged by Mammoth Coal Company on January 23, 2012.

Exhibit JX-1.

DISCUSSION OF RELEVANT LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. 30 U.S.C. § 815(c). The purpose of this protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of health and safety, they must be protected against

[1] Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *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 623 (1978).

In adopting Section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *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 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.,* 9 FMSHRC 1305, 1306 (Aug. 1987) aff'd, 920 F.2d 738, 747, n. 9 (11th Cir. 1990).

Temporary reinstatement is a preliminary proceeding, and narrow in scope. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.,* 21 FMSHRC 717, 719 (July 1999). As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Id*. Rather, the substantial evidence standard applies.[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co*., 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d at 744.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of 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 sub nom. Consolidation Coal Co. v. Marshall*, 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).

However, in the instant matter, Nickoson need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity, (2) knowledge of the protected activity, and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

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[2] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989)(*quoting Consolidated Edison Co. v. NLRB*, 305 US 197, 229 (1938)).

CONTENTIONS OF THE PARTIES

The Secretary contends that there is reasonable cause to believe that Nickoson's dismissal was motivated by his exercise of protected activities as a miner's representative, accompanying inspectors and reporting safety hazards. She further contends that Nickoson's prior discrimination complaint was supported by paperwork evidencing his proper designation as a miner's representative, but was refused the opportunity to accompany an MSHA inspector in June 2011. The Secretary argues that, while Nickoson acknowledges swearing at the safety meeting, this was not directed at Foreman Powers, but the situation surrounding his two days off work due to illness. She states that Nickoson was given a five day suspension, but was terminated upon returning to work. She identifies the protected activity as a miner's representative and filing a complaint when his right to accompany an MSHA inspector was violated as the actual reason that Nickoson was terminated and as evidence that the instant complaint was not frivolously brought.

Respondent contends that Nickoson was discharged for unprotected and insubordinate conduct during a safety meeting where he displayed disruptive, disrespectful and inappropriate behavior by cursing both Foreman Powers and the company by using foul, vile and crude language. It also contends that his discharge was not related to any alleged safety hazard or unsafe practice complaint that Nickoson purportedly made to any supervisor during his tenure at Mammoth. Respondent disputes that Nickoson never called in about his absence on January 13, 2012. Respondent argues that the complaint of discrimination is wholly frivolous.

THE EVIDENCE

A. Prehearing Submissions

On February 3, 2012, Nickoson executed a Summary of Discriminatory Action, filed with his Discrimination Complaint. In this statement, he wrote:

> On January 23, 2012, I was discharged from my job at the Mammoth Coal preparation plant in retaliation for my status of and active role as a Miner's Representative. In part, as a result of my actions, a petition for the Assessment of Civil Penalties was filed against the company on September 2, 2011. See, Docket No. WEVA 2011-2280. Also, as a result of my activities as a Miner's Representative, the company previously discriminated against me by removing me as a Miner's Rep. and I was forced to file a Discrimination Complaint, which is still pending. See, Case No. HOPE CD 2011-11.
>
> I am asking to be reinstated to my job and made whole for all lost wages and benefits.

Submitted with the Secretary's Application for Temporary Reinstatement was the April 20, 2012 Affidavit of James R. Humphrey, a Special Investigator employed by MSHA. Under oath, the Special Investigator made the following statement:

1. I am employed as a special investigator of the Mine Safety and Health Administration, United States Department of Labor, in Mt. Hope, West Virginia.

2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the discrimination claim filed by Robert Nickoson on January 11, 2012. My investigation to date has revealed the following facts:

    a. At all relevant times, Mammoth was engaged in the processing of coal which enters commerce and had operations which affected commerce and, therefore, is an "operator" as defined in § 3(d) of the Mine Act.

    b. The applicant, Robert Nickoson was employed by the Respondent as a mechanic and equipment operator at the Mammoth Coal Processing Plant and River Tipple, and therefore, is a "miner" within the meaning of § 3(g) of the Mine Act.

    c. Mr. Nickoson's employment with Respondent at the Mammoth Coal Processing Plant and River Tipple began on or about January 2009.

    d. In June of 2011, Nickoson filed a Discrimination Complaint for not being recognized as a designated miner's representative and being refused opportunity to accompany an MSHA inspector during his inspection on June 8, 2011. In Nickoson's June 2011 complaint, he contends that he was being discriminated for engaging in the protected activity of being a miner's representative and for pointing out unsafe work practices to supervisors and inspectors. The matter is still open. Mammoth was made aware of those protected activities.

    e. Nickoson thereafter submitted the proper paperwork and began acting as an official and acknowledged miner's representative by the end of June 2011. Nickoson contends that he continued actively reporting safety hazards at the Mammoth Coal Processing Plant in his roles as miner's representative.

    f. On Thursday, January 12 and Friday, January 13, 2012, Nickoson missed work due to an illness. Nickoson states that he was called into work on the 12th to notify them that he would not be into work. Nickoson was given a doctor's note allowing him to remain out of work until Saturday, January 14th. On Friday, January 13th, Nickoson called back into the office and was informed they were not running on Saturday, so he returned to work on Monday, January 16th.

    g. On Monday, January 16th, Foreman Powers conducted a safety meeting. At the conclusion of the safety meeting, he asked if anyone had any further questions. At that point, Nickoson asked Powers how he had handled the two days which Nickoson

was off for his kidney stones in the previous week. Powers told Nickoson that he had turned those days in as "personal days." At this point, Nickoson stated something to the effect of "Damn it Roger, I told you last year not to turn in my damn personal days. If I wanted my personal days, I would call and tell you. I'm tired of this f-cking shit." Nickoson acknowledges that he swore during the meeting, but contends that he was not swearing at Powers, but rather at the situation. At the end of Nickoson's shift that day, he was told to report to the mine superintendent, Jon Adamson.

h. In that meeting, Adamson questioned Nickoson regarding the swearing in front of 20 miners at the conclusion of the safety meeting. Nickoson again confirmed that he'd sworn, but had not directed it at Powers personally. Powers agreed. Adamson told Nickoson that he would do more investigating into the incident.

i. On Tuesday, January 17th, Adamson met with Nickoson prior to the start of the shift and informed Nickoson that he would be serving a five day suspension.

j. On Monday, January 23, 2012, Nickoson returned at the end of his five day suspension and met with Craig Boggs (president of Brooks Run North), Kyle Bane (human resources), Larry Ward (general manager), Jon Adamson (superintendent) and Roger Powers (foreman). In the meeting, Boggs informed Nickoson that he had "zero tolerance for cussing, disrespect, and absenteeism." Statement of Robert Nickoson, February 22, 1012. Nickoson was terminated.

3. There is reasonable cause to believe that Mr. Nickoson was discharged because he engaged in protected activities as a miner's representative and reported a safety hazard. This retaliatory employment action violation Section 105(c) of the Mine Act. I have concluded that the complaint filed by Mr. Nickoson was not frivolous.

B. Testimony of Robert Nickoson

Nickoson has been a miner since 1975. Tr. 12. Although he has worked at only one location, it has changed hands several times, eventually being bought by Massey and Alpha Natural Resources in January 2009. Tr. 12. Since that time, Nickoson has worked as a belt walker and was later assigned to run the loader. Tr. 12.

Nickoson testified that the previous owner of the mine property was Horizon. Tr. 13. In 1993, Nickoson was designated as a miner's representative and, in that capacity, accompanied inspectors and reported violations to the company that were brought to his attention. Tr. 16. In 2004, the operator engaged in a company-wide union lockout. Tr. 13. Jon Adamson ("Adamson") was the mine superintendent at that time. Tr. 13. During the lockout, the miners engaged in picketing and set up a "picket shack" directly across the road from the mine entrance. Tr. 13-15. Nickoson was the captain of the midnight shift and ensured that there were always enough men present during the picketing. Tr. 13, 14. This lockout continued for approximately two months and ended when a court order was issued, directing Horizon to return eighty five employees to their jobs. Tr. 14, 15. In reality, only about nine returned to work and Nickoson was not among them. Tr. 15, 16.

By the time that Nickoson returned to the mine in 2009, Massey had purchased the property and it was no longer represented by a union. Tr. 15, 16. Nickoson testified that he did not return to the mine as a miner's representative because the mine was not represented by a union and he did not want to "cause no waves" until he had an opportunity to see how the mine operated. Tr. 17. However, he testified that he changed his mind in January 2010 when a few of the miners asked him to be their representative. Tr. 17. He claims that he was designated as a miner's representative and began making complaints concerning the belts and equipment shortly thereafter. Tr. 17, 18. These complaints were made to Mine Superintendent Adamson. Tr. 18. On cross-examination, Nickoson testified that the issues he raised were addressed and handled, even if they did take a long time.[3] Tr. 78.

Nickoson described an incident involving an inspection where Charles Hamilton ("Hamilton") was the company representative. Tr. 21. Nickoson pointed out several pieces of equipment in need of repairs which resulted in the writing of several citations to Mammoth by the inspector. Tr. 20, 21. Nickoson testified that he turned to Hamilton and said, "I hope you don't get mad at me." Tr. 21. Hamilton replied, "I hope you don't get mad at me." Tr. 21. Nickoson took this to imply that Hamilton was going to report all of Nickoson's activities during the inspection to Adamson. Tr. 21. However, Nickoson admitted on cross-examination that he did not know whether Hamilton talked to Adamson after this exchange. Tr. 56.

In June 2011, Nickoson stated that his shift was almost over when an MSHA inspector pulled onto the property. Tr. 22. When Nickoson asked where he was going, the inspector stated that he had been at the mine since before noon, but was told that Nickoson no longer served as a miner's representative, so the inspection would have to wait until that shift was over. Tr. 22. According to Nickoson, who was unaware of any problems with his status as a miner's representative, this information came from Adamson. Tr. 22. In order to regain his position as a miner's representative, Nickoson had to fill out paperwork, have it approved by MSHA and then take Alpha Resources' "Running Right"[4] class. Tr. 23. At this time, he also filed a separate discrimination complaint under 105(c) that is still pending.[5] Tr. 24. On cross-examination,

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[3] The exception to this statement is an issue with a power substation. Tr. 80. The details are a little murky, but Nickoson testified that management was allowing miners to enter the substation when certified electricians should be the only people entering. Tr. 80, 81. To his knowledge, this situation was never addressed, even though Adamson had been informed. Tr. 80, 83.

[4] Nickoson testified that "Running Right" is a board or committee interested in safety. Tr. 26. Although unclear from the testimony, this is a way of anonymously alerting Respondent to equipment defects through the use of cards that can be filled out and placed in a box. Tr. 26, 27. The committee then reviews them once every week or once every two weeks. Tr. 27. Nickoson volunteered to be on this board because it pertained to safety; however, he was not chosen. Tr. 28, 29. Instead, he claims that the board is comprised of Adamson's "kiss asses." Tr. 29.

[5] In this complaint, Nickoson only sought to be reinstated as a miner's representative, not for any type of compensation. Tr. 52.

Nickoson admitted that once his miner's representative paperwork was re-filed, he was not removed from that status until the date of his discharge. Tr. 53. He was permitted to accompany inspectors while on the job site and no one from the company tried to prohibit him at any time. Tr. 53, 54

Nickoson testified that, except for his becoming a miner's representative in 2010, there were no other miner's representatives from 2009 until late summer or early fall 2011. Tr. 31. However, he stated that neither one of these men were known to be active in making safety complaints. Tr. 32. When Nickoson was not at the mine to accompany inspectors, he stated that only mine management accompanied them. Tr. 33.

On the morning of January 12, 2012, Nickoson stated that he got up, dressed himself for work and became ill enough that his wife took him to the emergency room. Tr. 34. His wife also called Adamson to inform him of the situation; however, Nickoson does not know what the response was to her call. Tr. 34, 35. Nickoson remained in the emergency room, where he was informed that he had kidney stones, until late that night and was told to stay at home and drink plenty of water in order to pass them. Tr. 35. Nickoson testified that the doctor gave him a note to stay home and Nickoson called into work on January 13, 2012, to explain his absence and determine whether the company was working on Saturday. Tr. 35, 36. The response was that the operation was not running on Saturday, so Nickoson reported back to work on Monday. Tr. 36.

Nickoson stated that the policy for calling in absences had recently changed and he did not know the proper procedure. Tr. 36. Nickoson stated that Adamson had read the absentee policy to the men, but explained that it would take two to three months for them to receive their packets; however, it had also been posted on the bulletin board in the bathhouse and Nickoson admitted that he did not read it. Tr. 39, 40, 60. It was further revealed on cross-examination that a memorandum and letter had been distributed to each employee by some method. Tr. 60. Nickoson stated that he remembered receiving the document, but likely threw it in the trash because it said "absenteeism policy." Tr. 60.

Upon returning to work on January 16, 2012, Nickoson attended Respondent's safety meeting with about twenty other miners conducted by Foreman Roger Powers ("Powers"), who was Nickoson's direct supervisor. Tr. 37, 40, 67. At the end of the meeting, he asked if anyone had any questions and Nickoson asked what type of days had been turned in for Nickoson's absence on the 12th and 13th. Tr. 37. Powers replied that personal days had been turned in. Tr. 37. At this point, Nickoson testified that he said, "Hot damn, Rog, I told you all last year if I wanted personal days that I would call down here and tell you give me a personal day." Tr. 37. He added that he was "getting tired of this fucking shit" and that "[t]hese companies are getting dumber and dumber." Tr. 37, 70. Near the end of Nickoson's shift, Powers approached him and said that they needed to ride to the office to see Adamson. Tr. 41. Adamson explained that twenty miners had said that Nickoson "cussed Roger like a dog." Tr. 41. Nickoson stated that

these men were liars and testified that Powers agreed with Nickoson and stated that he was "cussing about his p-days[6]." Tr. 41, 42. Adamson stated that he would check into the situation further, to which Nickoson replied that Adamson's problem was that [Nickoson] was not one of his "kiss ass buddies." Tr. 42. Nickoson then left the premises.

The next day, Powers instructed Nickoson to report to Adamson's office. Tr. 43. Adamson handed him a piece of paper stating that he was suspended for five days and included a statement about "intent to discharge." Tr. 43. Nickoson was told to sign the paper, but refused to do so because he "didn't do what they had wrote up." Tr. 43. Instead, he stated that his lawyer would like it and left. Tr. 43.

Nickoson returned to work on January 23, 2012, for a "return-to-work" meeting. Tr. 43. He stated that Craig Boggs ("Boggs"), Kyle Banes, Adamson, Powers, Larry Ward and a new HR man were also in attendance. Tr. 43. Nickoson had brought a miner's representative with him and, although they originally allowed him in the office, they did not allow him to enter the meeting. Tr. 44. Nickoson testified that he was asked a few questions about the absentee policy[7] and Nickoson asked some questions about a boss cussing a man with no discipline and unsafe practices engaged in by the company. Tr. 45. He received no answers to his questions, but was asked to wait downstairs for their decision. Tr. 46, 47. When he was called back to the room, he was told that he was being terminated. Tr. 46, 47. Nickoson apologized for using the language in the meeting, but testified that this type of language is used in the mine on a daily basis by both miners and management. Tr. 47-49, 89. He did admit that other miners had been asked to "tone it down" by Adamson. Tr. 49. He stated that these miners were not suspended, much less terminated, but admitted that he actually did not know whether complaints were registered. Tr. 49, 57.

C. Testimony of Craig Boggs

Boggs has been the Business Unit President for the Brooks Run North Business Unit since June 1, 2011. Tr. 91. He started his career in mining as a general laborer and miner with Rawl Sales & Processing in Matewan, West Virginia in 1988. Tr. 91. After college, he began working for Massey Energy in 1994 as an accounting trainee and has held several positions both within the mine as well as in human resources and management prior to his current position. Tr. 92, 93. Boggs is directly responsible for the policies concerning suspension and discharge. Tr. 94. He explained that the policy is that the employee is suspended while the company does its own investigation into what occurred. Tr. 94. No matter how serious a violation is, Boggs stated that the employee is suspended with intent to discharge. Tr. 94.

In the early fall of 2011, Boggs realized that absenteeism was becoming a real issue that was disruptive to the individual work sites. Tr. 95. The new absenteeism policy was meant to curb absenteeism quickly and be viewed as a fresh start beginning January 1, 2012. Tr. 95. All

[6] This is a reference to personal days.
[7] Although Nickoson testified that he did not understand the absentee policy, he admitted that he did not ask any questions of management and, in fact, refused to read the documents that were given to him and posted. Tr. 36, 40, 60, 61.

of the human resources managers at the work sites were to distribute the memorandum and policy papers to every employee by mailing them to their homes. Tr. 96. The letter explains the company's zero tolerance policy for absenteeism and it was accompanied by the policy itself. Tr. 96; Ex. R-A. The policy itself explained to employees how personal days were going to be used going forward. Tr. 97; Ex. R-A. He explained that the policy was needed because of employees missing work for personal reasons, but still ending up with personal days at the end of the year because they were mischaracterizing their days off. Tr. 97. To fix this, the new absenteeism policy applied personal days to the first thirty-six hours taken off by an employee. Tr. 97. Doctor's excuses could then excuse any further time off. Tr. 97.

In addition to mailing the paperwork to the employees' homes, Boggs testified that he instructed general managers of each work group to conduct meetings to explain the new policy. Tr. 98. These meetings were to be held in December so that the employees understood the policy when it went into effect on January 1, 2012. Tr. 98. To this day, Boggs testified that he has never received any questions or complaints about the policy. Tr. 98.

In describing the termination process, Boggs stated, generally, an employee first receives a suspension with intent to discharge. Tr. 99. Boggs is then notified of this through the human resources department and a back-to-work meeting is then set up for the employee at the end of the suspension. Tr. 99. In the time between the suspension and the meeting, the company will develop information at the individual work site. Tr. 99, 122. He stated that he likes to attend these meetings because he can hear the employee's side of the story, which is then used in determining what actually occurred. Tr. 99. Boggs testified that a suspension with intent to discharge does not automatically result in a termination and situations have occurred within his tenure where employees were disciplined in ways other than discharge. Tr. 99. Additionally, Boggs testified that, in some instances, a supervisor has been found to be wrong in the suspension and the employee was paid for the time that he was off. Tr. 102.

On the day of Nickoson's suspension, Boggs was informed by General Manager Larry Ward that Nickoson had been suspended for insubordination and unacceptable conduct at a safety meeting. Tr. 100. At that point, Boggs asked for information regarding what had occurred and any witness statements from the occurrence. Tr. 100. He was supplied with approximately twenty to twenty-five handwritten statements that were all relatively similar in nature. Tr. 100, 101. He recollected that the statements generally described the situation as Nickoson belittling a foreman in front of a group by cursing and referring to the company as "f'ing stupid." Tr. 101. Some of the statements referred to Nickoson's comment that the company is getting f'ing stupider every day." Tr. 108. He testified that he was surprised that so many employees wanted to be involved in the situation and inferred from these statements that most of the witnessing employees were offended by the situation. Tr. 101, 124. Boggs stated that he may have spoken with Adamson and Powers as well, but had no idea what the determination would be on Nickoson's employment prior to the January 23, 2012 meeting. Tr. 101, 102.

Nickoson's back-to-work meeting took place in the conference room at Mammoth Coal and lasted for approximately two hours. Tr. 103. Nickoson advised Respondent that he would be taping the meeting and Kyle Bane taped the meeting as well. Tr. 103. Boggs testified that,

when questioned, Nickoson stated that he received the letter, Adamson had conducted the meeting in the bathhouse and he understood the policy. Tr. 104. Nickoson did not mention any confusion or concerns about the application of personal days for the missed work time. Tr. 105. The only problem raised by Nickoson was that, under the prior policy, some employees' personal days were not taken during their absences, specifically referring to 2010. Tr. 105. Boggs explained that he could not fix those problems now, but that the policy instituted on January 1, 2012, would be the policy going forward. Tr. 105.

Concerning the incident during the safety meeting, Boggs testified that he was very concerned that an employee would be so disrespectful in front of other employees. Tr. 106. He stated that it was insubordinate and unacceptable, as well as contrary to common sense, to treat the employer in that manner in front of its employees. Tr. 106. He further believed that it would have been unacceptable to let the incident go unpunished and questioned the control that the management team would have over its work force if no action was taken. Tr. 106, 107. Boggs further believed than the salaried men, including himself, would be fired for treating hourly employees in a similar manner. Tr. 106, 107. He stated that, during the meeting, Nickoson understood that his conduct was unacceptable and apologized. Tr. 108. He offered no real defense, but stated only that he needed his job. Tr. 112.

In addressing the statement by Nickoson that Powers agreed with the statement that Nickoson was not cussing him, Boggs testified that this was not the case. Tr. 109. To the contrary, he testified that Powers' comment was, "I was the only one there. I was the only one standing there." Tr. 109. He further stated that Powers felt disrespected by the comments. Tr. 109. In terms of the safety issues Nickoson testified to have raised, Boggs stated he gave Nickoson the opportunity to speak his mind, but he does not remember this occurring during the back-to-work meeting. Tr. 111, 112. He testified that he does not recall Nickoson ever mentioning anything about the power substation to him. Tr. 111. Nor could he recall any maintenance issues raised during the meeting. Tr. 111, 112.

At some point during the meeting, Boggs asked Nickoson to step out of the room. Tr. 112. At this time, he discussed the situation with the management team in light of Nickoson's opportunity to give his side of the story. Tr. 113. Given Nickoson's behavior during the safety meeting, the fact that he knew the policy on absenteeism and the lack of any evidence apparent discriminatory behavior by management, Boggs testified that he made the decision to terminate Nickoson on January 23, 2012. Tr. 113. He testified that, at no time, did Nickoson say that the suspension and termination were retaliatory in any way, including the pending 105(c) complaint, complaints about maintenance and safety issues, and reports to inspectors. Tr. 110, 111. When asked about Nickoson's past work history, Boggs stated that he had only been with Mammoth for about six months, and was only indirectly associated with the plant, so all he had knowledge of was the information that was provided him regarding the particular situation that occurred on January 16, 2012. Tr. 113, 114. To his knowledge, the only safety issue raised by Nickoson concerned putting mirrors on the dozers, which became a standard operating procedure at Alpha Natural Resources. Tr. 114.

Under cross-examination, Boggs testified that Respondent has a progressive discipline record. Tr. 116. This policy includes verbal and written warnings that can eventually lead to discharge. Tr. 116. He testified, however, that some infractions, such as insubordination, unacceptable conduct and drug testing, were considered zero tolerance and bypassed this progressive system. Tr. 117. He stated that since January 1, 2012[8], the policy for zero tolerance infractions became an automatic suspension until the matter could be discussed. Tr. 116, 117. Interestingly, Boggs testified that the progressive policy is not defined in a written document and it is unclear what identifies infractions that are considered zero tolerance. Tr. 118. Further, it appears that a superintendent, general manager and foreman would all have the authority to suspend an employee. Tr. 119.

In discussing the Disciplinary Action Form, the Secretary questioned why absenteeism was discussed in the explanation, but "Attendance" was not marked as one of the reasons for discipline. Tr. 132. Boggs testified that his attendance did not have anything to do Nickoson's conduct; rather, Nickoson himself had asked whether he was discharged due to his attendance. Tr. 132, 133. It was the position of Respondent that he was terminated due to his conduct at the particular meeting. Tr. 133.

D. Exhibits

The Secretary submitted one exhibit for the record at the hearing and it was duly admitted into evidence. Tr. 131. Exhibit G-1 is a Disciplinary Action Form filled out by Respondent against Nickoson. In it, Respondent describes Nickoson's behavior as "unprofessional and disrespectful conduct toward a supervisor and the company in a safety meeting over the absentee policy on p-days. 'Cussing.'" Ex. G-1. Under the Comments section, it reads, "Suspended for 5 days with intent to discharge. Return to work meeting Monday 1-23-2012 at 8:00 AM at Mammoth Office." *Id*. It is signed by Powers and Adamson and notated that Nickoson "refused to sign the form." *Id*.

Respondent likewise submitted five exhibits for the record at hearing and they were duly admitted into evidence. Tr. 59, 135, 136. Exhibit R-A contains Respondent's policy concerning absenteeism. This document discusses the disruptive and unacceptable nature of unnecessary absences and tardiness. Ex. R-A. It discusses the proper procedures for informing the company about planned, as well as unplanned, absences. *Id*. It also explains the way that unexcused absences are handled and that unsatisfactory attendance can result in disciplinary action, including termination. *Id*.

Exhibit R-B is the attendance form for the January 3, 2012 safety meeting. The significance of this meeting is that the absenteeism policy was discussed at length during this meeting and Nickoson's signature is on the sheet. *Id*.

[8] The transcript refers to June 1, 2011, but Boggs corrected himself several times on this mistake.

Exhibit R-C contains fourteen written statements by Mammoth employees and management who witnessed the incident on January 16, 2012. All of them reference Nickoson's disrespectful behavior in one form or another. Ex. R-C. Nearly all of them specifically reference his use of foul language. *Id*.

Exhibit R-D is a CD containing a recording of Nickoson's back-to-work meeting on January 23, 2012. This was transcribed by Respondent using an independent resource and admitted into evidence after the hearing as Exhibit R-E.

ANALYSIS

A. Protected Activity

Section 105(c)(1) of the Act states in relevant part:

> No person shall discharge or in any manner discriminate against […] or otherwise interfere with the exercise of the statutory right of any miner […] in any coal or other mine subject to this chapter because such miner […] has filed or made a complaint under or related to this chapter, **including a complaint notifying the operator or the operator's agent […] of an alleged danger or safety or health violation in a coal or other mine.**

30 U.S.C. § 815(c)(1)(Emphasis added).

The record indicates that Nickoson has engaged in protected activity for most of his employment with Mammoth. He became a miner's representative in January 2010 and immediately began reporting equipment defects to management. He further pointed out these defects as he accompanied inspectors during their inspections. And, most recently, he testified that he pointed out what he believed to be a dangerous situation concerning the power substation during his back-to-work meeting on January 23, 2012. All of these activities are those protected by Section 105(c) of the Act, thus, the undersigned finds that Nickoson engaged in protected activity.

B. Nexus between the Protected Activity and the Alleged Discrimination

1. Hostility or Animus toward the Protected Activity

Direct evidence of actual discriminatory motive is rare. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 19 FMSHRC 855, 860 (May 1997)(ALJ). Instead, it is much more typical that the only available evidence is indirect. *Chacon*, 3 FMSHRC at 2510. "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. *Id*. (*see also NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). Later cases have found that this circumstantial evidence and the reasonable inferences drawn from this evidence may be used to sustain a prima facie case of discrimination. *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 992 (June 1982).

During an inspection, Nickoson testified that he pointed out several pieces of equipment that were in need of repair, which were cited by the inspector. Tr. 20, 21. At some point, he turned to the company representative, Hamilton, and said, "I hope you don't get mad at me." Tr. 21. This representative replied that he hoped that Nickoson did not get mad at him, implying that his behavior would be reported to management and may result in some type of action. Tr. 21. The reasonable inference to be drawn from this exchange would be that Hamilton reported this situation to Adamson or some other member of management. Later, when Mammoth asked for volunteers to form the Running Right committee, Nickoson volunteered immediately, but was denied. However, the other two miner's representatives, who Nickoson described as not being known for making safety complaints, were chosen. According to Nickoson, Adamson agreed that the committee was made up of his "kiss asses." Tr. 29, 30. In light of these incidents, the outburst during the safety meeting on January 16, 2012 could very well have served as a pretext for Nickoson's termination due to his protected activities. Considering the testimony and evidence in the light most favorable to the Complainant, the undersigned finds sufficient evidence of hostility or animus toward the protected activity.

Mammoth argues that Nickoson was fired wholly for his behavior at the safety meeting. However, the Commission has noted that a temporary reinstatement proceeding is not the forum to weigh the operator's affirmative defense against the Secretary's evidence of a prima facie case. *CAM Mining, LLC*, 31 FMSHRC at 1091. To do so would be assigning a greater burden of proof than is required. *Id*. In a temporary reinstatement proceeding, "the Secretary is required to prove only that a non-frivolous issue exists as to whether [Nickoson's] discharge was motivated in part by his protected activity." *Id*. At best, in this stage of the proceeding, Mammoth's explanation serves only as an alternative theory of why Nickoson was discharged. *See Sec'y of Labor v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). In light of this, the undersigned will not rule on Respondent's offered defense.

2. Knowledge of the Protected Activity

The evidence overwhelmingly establishes that Respondent had knowledge of Nickoson's protected activities at the mine. Nickoson began serving as a miner's representative in January 2010 and he immediately began making complaints about the belts and equipment. Tr. 17,18. At least one inspection in which Nickoson accompanied an inspector directly resulted in the assessment of civil penalties against Respondent. *See* Affidavit of James R. Humphrey. When his status as a miner's representative was revoked in June 2011, for whatever reason this may have occurred, Nickoson took action immediately to re-file his paperwork and subsequently initiated a 105(c) action against Mammoth for revoking this status. Tr. 22-24. Further, Boggs acknowledges that a specific complaint raised by Nickoson, mirrors on the dozers, has since become a company-wide policy for which Nickoson was given credit. Tr. 114. For these reasons, the undersigned finds that Respondent had knowledge of Nickoson's protected activities.

3. Coincidence in Time between the Protected Activity and the Adverse Action

The Commission has stated that it applies "no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999)(quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). As such, the Commission has noted that "[a] three week span can be sufficiently close in time," especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in All American Asphalt, a sixteen month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Id*., 21 FMSHRC at 47.

Nickoson testified that he brought up safety issues in the mine as recently as his back-to-work meeting on January 23, 2012. Tr. 45. Although Boggs stated he has no knowledge of this complaint, the Commission has repeatedly instructed that it is not the judge's duty or appropriate to resolve conflicts in testimony or to make credibility determinations at this preliminary stage of the proceedings. *Proppant Specialists, LLC*, 33 FMSHRC at 2385; *Williamson v. CAM Mining, LLC*, 31 FMSHRC at 1088; *Albu v. Chicopee Coal Co.*, 21 FMSHRC at 719. Congress intended that the benefit of the doubt be with the employee, rather than the employer. *Jim Walter Resources*, 920 F.2d at 748, n. 11.

It is also important to note that Nickoson had established a pattern of behavior in his constant vigilance for safety. The record reveals that Nickoson brought multiple safety complaints, not only to management, but to MSHA inspectors as well. Some of these complaints were within the seven months prior to his termination. In light of the foregoing, the undersigned finds a coincidence in time between the protected activity and the adverse action.

4. Disparate Treatment

Disparate treatment which allows for an inference of retaliatory discharge is different treatment on individuals who are similarly situated. *Sec'y of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corporation*, 18 FMSHRC 1250, 1258 (July 1996)(ALJ)(citing *Hayes v. Invesco*, 907 F.2d 853 (8th Cir. 1990)). Here, there is some evidence that Nickoson was treated differently than similarly situated miners.

Nickoson testified that foul language is engaged in by nearly everyone in the mine on a daily basis, including the bosses. Tr. 48, 49, 88. He had even heard employees using this type of language during safety meetings. Tr. 74. To his knowledge, other than a verbal warning from Adamson when an employee was cussing over the radio, none of these employees had been terminated, or even suspended, for this behavior. Tr. 48, 49, 89. Additionally, Nickoson was denied a position on the Running Right even though he was one of the first volunteers and the

other two miner's representatives were permitted to participate. Given that Nickoson was fired for language that is essentially accepted, or at the very least ignored, otherwise in the mine, and he was the only miner's representative denied participation in the Running Right committee, the undersigned finds that there is sufficient evidence of disparate treatment.

CONCLUSION

I have reviewed the entire record in this case, and have carefully considered the contentions of the parties. In any subsequent discrimination proceeding Respondent may prevail on the merits; however, based on the elements discussed above in the instant case and with particular reference to applicable precedent I am constrained to find that the complaint of discrimination was not frivolously brought.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is **GRANTED**. Accordingly, Mammoth Coal Company is **ORDERED** to provide immediate **ECONOMIC REINSTATEMENT** to Robert Nickoson, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 25, 2012

SAND PRODUCTS, LLC,	:	EQUAL ACCESS TO JUSTICE
Applicant,	:	PROCEEDING
	:	
	:	Docket No. EAJ 2012-01
v.	:	
	:	Formerly SE 2010-407-M
SECRETARY OF LABOR	:	SE 2010-510-M
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 40-03168
Respondent.	:	Mine: Sand Products

DECISION

Appearances: Angela F. Donaldson, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Room 7T10, Atlanta, GA for the Secretary

Christopher D. Pence, Esq., Allen Guthrie & Thomas, PLLC, 500 Lee Street, East, Suite 800, P.O. Box 3394, Charleston, WV for the Applicant

Before: Judge Lewis

This case is before me upon an Application for Fees and Other Expenses filed by Sand Products, LLC ("Sand Products" or "Applicant") pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "Act"), and the Federal Mine Safety and Health Review Commission's ("Commission") implementing regulations at 29 C.F.R. § 2704.100 *et seq*.

PROCEDURAL HISTORY

On December 2, and 7-8, 2009, the Secretary of Labor (the "Secretary") issued twenty-three citations to Sand Products pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. Both dockets[1] were set for hearing on August 4-5, 2011 in

[1] The penalty petitions for these twenty-three citations were docketed as SE 2010-407-M and SE 2010-510-M.

Memphis, Tennessee. By emails dated July 29, 2011, the parties informed the undersigned that both dockets had settled. The parties submitted a Joint Motion to Approve Settlement for Docket No. SE 2010-407-M on October 12, 2011. On October 13, 2011, the Secretary submitted her Motion for Decision and Order Approving Settlement for Docket No. SE 2010-510-M. Both settlements were approved by the undersigned and decisions approving settlement were issued on October 18, 2011.

On November 16, 2011, Sand Products entered its Application for Fees and Other Expenses with the Commission. In the application, it specifically points to Citation Nos. 6510749, 6510750, 6510751, 6510754, 6510755, 6510760, 6510762 and 6510769 as those particular parts of the settlement agreement warranting the grant of legal fees and expenses incurred.

A. The Settlement Agreements

The settlement agreements contain the following information:

Docket No. SE 2010-407-M contained seventeen citations and was settled for $10,470.00. The originally assessed penalty for the docket was $18,565.00. Of the seventeen citations, three were vacated, eleven were reduced in amounts ranging from twenty-five to thirty-five percent and three were maintained exactly as they had been issued by the inspector.

Docket No. SE 2010-510-M contained six citations and was settled for $4,584.00. The originally assessed penalty for the docket was $6,882.00. Of the six citations, three were modified and reduced and three were maintained exactly as they had been issued by the inspector.

B. The Settlement History

The history of settlement negotiations entered by the parties indicates an arduous process involving months of work, and significant compromise by both parties. On February 25, 2011, the Secretary offered to vacate Citation Nos. 6510760 and 6510762. She further offered to vacate Citation No. 6510760, but only if certain conditions were met. At this time, Thad Drake, Sand Products' Executive Manager, agreed to the terms of the vacations and, upon meeting the conditions of the Secretary's offer, the three citations above were vacated. At the same time, the Secretary offered to reduce several of the citations brought to light by the Applicant by fifteen percent and to modify one by thirty percent with a change in the paperwork.

On February 25, 2011, Sand Products also provided a counteroffer to the Secretary. This counteroffer included the vacation of two more citations as well as modifications to the paper accompanied by drastic penalty reductions to the remaining citations. This was not accepted by the Secretary.

In a counteroffer on March 1, 2011, the Secretary offered thirty-five percent reductions to five of the citations at issue. Sand Products did not reply to this offer, but informed the Secretary that it was retaining counsel in this matter on March 29, 2011. However, it maintained its interest in continued settlement negotiations. On June 16, 2011, the Secretary repeated its March 1, 2011 offer to the Applicant's counsel. This offer was declined.

On June 26, 2011, the Secretary offered a thirty-five percent reduction in four of the citations at issue here and a thirty-four percent reduction with a modification to the injury reasonably expected for the last. On June 30, 2011, Sand Products reaffirmed that the Secretary had agreed to vacate Citation Nos. 6510755, 6510760 and 6510762. It then presented a counteroffer that was only slightly less than the amounts offered on February 25, 2011. With the hearing date looming, the offer made by the Secretary on June 26, 2010 was accepted by Sand Products and became the final settlement agreement of the parties.

LAW AND REGULATIONS

The Act provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1); *see also* 28 U.S.C. § 2412(d)(1)(A).

The Commission's implementing regulation similarly provides, "[a] prevailing applicant may receive an award of fees and expenses in connection with a proceeding, or in a significant and discrete substantial portion of the proceeding, unless the position of the Secretary was substantially justified." 29 C.F.R. § 2704.105(a).

CONTENTIONS OF THE PARTIES

Sand Products contends that it prevailed within in the meaning of the Act as to Citation Nos. 6510755, 6510760 and 6510762 when the Secretary agreed to vacate the citations prior to trial. It further contends that it prevailed within the meaning of the Act as to Citation Nos. 6510749, 6510750, 6510751, 6510754 and 6510769 when the Secretary agreed to settle the citations for amounts far less than the original assessment. It states that the Secretary was not substantially justified as required by 29 C.F.R. § 2704.206 for the following reasons: (1) the Secretary unreasonably, and without justification, assessed significant penalties based on conditions that did not violate any regulations; (2) the Secretary failed to provide fair notice that the Mine Safety and Health Administration ("MSHA") had changed its interpretation of the regulations; and (3) the Secretary's enforcement of the regulations is inconsistent. Sand Products

argues that it would not have incurred legal fee and expenses had MSHA and the Secretary declined to cite conditions that complied with the law and provided reasonable notice prior to December 2009 that enforcement standards had changed.

The Secretary contends that Sand Products did not prevail within the meaning of the Act as to the citations indicated above. She argues that she was substantially justified in the issuance of the underlying citations and in pursuing litigation that arose from them. She further asserts that Sand Products cannot recover the costs associated with terminating the cited conditions and that it has failed to identify attorney's fees and expenses related solely to defending against the citations for which it has claimed to have prevailed.

ANALYSIS AND CONCLUSIONS OF LAW

In order for an applicant to succeed in a claim under the Act, it must first meet the basic threshold of being a prevailing party. The phrase "prevailing party" is a legal term of art acknowledging that the party has been awarded some relief by the court. *Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 615-616 (2001); *USA Cleaning Service & Building Maintenance*, 33 FMSHRC 2264, 2267 (Sept. 2011)(ALJ). Judgment on the merits and settlement agreements enforced through a consent degree may serve as the basis for an award of attorney's fees. *Buckhannon*, 532 U.S. at 604-605. The D.C. Circuit has interpreted *Buckhannon* as having established a three-part test, classifying a party has having "prevailed" if: (1) there was a "court-ordered change in the legal relationship" of the parties; (2) the judgment was in favor of the party seeking the fees; and (3) the judicial pronouncement was accompanied by judicial relief. *Turner v. National Transportation Safety Board*, 608 F.3d 12, 15 (D.C. Cir. 2010); *USA Cleaning*, 33 FMSHRC at 2267. In *USA Cleaning*, the ALJ noted that courts have consistently applied this rationale. *Id*. *Buckhannon* did not address whether a court-approved settlement agreement that is not embodied in a formal consent decree may serve as the gateway to prevailing party status, but the First Circuit found that it could if there is a change in the legal relationship of the parties, judicial approval of the relief vis-à-vis the merits of the case, and judicial oversight and ability to enforce the obligations imposed on the parties. *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 9 (1st Cir. 2011); *Aronov v. Napoloitano*, 562 F.3d 84, 90 (1st Cir. 2009).

The undersigned finds that Sand Products is not a prevailing party within the meaning of the Act. While there has been a change in the legal relationship of the parties and there is judicial oversight and the ability to enforce the obligations imposed on the parties, Applicant has failed to establish judicial approval of the relief vis-à-vis the merits of the case. In terms of the vacated citations, the Secretary has prosecutorial discretion in deciding whether to continue to pursue the merits of a particular citation. While the administrative law judge must dismiss the case filed with the Commission, this is a procedural, rather than a substantive function. In fact, the administrative law judge has no authority to deny the vacation of a citation by the Secretary. *RBK Construction, Inc.,* 15 FMSHRC 2099, 2101 (Oct. 1993)(*citing Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3 (1985)).

In determining the validity of modifications to citations and orders, the administrative law judge does have the authority to deny the Secretary's requests if inadequate justifications are provided. 30 U.S.C. § 820(k); 29 C.F.R. § 2700.31. However, Applicant mistakes review of the justifications in light of the modification and/or penalty reduction for a review of the merits of the citation itself. Here, the administrative law judge reviews justifications for any modification of either the citation or its assessed penalty. The judge does not review the totality of the citation in order to determine whether the violation was, in fact, evaluated at the correct gravity and negligence levels according to the case law and facts of the case. In light of the foregoing, the undersigned finds that there is no judicial approval of the relief vis-à-vis the merits of the case and, therefore, Sand Products is not a prevailing party within the meaning of the Act.

Although a finding on the issue is unnecessary, as the Applicant does not meet the threshold requirement of being a prevailing party, the undersigned would have found that the position of the Secretary was substantially justified. "Substantially justified" means that the Secretary's position was "justified to a degree that would satisfy a reasonable person" or that had a "reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *James M. Ray, Employed by Leo Journagan Construction*, 18 FMSHRC 2033, 2039 (Nov. 1996)(ALJ). The position of the agency can be justified within the meaning of the Act even though it is not correct or prevailing. *Pierce*, 487 U.S. at 566, n. 2, 569. Moreover, the government's position cannot be viewed as unjustified simply on the grounds that proceedings were voluntarily terminated on terms unfavorable to it. *Id*. at 568-569.

In evaluating the merits of Equal Access to Justice claims, the undersigned finds that settlements of cases involving multiple citations must be viewed through a broad perspective, taking into account the global disposition of all cases, rather than through the narrow prism of individual "cherry picked" citations settled in one party's favor. Here, Sand Products has chosen only eight citations out of the total settlement agreement, all of which suit its purposes perfectly. It ignores, however, the settlement agreement as a whole and the other fifteen citations that were also involved in the agreement. Of these, nine involved modifications and/or penalty reductions and six remained exactly as they were issued.

In looking at the totality of the settlement agreement, the undersigned finds that a reasonable person would be satisfied with its balance. Obviously, at the very least, these six affirmed citations had some basis in law and fact, or Sand Products probably would not have agreed to their settlement as such. Further, of the three citations that were vacated, only one of them was originally written as significant and substantial. During the course of settlement negotiations, compromise is an obvious necessity and is certainly not a concept to be discouraged by this Court. In fact, the settlement history is evidence that the parties vigorously haggled to settle the dockets in order to avoid the extra expenses that would be incurred in further preparation for and during hearing. The offers made by Sand Products were not even close to the eventual terms agreed upon. In taking the settlement agreements as a whole, the undersigned would have found that the actions of the Secretary in settling these dockets were substantially justified.

Finally, although not part of the legal framework, the undersigned notes that this course of action treads on dangerous ground. If the Secretary is forced to defend herself against a claim for attorney's fees each time she enters into a settlement agreement, settlement negotiations could come to a halt. In particular, this harms small operators who would be forced to incur the expense and time of litigation each time that it disagrees with a citation. Due process includes maintaining an environment that nurtures negotiation and compromise, which is key to an operator's ability to contest a citation while quickly moving forward with continuing its operations.

ORDER

It is hereby **ORDERED** that Sand Products' Application for Fees and Other Expenses is **DENIED**. As such, this case is **DISMISSED**.

/s/ John Kent Lewis
John Kent Lewis
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

May 10, 2012

TODD DESCUTNER,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2011-523-DM
	:	WE MD 2010-18
	:	
v.	:	
	:	
NEWMONT USA LIMITED,	:	
Respondent.	:	Mine: Leeville Mine
	:	Mine ID: 26-02512

ORDER DENYING JEFF SCOTT'S REQUEST TO REPRESENT TODD DESCUTNER

Before: Judge Barbour

On April 30, 2012 Jeff Scott filed an electronic request to represent Todd Descutner, the complainant, in this discrimination proceeding. Commission Rule 3(b)(4), 29 C.F.R. § 2700.3(b)(4), permits any person to practice before the Commission with the approval of the presiding judge. In a May 01, 2012 order I directed Mr. Descutner to file a letter advising the court whether he intended to appear *pro se*, represent himself, or have Mr. Scott represent him. Order 1-2. Also, Mr. Scott was directed to file an entry of appearance if he intended to appear on behalf of Mr. Descutner. *Id.* On May 04, 2012 the court received Mr. Scott's entry of appearance and a letter from Todd Descutner stating that he was "asking Jeff Scott to help represent me in further actions with this case. He will be allowed access to all the information I have on my case." Entry of Appearance and Letter from Todd Descutner.

On May 07, 2012 the court received Newmont's's responsive objection to Mr.Scott's appearance in the case. In the objection, Newmont advised the court that Mr. Scott was party to a discrimination complaint brought against Newmont (*Jeff Scott v. Newmonot USA Limited,* Docket No. WEST 2012-79-DM). After the complaint was filed and answered the case was assigned to Commission Administrative Law Judge Margaret Miller and discovery ensured. Pursuant to Mr. Scott's request for the personnel files of 18 present and former Newmont employees, Newmont agreed to turn over to Mr. Scott the disciplinary portions of the files provided they were subject to an order that the employee information not be disseminated outside of the litigation before Judge Miller. As a result, Judge Miller ordered "that Newmont disclose to [Mr. Scott] the personnel files [of the

designated present and former employees], only as [the files] relate to the disciplinary action, reprimand, or other personnel action connected to performance." *Jeff Scott v. Newmont*, Protective Order (March 22, 2012) at 2. Judge Miller further ordered that "as to these 18 personnel files . . . they will not be disclosed by any party or agent of any party to any person or company outside of this litigation." *Id.* She added that, "The files will be sealed in a separate envelope and clearly labeled as such and kept in that form by each party or any agent of the party." *Id.* at 2-3. Following this, Mr. Scott's case was heard on April 11, 2012. A decision is pending.

In the meantime, discovery was ongoing in Mr. Descutner's case, and in response to a Newmont discovery request, Mr. Descutner sent Newmont's counsel copies of documents produced in the *Scott* case, including copies of documents involving disciplinary information from the personnel files of the 18 miners. The documents were marked "Confidential." Further, Newmont's counsel states that upon being deposed, Mr. Descutner stated that Mr. Scott gave him the confidential documents because Mr. Scott thought the documents would help Mr. Descutner with his case. Objection 2.

Newmont's counsel asserts that Mr. Scott's delivery of the protected documents to Mr. Descutner was in direct violation of Judge Miller's protective order. Counsel also maintains that Mr. Scott's misconduct should preclude him from representing Mr. Descutner. Objection 3. The court agrees. It is clear that many of the documents Mr. Descutner provided to Newmont were from protected and sealed files. *See* Objection 2, n.1. Judge Miller's order required the files to be marked "Confidential" and Judge Miller explicitly prohibiting disclosure of the files and the information therein to any person outside of the *Scott* litigation, but Mr. Scott game them to Mr. Descutner anyway. *Id. at* 1-2, Exhibit 2 at 3.

Mr. Scott was represented by counsel, Andrew Rempfer, and the court assumes discovery was served upon Mr. Rempfer and that Mr. Scott received the protected personnel information from his counsel, who should have warned Mr. Scott about prohibited disclosure. But be that as it may, even if Scott's counsel did not advise him of the confidential nature of the information, the court agrees with Newmont's cousel that Mr. Scott, as a party to the case, cannot claim ignorance of the judge's order, and that he may be assumed to have understood its strictures and must be held to them.

Commission Rule 56 , 20 C.F.R. § 2700.56(a) - (b), provides that a party may obtain discovery through depositions, written interrogatories, requests for admissions, requests for production of documents or objects or through requests for permission to enter upon property for copying, inspecting, photographing and gathering information and states that "parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." Personnel information or any other information needs to be obtained through the discovery process using one of the methods provided in the rule. By providing the confidential personnel information to Mr. Descutner rather than by advising Mr. Descutner to proceed with his own discover, Mr. Scott violated Judge Miller's order. His

conduct was no only unethical, it constituted serious misconduct far outside the bounds of what is acceptable in practice before the Commission. As a result, the court finds that Mr. Scott's conduct bars him from appearing in this case.

This stated, the court is not without sympathy for Mr. Descutner who is appearing *pro se.* The court understands Mr. Descutner's desire for assistance in presenting his case (*see e-mail response of Todd Descutner* (May 9,2012)). However, the court will not entertain representations from a person who flagrantly violates Commission orders, and it urges Mr. Descutner to redouble his efforts to obtain counsel or to find a knowledgeable representative who will abide by the Commission's rules.

ACCORDINGLY, Jeff Scott's request to represent Todd Descutner in this proceeding is **DENIED**. Todd Descutner may continue to appear *pro se,* representing himself, or he may obtain counsel or other representative.

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

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/ca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9933

May 16, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2011-677 Case No. 44-07087-00262626 A
v.	:	
DAVID R. ARNOLD, employed by BIG LAUREL MINING CORPORATION Respondent.	:	Mine No 2

ORDER ON MOTION TO DISMISS

Respondent, David R. Arnold, 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 a fatal accident at the mine on August 20, 2009. Respondent relates that Orders were then issued to the mine on or about August 25, 2009 and terminated on September 9th of that year. Thereafter, on or about August 8, 2011, the Secretary notified Mr. Arnold that she intended to propose a penalty against him under section 110(c) of the Mine Act.

On April 13, 2012 the Court issued its Orders on Motions to Dismiss in two related section 110(c) matters: Secretary v. Stephen M. Reasor, employed by Big Laurel Mining Corporation, VA 2011-678, and Secretary v. Robert J. Silcox, employed by Big Laurel Mining, VA 2011-680. The Reasor Order is representative of the issues in each of these Motions, including this Order on the Arnold Motion to Dismiss[1] and it is attached as an Appendix to this Order. The only significant distinguishing feature between the Arnold Motion, addressed in this Order, and the other related Motions to dismiss the section 110(c) actions, is that in the Arnold Motion, Counsel filed a Response to the Secretary's Reply. Following that submission, the Secretary filed a Motion to Strike the Response from Arnold. The Court elected to consider the Arnold Response and therefore implicitly denied the Secretary's Motion to Strike. However,

[1] There is yet another Motion to Dismiss which arises out of the same circumstances which prompted the Secretary to file its 110(c) actions against Arnold, Reasor and Silcox. That fourth matter is Secretary v. Steven T. Moore, employed by Big Laurel Mining, VA 2011 689. The formal Order on that motion, which presents nothing new from the other three, will be issued soon.

having considered the Response, the Court arrived at the same conclusion it reached in the Silcox and Reasor Motions for the reasons articulated in those Orders. Accordingly, Arnold's Motion to Dismiss is DENIED.

Although the reasoning provided in the Court's Orders in Silcox and Reasor applies with equal force in Arnold's Motion and therefore the reader is directed to the Appendix which contains the Order in Reasor, the following additional comments are made. In the Court's April 27, 2012 Order Regarding Secretary's Request for Clarification of Order on Motion to Dismiss, in Reasor, VA 2011 678, which is included as APPENDIX II to this Order, the Court determined, in the context of section 110(c) actions, that the time frame for measuring the reasonable time requirement does not begin until the conclusion of the Agency's section 110(c) investigation. *See*, APPENDIX II, *infra.* Arnold was notified as of June 21, 2010 that MSHA was proposing an individual penalty against him. There is no dispute about the date of this notification. While the proposed penalty itself was not issued until August 8,2011, Arnold was on notice some 13 months-plus earlier of the Agency's intentions regarding an individual civil penalty against him. Therefore, as the date of the underlying fatal accident is *not* the date to assess the reasonableness of the Secretary's action, but rather, at the earliest, the June 21, 2010 notification represents the starting point, it cannot be said that demonstrates a failure to issue its proposed penalty within a reasonable time. Two factors are at work. First, the time frame from June 21, 2010 to August 8, 2011, a thirteen month time frame is not *per se* an unreasonable time. Second, Arnold knew what he was facing in terms of potential Mine Act liability from that June 21, 2010 moment on.
Thus, the observation the Court made in the *Reasor* matter is applicable here as well:

> 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.

Reasor Order at 5.

The Court reviewed the Respondent's Response but found that, at the end of the day, it changed nothing in terms of the effort to have the matter dismissed. While the Response repeats itself in the space of its ten pages, listing five bases of prejudice, none of them, individually or cumulatively, demonstrate actual prejudice to Mr. Arnold. Response at pages 4 and 9.

Accordingly, while the Motion is DENIED, additional comments from *Reasor* are also apropos. There, the Court noted:

> 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. 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.

See APPENDIX I, Reasor Order at 5 and n. 10.

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

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APPENDIX I

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2011-678
Petitioner	:	A.C. No. 44-07087-262629 A
	:	
v.	:	
	:	
STEPHEN M. REASOR, employed by	:	Mine No 2
BIG LAUREL MINING CORPORATION	:	
Respondent	:	

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. 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 administrative law judge decisions. (emphasis in motion).

The Secretary filed a "Reply" to the Respondent's Motion, arguing, on several grounds, that the assessments here were issued within a "reasonable time." 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 time" was afforded deference where a 17 month span had elapsed.

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.

The Secretary's Reply goes on to present additional reasons why the Respondent's Motion should be denied. 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 since the miner's fatal accident.

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 provision. 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.

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

APPENDIX II

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9933

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

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.

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, 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 time period when the Section 110(c) investigation was being conducted. 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. 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.

Last, in Sec'y v. Sedgman and David Gill, Employed by Sedgman, 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 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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-505-M-A
Petitioner,	:	A.C. No. 20-01012-153165-03
	:	
v.	:	Docket No. LAKE 2008-506-M-A
	:	A.C. No. 20-01012-153165-04
EMPIRE IRON MINING PARTNERSHIP,	:	
Respondent.	:	Empire Mine

ORDER DENYING MOTION
FOR PARTIAL SUMMARY DECISION[1]
AND
NOTICE OF HEARING

Before: Judge Feldman

These proceedings, brought pursuant to the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("the Act" or "Mine Act"), concern the question of whether violations of Part 48 of the Secretary's training regulations for underground miners can properly be designated as significant and substantial ("S&S").[2]

[1] By Order of the Chief Administrative Law Judge dated March 28, 2012, the captioned Docket Nos. LAKE 2008-505-M-A and LAKE 2008-506-M-A were created from Docket Nos. LAKE 2008-505-M and LAKE 2008-506-M, respectively. The stay issued on August 18, 2011, in Docket Nos. LAKE 2008-505-M and LAKE 2008-506-M pending the Commission's disposition of the appeal in *Tilden Mining Company, LLC*, 33 FMSHRC 876 (Apr. 2011) (ALJ Paez) remains in effect.

[2] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum,* 3 FMSHRC 822, 825 (Apr. 1981).

At issue are 104(a) Citation No. 6199742 and 104(g)(1) Order No. 6199463 issued to the Empire Iron Mining Partnership ("Empire").[3] 104(a) Citation No. 6199742 alleges a violation of 30 C.F.R. § 48.25(a) that requires new miners to be trained in hazard recognition and safety aspects of the tasks to which they will be assigned. 104(g)(1) Order No. 6199463 alleges a violation of 30 C.F.R § 48.27(c) that requires miners to be instructed in the safety aspects and safe work procedures for newly assigned tasks. Sections 48.25 and 48.27 were promulgated as part of the Mine Safety and Health Administration's ("MSHA's") rulemaking proceeding entitled, "Training and Retraining of Miners Working at Surface Mines and Surface Areas of Underground Mines." 43 Fed. Reg. 47454 (Oct. 13, 1978). The training violations alleged in Citation No. 6199742 and Order No. 6199463 were designated as S&S in nature. The Secretary proposes a civil penalty of $243.00 for 104(a) Citation No. 6199742, and, $3,224.00 for 104(g)(1) Order No. 6199463.

It is well settled that "[s]ection 104(d) unambiguously authorizes a 'significant and substantial' finding for violation only of a mandatory health or safety standard."[4] *Cyprus Emerald v. FMSHRC*, 195 F.3d 42, 44 (D.C. Cir. 1999). The Court recently delineated the parameters for considering a regulatory provision adopted by the Secretary as a mandatory health or safety standard. The Court stated:

> Section 3(l) of the Mine Act defines a "mandatory health or safety standard" as "the interim mandatory health or safety standards established by [Titles] II and III of this [Act], and the standards promulgated pursuant to [Title] I of this [Act]." 30 U.S.C. § 802(l). Under [section 101(a) of the Act, 30 U.S.C. § 811(a), of] Title I of the Mine Act, the Secretary may, through notice and comment rulemaking, "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of

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[3] In the March 28, 2012, Order creating the captioned civil penalty matters, Citation No. 6199742 was removed from Docket No. LAKE 2008-505-M, and Order No. 6199463 was removed from Docket No. LAKE 2008-506-M.

[4] Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary [of Labor] finds that there has been a violation of *any mandatory health or safety standard*, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could *significantly and substantially* contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter.

30 U.S.C. § 814(d)(1) (emphasis added).

> injuries in coal or other mines." *Id.* § 811(a). Title II of the Mine Act provides for interim mandatory health standards "applicable to all underground coal mines" that are to "be enforced in the same manner and to the same extent as any mandatory health standard promulgated under the provisions of [Title I of the Act]." *Id.* § 841(a). Title III of the Mine Act provides similar authority for interim mandatory safety standards "applicable to all underground coal mines" and "enforced in the same manner and to the same extent as any mandatory safety standard promulgated under [Title I of the Act]." *Id.* § 861(a).

Wolf Run Min. Co. v. FMSHRC, 659 F.3d 1197, 1198 (D.C. Cir. 2011).

The Commission has routinely affirmed S&S designations in 104(g)(1) orders citing Part 48 training violations. *See, e.g., Twentymile Coal Company,* 26 FMSHRC 666, 674-75 (Aug. 2004); *Alcoa Alumina & Chemicals, LLC*, 23 FMSHRC 911, 912, 916-17 (Sept. 2001). However, the Commission has not previously addressed the assertion that the Secretary is precluded from designating Part 48 training violations as S&S based on the contention that training regulations are not mandatory health or safety standards.

While the Commission has not directly addressed whether training regulations are mandatory standards, Commission judges have reached different conclusions with respect to this issue. Judge Melick and Judge Hodgdon have concluded that violations of the Secretary's training regulations may not be characterized as S&S because these regulations are not mandatory health or safety standards. *Carmeuse Lime & Stone, Inc.*, 29 FMSHRC 816, 821 (Sept. 2007) (ALJ Hodgdon) (noting that violations of Part 48 of the Act governing training at underground mines could not be cited as S&S); *Rinker Materials South Central, Inc.*, Docket No. KENT 2008-1049-M (Sept. 2009) (ALJ Melick) (also noting that violations of Part 46 of the Act governing training at surface mines could not be designated as S&S). Conversely, in *Carmeuse Industrial Sands*, Docket No. WEST 2009-267-M (June 2010) (ALJ Barbour), the judge determined that Part 46 training violations can be designated as S&S.

Empire now has filed a motion for partial summary decision on this very question, arguing that violations of Part 48 cannot be characterized as S&S because training regulations are not mandatory safety standards. Empire relies on the Court's holding in *Cyprus Emerald* that the Secretary is precluded from designating violations of Part 50 as S&S because Part 50 does not contain mandatory health or safety standards. 195 F.3d at 45. The provisions of Part 50 govern the reporting of accidents. The Secretary opposes Empire's motion.

Disposition by summary decision is appropriate provided (1) the entire record, including pleadings, affidavits, and answers to interrogatories, establish 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). These matters concern analysis of the plain

language of sections 101(a) and 115(d) of the Act authorizing the Secretary to develop approved training plans which is a matter of law. 30 U.S.C. §§ 811(a), 825(d). Thus, resolution of the propriety of an S&S designation for alleged training violations is amenable to summary decision.

Empire, relying on *Cyprus Emerald*, argues that the Secretary's regulations are not mandatory health or safety standards because they are authorized under section 115(a) of the Act without the necessity of a rulemaking.[5] The Secretary asserts that the training provisions in Part 48 constitute mandatory health or safety standards under Title I because they were, in fact, promulgated in a section 101(a) rulemaking. 43 Fed. Reg. 47454 (Oct. 13, 1978).

Empire's reliance on *Cyprus Emerald* is misplaced. In *Cyprus Emerald*, the Secretary acknowledged that section 50.11(b) governing the reporting of accidents, was promulgated under section 508, 30 U.S.C. § 957, rather than in a Title I rulemaking. 195 F. 3d at 43, fn. 2. Section 508 of the Act is a general provision that authorizes the Secretary to issue such regulations, without requiring a rulemaking, as "[deemed appropriate] to carry out any provision of [the] Act."

Unlike Part 50 reporting regulations authorized by section 508, the provisions of section 115(d) explicitly authorize the Secretary to develop approved training programs by promulgating safety and health standards. Thus, in the instant case, Part 48 training regulations have been promulgated in a rulemaking in accordance with section 115 of the Act. Specifically, section 115(d) provides:

> The Secretary shall promulgate appropriate *standards for safety and health training* for coal or other mine construction workers.

30 U.S.C. § 825(d) (emphasis added).

As a final matter, notwithstanding the express rulemaking authorization in section 115(d), the Court has noted that, in appropriate circumstances, if the Secretary finds particular practices so dangerous as to require sanctions, she may initiate a rulemaking to adopt appropriate mandatory standards that, if violated, can properly be designated as S&S. *Cyprus Emerald,* 195 F.3d at 46.

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[5] Section 115(a) of the Act provides, in pertinent part:

> Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs . . . .

30 U.S.C. § 825(a).

ORDER

As the Part 48 provisions were properly promulgated pursuant to a Title I rulemaking as authorized by section 115(d) of the Act, training regulations are mandatory health or safety standards as defined by section 3(l) of the Act. As such, Part 48 training violations may be designated as S&S. Accordingly, **IT IS ORDERED** that Empire Iron Mining Partnership's motion for partial summary decision **IS DENIED**.

IT IS FURTHER ORDERED that a hearing on the merits with respect to the remaining issues of fact concerning the fact of the violation, gravity, negligence and the appropriate civil penalties, is scheduled for **July 17, 2012, in the vicinity of Marquette, Michigan.** A hearing location will be specified in a subsequent order.

The parties may consider stipulating to the remaining issues of fact, while preserving their rights of appeal with respect to whether Part 48 training violations can be properly designated as significant and substantial in nature. **IT IS FURTHER ORDERED** that the parties should notify me, **on or before June 28, 2012**, in the event such stipulations are agreed upon.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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