

**AUGUST 2012**

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(Judge Barbour, July 26, 2012)

Secretary of Labor, MSHA v. West Alabama Sand & Gravel, Inc., Docket No.  
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Secretary of Labor, MSHA v. Stansley Mineral Resources, Inc., Docket No. LAKE 2011-693-M.  
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Jeff Scott v. Newmont USA, Limited, Docket No. WEST 2011-269-D, WEST 2012-79-D. (Judge  
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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

August 2, 2012

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

v.

Docket No. LAKE 2008-477

BLACK BEAUTY COAL COMPANY

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

**DECISION**

BY: Cohen and Nakamura, Commissioners<sup>1</sup>

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Black Beauty Coal Company (“Black Beauty”) contested a citation and two orders that were issued by a Department of Labor Mine Safety and Health Administration (“MSHA”) inspector after he observed alleged failures to provide sufficient protection against overtravel at three discrete areas of Black Beauty’s mine. 32 FMSHRC 356 (Mar. 2010) (ALJ). Administrative Law Judge Margaret Miller affirmed the citation and orders as significant and substantial (“S&S”) violations that were also attributable to the operator’s unwarrantable failure to comply with the cited standards. *Id.* Black Beauty filed a petition for discretionary review, which was granted by the Commission.

For the reasons that follow, we affirm in part, and reverse and remand in part.

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<sup>1</sup> Commissioners Cohen and Nakamura join in every section of this opinion. In each section, we will list the other Commissioners joining to constitute a majority.

## I.

### Citation No. 6671134

#### **A. Factual and Procedural Background**

On September 11, 2007, MSHA Inspector Vernon Stumbo began a regular inspection of the Somerville Central Mine, a surface coal mine located near Gibson, Indiana. *Id.* at 356-57. Stumbo inspected a bench<sup>2</sup> which measured 180 feet to 200 feet wide and was elevated approximately 50 feet above the pit floor. *Id.* at 358; Tr. 29; Gov. Ex. 4. At the time of the inspection, Black Beauty was in the process of moving a dragline<sup>3</sup> across the bench. Stip. 12. The berms on the bench had been lowered in order to accommodate the dragline's boom. 32 FMSHRC at 358. During the move, the dragline suffered electrical problems, which caused it to come to a stop on the bench. *Id.* The dragline is not a rubber-tired vehicle; instead, "shoes" lift and move the machine in increments of eight feet. 32 FMSHRC at 358; Tr. 65-67. As this process is repeated, the dragline can travel 450 to 500 feet per hour. Tr. 66-67. Black Beauty normally moves the dragline to a new location in the mine once every seven to ten days. Tr. 79.

While inspecting the bench, Stumbo observed a service truck near the dragline. 32 FMSHRC at 358. Two miners had driven the service truck along the bench to the dragline so that welding maintenance could be performed while the dragline was idled. Tr. 33, 93; Gov. Ex. 4. Stumbo issued Citation No. 6671134 under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging that the operator failed to provide berms or guards on the outer bank of an elevated roadway as required by 30 C.F.R. § 77.1605(k). Section 77.1605(k) provides that "berms or guards shall be provided on the outer bank of elevated roadways." In the citation, Stumbo noted that "[t]he dragline bench travel road [did] not have a berm for a distance of approximately 2/10 of a mile where a service truck . . . had traveled within 18' of the outer banks of a bench." Gov. Ex. 4.

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<sup>2</sup> A bench is "[a] ledge that, in open-pit mine[s] and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank or bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in, an open-pit mine or quarry." American Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 47 (2d ed. 1997) ("Dictionary of Mining").

<sup>3</sup> A dragline is "[a] type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket towards itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile." *Dictionary of Mining* at 167. The dragline in this case weighs approximately ten million pounds. Tr. 67.

The judge determined that “once rubber-tired equipment begins operating on the bench, especially within close proximity to the edge . . . the bench becomes a roadway.” 32 FMSHRC at 359 (citing *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981)). She affirmed the citation, concluding that the elevated roadway did not contain adequate berms as required by section 77.1605(k). *Id.* at 358-59. She stated that a reasonably prudent person familiar with the facts would have recognized that the safety standard required the bench to contain a berm that was at least mid-axle height of the service truck which traveled it.<sup>4</sup> *Id.* at 359. The judge further concluded that the violation was S&S and attributable to the operator’s unwarrantable failure to comply with the cited standard. *Id.* at 361-62.

**B. Disposition**

**1. The bench was a “roadway” pursuant to section 77.1605(k).<sup>5</sup>**

Black Beauty asserts that the judge misapplied the standard when she determined that the bench was a “roadway” and governed by section 77.1605(k). It contends that a roadway commonly involves vehicle travel as part of the normal mining routine. While the operator acknowledges that the bench was a roadway before the dragline move, it states that at the time of the move it was not a roadway. *See* Oral Arg. Tr. 6. The Secretary agrees that the judge’s reasoning was erroneous; however, she maintains that the judge’s error was harmless.

We conclude that, in finding that the bench was a roadway simply because a rubber-tired vehicle began operating on it, the judge did not use the proper inquiry. The Commission has found that an elevated area, such as a bench, is a roadway where a vehicle commonly travels its surface during the normal mining routine. *See Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982); *Burgess Mining and Constr. Corp.*, 3 FMSHRC 296 (Feb. 1981); *El Paso Rock Quarries, Inc.*, 3 FMSHRC at 36. For instance, in *Burgess Mining*, 3 FMSHRC at 296, the Commission concluded that because a bridge was commonly traveled by trucks during the normal mining routine, it was a roadway governed by section 77.1605(k). In *Capitol Aggregates*, 4 FMSHRC at 846-47, a ramp which was commonly traveled by a front end loader was found to be a roadway.<sup>6</sup> Thus, the presence of a rubber-tired vehicle on the bench, by itself, did not mean that the bench was a “roadway.”

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<sup>4</sup> The judge relied on MSHA’s general policy that an adequate berm is to be at least mid-axle height of the largest vehicle traveling the roadway. 32 FMSHRC at 359

<sup>5</sup> Chairman Jordan joins on the issue of the applicability of section 77.1605(k).

<sup>6</sup> While the regulation at issue in *Capitol Aggregates* was 30 C.F.R. § 56.9-22 (no longer in effect), that safety standard was worded identically to section 77.1605(k).

Nevertheless, we conclude that the bench here was a “roadway” at the time that the inspector issued the citation and that the judge’s error was harmless. The record evidence demonstrates that vehicles commonly traveled over the surface of the bench during the normal mining routine, including during a routine dragline move. Tr. 79, 93. Black Beauty acknowledged that haulage trucks traveled the area before the dragline move and that after the move the operator planned to resume regular traffic. Oral Arg. Tr. 6 (“Prior to the move there is, in fact, to-and-from haulage across that bench; and it is a roadway.”); Oral Arg. Tr. 23-24.

Dragline moves were common at the mine, occurring every seven to ten days. Tr. 79. During a dragline move, it was routine for a rubber-tired backhoe to accompany the dragline and carry its cable. Tr. 79. Therefore, even though the bench was closed to traffic by haulage trucks, the nature of the move necessitated that the bench continue to be used by a rubber-tired vehicle. Stated another way, the dragline move did not alter the bench’s status as a roadway for rubber-tired vehicles. Additionally, it was common for a truck to travel on a bench if the dragline were to require service during a move. Tr. 93. Thus, the service truck’s use of the bench in this instance illustrates that the character of the bench was unchanged. Therefore, the evidence demonstrates that the bench remained a “roadway” during the dragline move.

Our colleague, Commissioner Duffy, claims that our approach is impractical, as berms cannot be maintained during a dragline move at the height sufficient to service a dragline (that is, to permit service trucks in the area) because existing berms must be lowered to accommodate the dragline. Slip op. at 23-24. His point is undercut by Black Beauty’s contention that adequate berms were present (in the form of a remnant berm) during the dragline move. 32 FMSHRC at 359, citing BB Trial Br. at 10-11; *see also* BB Trial Br. at 4 (“[T]he remnant berm that remained behind the dragline was the same height as the whole tire of the MSHA inspection party’s vehicle . . . [t]his would have equated with at least half the height of the tire of the service truck, i.e., axle height”). Terry Traylor, Black Beauty’s operations manager, testified that “there’s normally a five-foot [berm] . . . we lower that . . . down to three feet. We do that to have enough maneuvering room for the machine.” Tr. 68. Significantly, at oral argument, Black Beauty’s counsel was asked whether the operator contended that during the move it was unable to maintain berms at a height that would meet the mid-axle standard. Oral Arg. Tr. at 7. He replied that the remnant berms “would have been adequate for the service truck.” Oral Arg. Tr. at 8. Consequently, our colleague’s fears appear to be unfounded.

**2. The judge's conclusion that a violation occurred should be vacated and remanded.**<sup>7</sup>

Black Beauty also asserts that the judge erred in her analysis of the violation because her rationale is inconsistent with the inspector's testimony on which she relied. BB Br. at 12-13. We agree.

The record contradicts the judge's statement that the parties "[did] not dispute that only a remnant berm existed for the two-tenths of a mile from the bottom of the road to the area where the service truck was located." 32 FMSHRC at 358. Black Beauty asserted that the bench contained a "remnant berm" that was "mid-axle height of the largest rubber-tired vehicle present." BB Trial Br. at 10-11. However, the Secretary in her post-hearing brief repeatedly urged the judge to find that the dragline bench contained *no berms*. S. Tr. Br. at 3 (No. 7 citing Tr. 24, 29), 4 (No. 13 citing Tr. 31), 10 (citing Tr. 29), and 11. Stumbo testified that he observed "no berms" or "zero berms" on the section of the bench where the service truck had traveled. Tr. 29, 31; Gov. Ex. 4; BB Ex. 1. Nowhere in Stumbo's testimony or notes is there any reference to a "remnant berm" or anything similar. Tr. 25-59; Gov. Ex. 5 at 3-5. Thus, the judge's statement that the parties did not dispute the existence of remnant berms is patently incorrect because the Secretary denied the existence of remnant berms. The judge did not resolve the question whether there was a remnant berm or no berm at all. Consequently, we vacate and remand the judge's decision to affirm the citation so that the judge can resolve the conflicts in testimony and explain the basis for her findings. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (holding that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision).<sup>8</sup>

Although, the judge credited the inspector, who testified that there were "no berms," she reached a different conclusion – that there were "inadequate berms." 32 FMSHRC at 359. If, on remand, the judge determines that a remnant berm did exist, she must again determine whether it was adequate. The record establishes that no large haul trucks traveled the roadway during a

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<sup>7</sup> Commissioner Young joins on the issue of whether a violation occurred.

<sup>8</sup> The Secretary acknowledges that "the ALJ's language may be confusing on its face." S. Br. at 6. Nevertheless, the Secretary urges us to "discern" the judge's "intended meaning" which was, according to the Secretary, that there was no berm for 2/10 of a mile. *Id.* at 6-7. However, the Commission is not permitted to "discern" a judge's intended meaning but must rely on what the judge actually says. *See U.S. Steel Mining Co.*, 23 FMSHRC 981, 990 (Sept. 2001); *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006). As Chief Judge Posner pointedly stated in *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996), "we cannot uphold a decision by an administrative agency, any more than we can uphold a decision by a district court, if, while there is enough evidence in the record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result."

dragline move. The typical rubber-tired vehicles which use the roadway during a dragline move are a backhoe and service trucks such as the one that was present on the day of the inspection. Tr. 72-73, 79; BB Ex. 3. Traylor testified that he had observed a berm which existed all along the bench and which arose to at least mid-axle height of the service vehicle. Tr. 73-74, 82. The judge did not make a determination whether Traylor's testimony was credible. If she concludes that there was a remnant berm, she should address this aspect of his testimony.

If the judge should conclude that the mandatory standard was violated, she should also reconsider her S&S and unwarrantable failure analysis in accordance with her findings on remand. The S&S and unwarrantable failure analysis should conform to the guidance we have provided with respect to the other violations herein.

## II.

### Order No. 6671135

#### **A. Factual and Procedural Background**

Inspector Stumbo continued his September 11 inspection by visiting a recently built road which connected a bench to the upper level of the pit. 32 FMSHRC 363. Black Beauty constructed it to transport a drill rig. Stip. 17. The road was approximately 110 to 120 feet in length and inclined at a 30% grade. 32 FMSHRC at 363. A wall was located to its right, and on the opposite side was a ledge with a 50-foot drop to the level below. *Id.*; Tr. 124. Stumbo observed that a 75-foot long section of the road lacked a berm. Tr. 99, 107, Gov. Ex. 6. Stumbo also observed truck tire tracks on the road, which he learned were left by drill foreman Andrew Alano. 32 FMSHRC at 363, Tr. 99-100. As a result of his observations, Stumbo issued section 104(d)(1) Order No. 6671135, which alleged a violation of 30 C.F.R. § 77.1605(k).

The judge concluded that the evidence demonstrated that "inadequate berms existed for part of the drill road." 32 FMSHRC at 363. She relied on Stumbo's testimony and on her own examination of the photograph marked as Black Beauty Ex. No. 6. *Id.* at 363-64. In addition, the judge concluded that the violation was significant and substantial, and attributable to the operator's unwarrantable failure to comply with the cited standard. *Id.* at 364-65.

**B. Disposition**

**1. Substantial evidence supports the judge's decision to affirm the order.<sup>9</sup>**

Black Beauty contends that substantial evidence does not support the judge's finding of a violation. In particular, the operator contends that the judge erred in relying on Stumbo's testimony because it differs from the testimony of its own witnesses.

We conclude that substantial evidence supports the judge's conclusion. Stumbo testified that part of the travel road lacked a berm. Tr. 99, 100-01, 106, 149, 152-53. In addition, the judge credited Stumbo's testimony that the photograph marked as Black Beauty Ex. No. 6 depicted the road as lacking adequate berms. 32 FMSHRC 364. It was within the judge's discretion to credit Stumbo's description of the photograph, despite conflicting testimony from other witnesses. The Commission has held that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Furthermore, the Commission has recognized that, because the judge "has the opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998)). Moreover, the judge examined the photograph herself and found that it depicted a road which lacked adequate berms. 32 FMSHRC at 363-64. Accordingly, substantial evidence supports the judge's determination that a violation occurred.

**2. Substantial evidence supports the judge's S&S designation.<sup>10</sup>**

Black Beauty asserts that the judge erred in affirming the order's S&S designation. The Secretary contends that any error by the judge was harmless.

We conclude that the judge correctly applied the S&S test, and that her findings are supported by substantial evidence. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d),<sup>11</sup> and refers to more serious violations. A violation is S&S if,

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<sup>9</sup> Chairman Jordan and Commissioners Duffy and Young join in affirming the order.

<sup>10</sup> Chairman Jordan joins in affirming the S&S designation.

<sup>11</sup> Section 104(d)(1) provides, in pertinent part,

(continued...)

based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

*Id.* at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The 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.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

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<sup>11</sup>(...continued)

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard*, . . . he shall include such finding in any citation given to the operator under this Act. (emphasis added).

30 U.S.C. § 814(d).

As to the first element of *Mathies*, the judge found, and we have affirmed, that Black Beauty violated section 77.1605(k), a mandatory safety standard under the Act. Thus, we proceed under the second element of *Mathies* to consider whether the violation contributed to a discrete safety hazard.

**a. The judge correctly applied the second element of *Mathies*, and substantial evidence supports her conclusions.**

We conclude that the judge accurately articulated the relevant hazard as “the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline.” 32 FMSHRC at 364. Her description correctly accounts for the dangerous situation that the mandatory safety standard anticipates, i.e., loss of vehicle control near the edge of the road. We have recently upheld analogous descriptions of hazards in the context of the *Mathies* test. See *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366 (Oct. 2011) *appeal docketed*, No. 11-1464 (D.C. Cir. Nov. 29, 2011); *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“*PBS*”). In *Cumberland*, we ruled that the operator’s failure to equip escapeways with lifelines that can be used effectively in an evacuation contributed to a hazard of “miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” 33 FMSHRC at 2361. In *PBS*, we affirmed that the production of an inaccurate mine map contributed to “the danger of breakthrough to an adjacent mine and resulting inundation.” 32 FMSHRC at 1280.

Additionally, we conclude under the second element in *Mathies* that substantial evidence supports the judge’s determination that the lack of berms contributed to the hazard in this case. 32 FMSHRC at 364. The road entirely lacked a berm for about 75 feet, which was the majority of its length. *Id.* at 363. The edge of the road was described as “horizontal, straight out” with a 50-foot drop to the level below. *Id.* In addition, the roadway was inclined at a steep 30 percent angle. *Id.*; Tr. 108, 112-13. It is clear that the lack of a berm under these particular circumstances contributed to the hazard of a vehicle veering off the elevated roadway.<sup>12</sup>

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<sup>12</sup> Commissioner Cohen and Commissioner Nakamura note, as the Commission did in *Cumberland*, that focusing on the clear identification of a “discrete safety hazard” -- such as “the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline” -- does not foreclose consideration of the particular facts of the situation. See 32 FMSHRC at 2368. In *Cumberland*, the ineffective lifelines extended over a substantial distance, and were of a nature that could be expected to cause miners to become confused in an emergency and to be delayed in escaping. *Id.* Thus, we found substantial evidence that these lifelines contributed to the safety hazard of “miners not escaping quickly in an emergency with attendant increased risk of injuries due to a delay in escape.” *Id.* We noted that if the lifeline violations had “been relatively minor in nature and scope, a fact-finder may well not have found that the violations contributed to the hazard of miners being delayed in escaping from the mine in an emergency.” *Id.* Similarly, if the roadway here had lacked berms for only a short distance, or if

(continued...)

**b. The judge correctly applied the third and fourth elements, and substantial evidence supports her conclusions.**

The judge concluded that, if a truck were to veer off the edge of the road, it is reasonably likely that the driver would receive an injury. 32 FMSHRC at 364. Black Beauty contends that the evidence does not support a conclusion that an incident of overtravel was reasonably likely to occur during continuing mining operations. However, the relevant inquiry in the present case is not whether the lack of berms is reasonably likely to cause injury. Instead it is whether the hazard in question – a vehicle veering off the road because of a lack of berms – would be reasonably likely to cause injury.<sup>13</sup>

This analysis is consistent with recent Commission case law involving S&S determinations. In *PBS*, we stated that “[t]he test under the third element is whether there is a

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<sup>12</sup>(...continued)

the violation had been otherwise insignificant, the trier-of-fact could have found that the violation did not contribute to a discrete safety hazard, and hence that the Secretary had failed in her proof under the second element of *Mathies*.

<sup>13</sup> Commissioner Cohen notes that although we ultimately agree with the Secretary that there is a reasonable likelihood that the hazard in question will cause injury, we disagree with the Secretary’s analytical approach taken at the oral argument. Counsel for the Secretary defined the hazard under the second element of *Mathies* as “going over the edge of an elevated roadway in the event that the driver of the vehicle loses control,” and then described the question under the third element of *Mathies* as “in the event that a driver loses control of the vehicle, is it reasonably likely that vehicle is going to go over the edge.” Oral Arg. Tr. 44-45. However, the Secretary’s formulation of the third element is the same as her formulation of the second element, with the addition of the idea of “reasonably likely.” As to both the second and the third elements, the Secretary has assumed that the driver loses control of the vehicle, and then asks whether the vehicle will go over the edge of the road. The Secretary does not distinguish between “hazard” and “injury” (or even mention “injury”). However, the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury. *PBS*, 32 FMSHRC at 1280-81; *Cumberland*, 33 FMSHRC at 2365-66.

Counsel also maintained that the Commission must assume in this case that an emergency has occurred, i.e., a truck is out of control, because the berm standard applies only in emergency situations. Oral Arg. Tr. 47-48, 51. But the Commission has explained that the berm standard is intended to restrain a vehicle by providing “reasonable control and guidance of vehicular motion.” *U.S. Steel Corp.*, 5 FMSHRC 3, 5 n.6 (Jan. 1983). In other words, the standard does not apply only when a vehicle is already out of control; the standard is also intended to warn a driver that the vehicle is too close to the edge. Thus, counsel’s attempt to compare the berm standard to the emergency evacuation standard involved in *Cumberland* is inappropriate.

reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury.” 32 FMSHRC at 1281. We specifically instructed that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* In *Cumberland*, we reaffirmed this principle and concluded that the judge erred because he should “have determined whether there was a reasonable likelihood that the relevant hazard – miners not being able to escape quickly in an emergency situation – would cause injury.” 33 FMSHRC at 2366.

We conclude that substantial evidence supports the judge’s conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury. The evidence clearly shows that the road was steeply inclined and that a truck overtraveling the side of the road would fall 50 feet. Tr. 99, 101, 107-08.

Black Beauty additionally suggests that the existence of a second berm on the bench at the base of the travel road would have prevented a truck from overtraveling the entire bench and falling 50 feet to the level below. However, we conclude that if a truck were to overtravel the road and crash into the bench’s berm instead of falling off the entire bench, it remains reasonably likely that any miners traveling in the truck would receive injuries.

Finally, the judge also determined that each injury would be of a reasonably serious nature. 32 FMSHRC at 364. Black Beauty did not dispute this conclusion. Accordingly, we conclude that the fourth element of *Mathies* is satisfied.

Commissioners Duffy and Young assert that the judge’s S&S finding should be vacated because of the absence of “evidence that any vehicle that used the road went near its edge, or had a reason to go near the edge, or may have been operated in a fashion that would have resulted in its going over the edge (Tr. 144).” Slip op. at 25. However, the analysis of whether a particular violation is S&S also involves looking forward to events which may occur during continuing normal mining operations. *U.S. Steel*, 7 FMSHRC at 1130; *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Elk Run*, 27 FMSHRC at 905-06.

**c. The inclusion of irrelevant evidence in the S&S analysis was harmless error by the judge.**

Black Beauty asserts that the judge’s S&S analysis was confused because she considered evidence relating to its negligence within her S&S findings. Specifically, when setting forth her S&S analysis, the judge stated that Andrew Alano, a supervisor, presented an “extremely poor example” to rank and file miners, in part, because his testimony included a “lax explanation as to why he traveled the road.”<sup>14</sup> 32 FMSHRC at 364. Black Beauty states that Alano’s testimony as to why he traveled the road is irrelevant to the *Mathies* test.

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<sup>14</sup> Alano stated that he traveled the road “because it was done. It was convenient” and “It was - - quicker to the drill. I would have had to drive around the spoil and then down the ramps and the across to get to the 6 bench, and this led directly from the dirt bench or the access road to the drill pad.” Tr. 141-42.

We agree. This testimony by Alano reflects the degree of negligence exhibited by the operator. The finding was extraneous to the S&S analysis, but we believe that its inclusion was harmless error. There is no indication that the judge's reference to Alano's testimony actually affected the way in which she applied the *Mathies* test. Substantial evidence remains to support the S&S designation. Accordingly, we affirm the judge's conclusion.

**3. The judge's unwarrantable failure determination is vacated and remanded.**<sup>15</sup>

The judge concluded that Black Beauty's violation of the mandatory standard was the result of an unwarrantable failure to comply. *Id.* at 365. Black Beauty contends that the judge's analysis contains fatal errors. In particular, it states that the judge erred in finding that it was on notice that greater efforts were necessary and in ignoring evidence that a manager had a good-faith reasonable belief that the road was adequately bermed. The Secretary asserts that the judge's determination is correct and is supported by substantial evidence in the record.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995).

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). 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.

We conclude that the judge's analysis contained multiple errors. First, she relied on a finding that lacked substantial evidentiary support. The judge stated that she "question[ed]

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<sup>15</sup> Commissioners Duffy and Young join on the issue of unwarrantable failure.

whether the road was truly a ‘temporary’ road.” 32 FMSHRC at 365. This statement contradicts the record evidence. The temporary status of the road was undisputed. The parties stipulated that the road was built on the day of the inspection. Stip. 16. Furthermore, the evidence demonstrates that Black Beauty intended to eliminate the road within a few days. Chad Wirthwein, Black Beauty’s safety manager, testified that the road would be destroyed in “[one] to three days.” Tr. 134. Alano, a supervisor for Black Beauty, testified that the road would have probably been destroyed the next morning. Tr. 145. Stumbo testified that “[he] learned that it’s a temporary road.” Tr. 113. We conclude that the temporary status of the road is relevant to both the length of time the violation existed and the degree of danger posed by the violation. *See Consol*, 22 FMSHRC at 353.

The judge’s second error was the failure to consider relevant, potentially mitigating evidence. The judge concluded that “management displayed a certain level of indifference to the requirements of the standard when one of its own foremen utilized the road as a shortcut to travel in his pickup truck.” 32 FMSHRC at 365. She failed to consider, however, that Alano testified that he found the road to contain adequate berms when he traveled it. Tr. 143. Although it is established that a berm was lacking on a large part of the road, the roadway was adequately protected at the top, where Alano entered it. Tr. 106, 143; BB Ex. 8. It may be that from that point, Alano could not see that the berm was inadequate further down the roadway. If so, his action may have been in the nature of a reasonable, good faith mistake, which would be a mitigating factor. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628 (Aug. 1994). On remand, the judge should consider the impact of this testimony when determining if the operator had knowledge of the existence of the violation.

With respect to the issue of notice that greater efforts were necessary for compliance, we conclude that the judge’s decision is supported by substantial evidence. Specifically, the judge concluded that “[t]he mine has a recent history of berm violations, and was on high notice of the need to comply.” *Id.* at 365.

Black Beauty alleges that the judge erred in relying on the past citations, in part, because Stumbo was not familiar with the details of the inspection which led to their issuance. We disagree. The circumstances under which past violations may be considered by a judge in determining whether an operator’s conduct demonstrated aggravated conduct are not limited in this manner. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (Aug. 1992). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11 (Jan. 1997) (citing *Peabody*, 14 FMSHRC at 1263-64). Moreover, substantial evidence supports the judge’s determination. Five days earlier the operator had been issued two citations alleging violations of section 77.1605. Gov. Exs. 2-3.

Accordingly, the judge’s unwarrantable failure designation is vacated and remanded. On remand, the judge should consider evidence that the road was temporary, and also consider Alano’s use of the road in light of conditions as he found them when he entered the road.

### III.

#### Order No. 6671177

##### **A. Factual and Procedural Background**

On September 27, 2007, Stumbo returned to the mine and discovered that Black Beauty was operating three haul trucks to transport material from a shovel to a dumpsite. 32 FMSHRC at 366. Stumbo observed that a section of a dumpsite entirely lacked the protection of a berm. *Id.* at 367; Tr. 169. Stumbo also observed that another section of the dumpsite contained a 45-inch berm which he considered to be inadequate, because the mid-axle height of the haul trucks was 66 inches. 32 FMSHRC at 367; Tr. 170. Stumbo halted a truck that was in the process of backing up. 32 FMSHRC at 367; Tr. 163. He observed that there was not a miner acting as a spotter at the dumpsite. 32 FMSHRC at 367. As a result of his observations, Stumbo issued Order No. 6671177, alleging a violation of 30 C.F.R. § 77.1605(k).

On November 23, 2009, prior to the hearing, the Secretary filed a motion to amend the petition and to plead, in the alternative, that Black Beauty violated the safety standard in 30 C.F.R. § 77.1605(l). It provides that “[b]erms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.” Black Beauty filed a motion in opposition, alleging that the amendment of the order would be prejudicial.

The judge did not rule on the motion at the hearing, but granted it in her written decision, noting that administrative pleadings are “liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party.” 32 FMSHRC at 366 (citing *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ)). She concluded that an area of the dumpsite entirely lacked berms, and that the berms in a separate area were inadequate. *Id.* at 367. In addition, a truck was attempting to dump without the assistance of a spotter. *Id.* As a result, the operator’s dumpsite did not comply with the requirements of section 77.1605(l). *Id.* She found that the violation was S&S and attributable to the operator’s unwarrantable failure to comply with the mandatory safety standard. *Id.* at 368-69.

##### **B. Disposition**

###### **1. The amended petition complied with section 104(a) of the Mine Act.<sup>16</sup>**

Black Beauty contends that the judge erred in granting the Secretary’s motion to amend because section 104(a) of the Mine Act “requires contemplation of only a single standard for each

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<sup>16</sup> Chairman Jordan, along with Commissioners Duffy and Young, join in affirming the judge’s decision to amend the petition.

enforcement action.” Black Beauty also asserts that the judge’s failure to rule on the motion at the hearing prevented it from knowing which violation it was litigating.

The Secretary contends that the judge did not abuse her discretion in permitting the Secretary to plead in the alternative as it had no effect on the operator’s ability to abate the violation or to prepare its defense. The Secretary also contends that section 104(a) of the Mine Act does not prohibit alternative pleadings.

Section 104(a) of the Act provides, in part, that “[e]ach citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.” 30 U.S.C. § 814(a). The Commission has generally recognized that this requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993) (citing *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 510 (April 1989)).

The Secretary may allege alternative violations and comply with section 104(a). *See Empire Iron Mining P’ship*, 29 FMSHRC 999, 1003 (Dec. 2007). In *Empire Iron*, the Commission determined that the Secretary’s citation of alternative violations complied with section 104(a) after it concluded that the operator was able to both discern the condition requiring abatement and prepare for a hearing. *Id.* at 1003-04.

Black Beauty demonstrated that it was aware of the conditions requiring abatement when it successfully abated the violation on the day the order was issued. Gov’t Ex. 8. The order was terminated after the inspector observed that “[t]he operator had a spotter in place as haul trucks dumped spoil to create adequate berms.” *Id.* We note that the use of a spotter is contemplated by section 77.1605(l), rather than by section 77.1605(k).

In addition, the judge correctly concluded that the operator did not suffer prejudice. 32 FMSHRC at 366. The Secretary filed the motion in advance of the hearing. At the hearing, Black Beauty’s witnesses testified that the operator had used a spotter at the dumpsite for part of the day. Tr. 182, 192, 194-95, 197. The use of a spotter at the site is only relevant to the alleged alternative violation of section 77.1605(l). An operator cannot comply with section 77.1605(k) by using a spotter. Accordingly, we conclude that the operator was able to adequately prepare for hearing.<sup>17</sup>

In summary, we conclude that the operator was able to discern which conditions required abatement and was able to adequately prepare for hearing. Therefore, we hold that the judge’s amendment of the order did not violate section 104(a).

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<sup>17</sup> We note that the best practice is for judges to rule on such pending motions prior to the start of a hearing and that there was no reason not to do so in this case.

**2. Substantial evidence supports the judge's conclusion that the operator violated section 77.1605(l).**<sup>18</sup>

The judge concluded that the operator violated the mandatory standard in section 77.1605(l), because a truck was observed in the process of dumping without the protection of adequate berms or a spotter. 32 FMSHRC at 367. Black Beauty argues that the judge's conclusion is unsupported by substantial evidence. In particular, Black Beauty argues that the record demonstrates that the dumpsite contained adequate berms. In addition, it contends that the record does not contain evidence that a truck was dumping without a spotter.

We conclude that substantial evidence supports the judge's decision. First, Inspector Stumbo testified that the west edge of the area contained "no berm." Tr. 161-62, 169. Second, Stumbo stated that he measured the berms on the east side of the site and found that they were 45 inches high. Tr. 170. The mid-axle height of the haul trucks was 66 inches. 32 FMSHRC at 367. Previously, the judge concluded that a reasonably prudent person would recognize that section 77.1605 required a berm that was mid-axle height of the truck operating in the area. *Id.* at 359.<sup>19</sup>

We also conclude that substantial evidence supports the judge's finding that a truck was dumping without a spotter. Stumbo testified that he observed one truck and stopped it from dumping. Tr. 163. He also stated: "[w]e stopped the truck driver and asked him for his spotter, stopped him from dumping. . . . [The truck driver] said that there had been a spotter there earlier, but they had left. A guy on a dozer is the way he put it." Tr. 163. Black Beauty asserts that the judge erred in failing to credit the testimony of Danny Miller, the dozer operator and spotter, whose testimony suggested that he may have spotted the truck in issue before leaving the dumpsite. We conclude that it was within the judge's discretion to credit the testimony of Stumbo over that of Miller.

**3. Substantial evidence supports the judge's S&S designation.**<sup>20</sup>

As previously stated, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Nat'l Gypsum*, 3 FMSHRC at 825; *Mathies*, 6 FMSHRC at 3-4.

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<sup>18</sup> Chairman Jordan, along with Commissioners Duffy and Young, join in affirming a violation of the mandatory standard.

<sup>19</sup> "[T]he adequacy of an operator's . . . guards [is] evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute." *U. S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

<sup>20</sup> Chairman Jordan, along with Commissioners Duffy and Young join in affirming the S&S designation.

Substantial evidence supports the judge's decision to affirm the S&S designation. First, substantial evidence supports the conclusion that the violation contributed to the hazard of a truck veering off the dumpsite and rolling or falling down the spoil bank. 32 FMSHRC at 368. The vertical height of the dumpsite was at least 115 feet. Gov. Ex. 8. One area of the dumpsite completely lacked a berm, while another contained a berm that was not adequate due to insufficient height. *Id.* Furthermore, Inspector Stumbo observed one truck dumping, despite testimony that the drivers were told to halt. Tr. 163, 201. It was within the judge's discretion to infer that the other trucks would also continue to dump in the area, without a spotter, during continuing mining operations. As a result, the second element of the Mathies criteria was satisfied.

In addition, we find that substantial evidence supports the judge's conclusion that a vehicle which veered off the elevated dumpsite is reasonably likely to result in injury, satisfying the third *Mathies* element. The evidence clearly shows that a truck veering off the dumpsite would fall at least 115 feet down a steeply angled slope to the bench below. Gov. Ex. 8; Tr. 164-65, 168. Finally, the judge concluded that such injury would be of a reasonably serious nature, which

satisfies the fourth element of the test. Black Beauty did not dispute this conclusion. Accordingly, we affirm the judge's S&S determination.

**4. The judge's unwarrantable failure determination is vacated and remanded.<sup>21</sup>**

The judge also found that the violation was attributable to an unwarrantable failure to comply with section 77.1605(l). 32 FMSHRC at 369. Black Beauty states that the judge erred in her analysis because she failed to consider relevant evidence, such as evidence that a supervisor ordered the trucks to halt dumping after the spotter left the dumpsite.

We conclude that the judge erred in failing to consider relevant, potentially mitigating evidence. For instance, while the judge stated that the trucks may have been told to halt after the spotter left the dumpsite, she failed to weigh this testimony in her unwarrantable failure analysis. 32 FMSHRC at 368-69.<sup>22</sup> We conclude that, because this evidence may be relevant to the

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<sup>21</sup> Commissioners Duffy and Young join on the issue of unwarrantable failure.

<sup>22</sup> The judge stated that Miller, the spotter, told the trucks to halt. 32 FMSHRC at 368. In fact, Miller testified that his supervisor told the trucks to halt. Tr. 194. Sama, the supervisor, confirmed that he told the trucks to halt dumping activities. Tr. 201. He testified that he expected that Miller's work building another berm would take no more than 30 to 45 minutes, and that he had told the dump truck drivers to hold up during that period. Tr. 201. In contrast, Inspector Stumbo provided hearsay testimony that Sama told him that he had not stopped the trucks. Tr. 178 ("[w]e were talking about the spotter and he had pulled spotter off to do some  
(continued...)

operator's knowledge of the existence of a violation, as well as the judge's assessment of the overall degree of negligence, it should have been weighed in the unwarrantable failure analysis. *Consol*, 22 FMSHRC at 353. It may be that the dumping by one truck, which Stumbo prevented, was contrary to the supervisor's orders, or at least that the supervisor's orders would have prevented any other trucks from dumping without a spotter that day.

As a result, we reverse the judge's unwarrantable failure analysis and remand that issue so that she may consider and weigh all the relevant evidence.

#### IV.

#### Conclusion

The judge's decision regarding Citation No. 6671134 is vacated and remanded. On remand, the judge shall resolve the conflicts in testimony, and if she determines that the Secretary has proven a violation, she should reevaluate the S&S and unwarrantable failure designations.

The judge's decision regarding Order No. 6671135 is affirmed, along with her decision that the order was S&S. However, the unwarrantable failure designation is vacated and remanded. On remand, the judge should consider all relevant evidence when evaluating if the operator's failure to comply with the mandatory safety standard was the result of an unwarrantable failure.

Finally, the judge's decision regarding Order No. 6671177 is affirmed, along with her decision that the order was S&S. However, the unwarrantable failure designation is vacated and remanded. On remand, the judge should consider all relevant evidence when evaluating whether the operator's failure to comply with the mandatory safety standard was the result of an unwarrantable failure.

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

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

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<sup>22</sup>(...continued)  
other work, berm or something like that, but he hadn't stopped his trucks.")

Chairman Jordan, concurring in part and dissenting in part:

I agree with the analysis in Commissioners Cohen and Nakamura's opinion, finding that the dragline bench at issue in Citation No. 6671134 was a roadway for purposes of 30 C.F.R. § 77.1605(k). I would also affirm Order No. 6671135 (concerning the drill road violation) and the judge's finding that the violation was significant and substantial ("S&S"). Regarding Order No. 6671177, which involved allegations of haul trucks traveling and dumping in an area without berms, I agree with the majority that the judge's decision to grant the Secretary's motion to amend the pleading did not violate section 104(a) of the Mine Act. I also agree with the section of the opinion affirming the Order and the S&S designation.

I write separately because I would affirm the dragline bench citation and find it S&S. Additionally, I would affirm the judge's findings of unwarrantable failure regarding the two orders.

**A. Citation No. 6671134**

Regarding the violation of the berm regulation as it pertained to the dragline bench, in Citation No. 6671134, the judge credited the inspector's testimony that for approximately two-tenths of a mile there were inadequate berms.<sup>1</sup> 32 FMSHRC 356, 359 (Mar. 2010) (ALJ). Substantial evidence in the record supports this finding. Inspector Stumbo testified that part of the berm was non-existent. Tr. at 29-31. As the majority notes, the citation alleged that "[t]he dragline bench travel road does not have a berm for a distance of approximately 2/10 of a mile where a service truck with two miners traveled in 18' of the outer banks of a bench with approximately a 50' vertical drop to the pit floor." Gov. Ex. 4; slip op. at 2. Stumbo stated emphatically that there was "a part [of the dragline bench where] there were no berms, zero berms." Tr. 29.

The judge acknowledged Black Beauty's argument that a remnant berm existed, 32 FMSHRC at 359, but she credited the Secretary's witness that there was no berm. Nonetheless, my colleagues remand so that the judge might resolve conflicts in testimony. Slip op. at 5-6. This is unnecessary, as any confusing reference she may have made regarding "inadequate" berms does not detract from her credibility finding and the evidence in the record that no berm existed. Consequently, I would affirm this violation.

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<sup>1</sup> A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

I would also affirm the judge's finding that the violation was significant and substantial. Applying the *Mathies* test used to determine whether a violation is S&S, slip op. at 7-8, the first prong of the test is satisfied because the judge found a violation of a mandatory safety standard, a determination which, as previously stated, I would affirm. Regarding the second prong of the test, I would articulate the relevant hazard as my colleagues and I defined it in our S&S analysis of Order No. 6671135, slip op. at 8-9 -- that is, the danger of a vehicle veering off the elevated roadway and rolling, or falling. The lack of berms here contributed to this hazard, as the record demonstrates that the dragline bench travel road did not have a berm for a distance of approximately 2/10 of a mile,<sup>2</sup> and that a service truck had traveled within 18 feet of the outer banks of the bench. Gov. Ex. 4; Tr. 29-30 ("the truck tracks come [sic] near within 18 feet of the edge of the outer banks of the high wall where it just dropped straight down, approximately 50 vertical feet straight down"). As the judge noted, Stumbo testified that the closer a vehicle travels to the edge of a highway, the more unstable the ground. 32 FMSHRC at 361; Tr. 32. Similar to the drill rig road where we upheld the judge's S&S determination, the evidence shows that there was a 50-foot drop beyond the edge of the dragline bench. 32 FMSHRC at 358, 361; Tr. 32. Hence, the lack of a berm under these particular facts contributed to the hazard of a vehicle veering off the roadway.

As in the analysis my colleagues and I applied in finding Order 6671135 S&S, slip op. at 9-10, the third prong of *Mathies* is satisfied here because substantial evidence supports the judge's conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury. 32 FMSHRC at 361. Finally, the judge's determination that it is reasonably likely that the driver and any passengers would sustain broken bones and injuries of a serious and potentially fatal nature, *id.*, (satisfying the fourth prong of *Mathies*), is also supported by substantial evidence. Tr. 32. In recommending that the injury or illness could reasonably be expected to be permanently disabling, the inspector testified that he took into account "the size of the equipment and the distance of the fall and the material in the vehicle . . . just like a car crash distance, . . . only the truck would have a bigger impact than the car would . . ." Tr. 33. Accordingly, I would affirm the judge's conclusion that the violation was S&S.

However, I would vacate and remand the judge's finding that the violation was the result of the operator's unwarrantable failure. Black Beauty contends that it believed the berm requirement in section 77.1605(k) did not apply during the time the dragline was moving over the bench because the operator did not consider the section of the bench in question to be a "roadway" as that term is used in the standard. Acting on the good faith belief that its cited conduct was actually in compliance with applicable law will not be considered to be the result of unwarrantable failure, even though it is later determined that the operator's belief was in error. However, the operator's belief that the bench was not a road was objectively reasonable under the circumstances. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615-16 (Aug. 1994). I would instruct the judge to consider whether the operator's belief that the bench was not a road was objectively reasonable under the circumstances. As the D.C. Circuit noted in *General Electric*

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<sup>2</sup> My colleagues and I uphold the S&S determination in Order 6671135 where the road lacked a berm for about 75 feet, the majority of its length. Slip op. at 8.

*Co. v. EPA*, 53 F.3d 1324, 1331-32 (D.C. Cir. 1995), even if an agency's interpretation of a regulation is permissible, it may not be the first interpretation that comes to mind. As the D.C. Circuit explained, "[t]he permissible interpretation . . . is by no means the most obvious interpretation of the regulation." *Id.* at 1331.

**B. Order No. 6671135**

As I stated above, I agree with my colleagues that the judge's finding of violation and S&S should be affirmed, but I do not join them in vacating and remanding her unwarrantable failure determination. I would affirm her finding, as supported by substantial evidence. The record reflects that almost the entire drill road lacked berms. Black Beauty acknowledges that the condition existed for approximately 75 feet, BB Br. at 31-32, and the drill travel road was only 110 to 120 feet long. 32 FMSHRC at 363; Tr. at 107. Moreover, the road was on a 30% grade, 32 FMSHRC at 363, and there was a significant drop-off of approximately 50 feet from the edge of the road to the bench below. 32 FMSHRC at 363; Tr. 99. The judge's S&S analysis addressed the degree of danger posed by the road. Furthermore, as my colleagues acknowledge substantial evidence supports the judge's finding that greater efforts were necessary for compliance. Slip op. at 13. In particular, the citations issued on September 6, 2007, provided notice to the operator, as they were issued five days earlier, after an inspector observed inadequate berms at the mine. 32 FMSHRC at 362; Gov. Exs. 2-3.

I also take issue with my colleagues regarding the significance of the operator's argument that the road was temporary and would no longer have existed after the drill was moved. Slip op. at 12. Even if the judge had found that it was temporary, which she did not, 32 FMSHRC at 365; in no way should this finding diminish the aggravated nature of Black Beauty's conduct in failing to install berms, as the operator never intended to improve the berm on the road. Thus, this situation is readily distinguishable from other cases in which the duration of the violation is important because the operator intended to remedy the situation (such as a case where coal accumulations existed for only a short while before the operator was scheduled to clean them up).

I also disagree with my colleagues that a remand is necessary in order to permit the judge to consider the drill manager's testimony that the road contained adequate berms. Slip op. at 12-13. Substantial evidence in the record supports the unwarrantable failure determination based in large part on the extensiveness and danger of the violation. The manager's state of mind – whatever it was – does not undermine these central findings by the judge.

**C. Order No. 6671177**

I would also affirm the judge's determination that Order No. 6671177 was the result of the operator's unwarrantable failure to comply with the safety standard. The failure to supply berms in the dumping area created an extraordinarily dangerous hazard. The evidence is undisputed that there were drops of 115 feet on one side and 129 feet on the other side of the dumping site, with a slope of approximately 40% grade. 32 FMSHRC at 366; Gov. Ex. 8. Black Beauty's Exhibits Nos. 10 through 12, showing photos of the dump site, confirm the presence of a steep drop-off with alarming clarity. In addition, the judge placed great weight on the fact that less than a month

earlier, on September 6, 2007, the operator had been cited for the same conduct: “lack of means to prevent overtravel at the dumpsite.” 32 FMSHRC at 369; Gov. Ex. 3.

Black Beauty contends that trucks were put on hold while David Miller, who had been spotting the trucks, was temporarily called away to another area. BB Br. at 45. The majority remands this case to the judge in order for her to determine whether this was a mitigating factor. Slip op. at 17. However, in her analysis of the unwarrantable failure claim, the judge took this argument into account. Implicitly, she simply found that other factors outweighed it. Consequently, I am not sure what more she can do on remand.

Accordingly, for the reasons stated above, I would affirm the judge’s finding of unwarrantable failure.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

Commissioner Duffy, concurring in part and dissenting in part:

I agree with Commissioners Cohen and Nakamura to affirm the judge's determinations that violations were established in Order Nos. 6671135 and 6671177 and that the latter violation was S&S and to remand with regard to the question of the unwarrantability of both violations. I part ways with my colleagues with respect to two other issues, however.

**A. The Secretary Failed to Establish that the Bench was a Roadway**

With regard to Citation No. 6671134, I cannot agree that the section of a 200-foot wide bench, over which a dragline was being moved, can also be considered a "roadway" here, simply because one vehicle traveled over that section, and in doing so came to within no more than 18 feet of the edge of the bench. The majority rightly rejects the judge's formulation that it was enough that one rubber-tire vehicle traveled over that section of the bench to convert it into a "roadway" for purposes of 30 C.F.R. § 77.1605(k).<sup>1</sup> My colleagues find it to be harmless error, however, because of the evidence that vehicles had used that section of the bench before the dragline move, and would do so again after the move was complete. Slip op. at 3-4. I fail to see the relevancy of that to the question presented, so I cannot join them in concluding that the judge's error was harmless.

In my opinion, the majority entirely fails to consider that, during the time period in which the dragline was moving over the bench at issue, the surface of the bench was such that it could not serve as the haulage roadway that it was before or was to be after the move. Tr. 91-92, 93-94. The Secretary made no attempt to establish that during the dragline move, vehicles could or would travel from one end of the bench to the other as they had before or would after the bench was repaired following the move. Tr. 46-47. That is because a dragline move results in ruts three-inches to three-feet deep being left on the surface of a bench, and thus regrading of it is required before use of the bench as a roadway by such haulage trucks could resume. Tr. 91, 93-94.<sup>2</sup>

Moreover, as the judge acknowledged, the dragline move was so disruptive to transportation over the bench that it necessitated that the existing berms be lowered or material knocked off during the move, and rebuilt after the move was complete. 32 FMSHRC at 358; Tr. 31, 90-91. And those berms could not be rebuilt until regrading had finished, because any excess bench material resulting from the regrading would need to be dumped over the side. Tr. 91-92.

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<sup>1</sup> This was also the reason that the inspector issued the citation. Tr. 30, 33, 47.

<sup>2</sup> Such trucks also require higher berms than were present during the dragline move, which further calls into question why the majority finds the haulage truck's past and future travel over the bench of any relevancy whatsoever.

There were pickup trucks on the other side of the dragline, but because they apparently traveled from the opposite end of the bench, where the berms were sufficient at the time, the operator was not cited regarding that section of the bench. Tr. 29, 46, 92-93; BB Ex. 1. Rather, the operator was cited only for the segment of the bench on which the berms may have been lowered or material knocked off to effectuate the dragline move and over which the service truck in question traveled. Gov't Ex. 4. Under these circumstances, I cannot agree that section of the bench should be considered a "roadway" during the time in question.

In addition to pointing to the questionably relevant pre- and post-dragline move periods of time, my colleagues also justify upholding the judge's conclusion that section 77.1605(k) may have been violated here because it was normal for a service vehicle to travel to the dragline *if* it needed service. Slip op. at 4. That hardly establishes that it was *routine* for the dragline to be serviced by the welding truck during a move.

Moreover, even if it was routine, I again fail to see the relevancy. Service vehicle trips to the dragline or the use of backhoes to reposition its cables when the dragline is located elsewhere on the mine property are not material to the question at hand, which is whether the *area in question*, i.e., the bench over which the dragline was moving, should have been considered to be a roadway at the time. Otherwise, any bench used by a dragline that may have the need for such services would be converted into a roadway, regardless of whether any such service on the dragline while on that particular bench turned out to be necessary.<sup>3</sup>

Finally, following the majority's rationale to its logical conclusion, the operator would not be permitted to remove berms to accomplish a dragline move and necessary subsequent regrading, because the potential service requirements of the dragline would require that the area around the dragline be considered a roadway over which berms must be maintained at all times. Tr. 45-46 (inspector's admission that service truck needed to get close to the dragline). I cannot agree with an interpretation of the standard that proves to be completely infeasible in the context of normal mining operations.<sup>4</sup>

In light of the foregoing, I would reverse the judge on the question of whether the bench was a roadway.

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<sup>3</sup> It is quite clear in this case that MSHA was only citing the operator because there was a service vehicle seen on the bench, and the agency alleges that the berms were inadequate for *that* vehicle. MSHA does not appear to have an interest in adopting the majority's analytical framework, and investigating a mine's practices to determine whether *all* of that mine's benches should be considered roadways *at all times*.

<sup>4</sup> In answering this contention, the majority credits the operator's evidence that in this instance adequate berms were maintained throughout the dragline move. Resolution of that factual issue, however, has been remanded to the judge. *See* slip op. at 4.

**B. The Judge Failed to Consider all of the Evidence in Affirming the Designation of Order No. 6671135 as S&S**

I also believe the majority errs in affirming the judge's S&S finding with respect to Order No. 6671135, having to do with the inclined temporary road. The majority correctly recognizes that it is the cause and effect of the hazard (here, the lack of berms for roughly half of the road) that must be significant and substantial; that we must consider the length of time the violative condition existed before it was cited, and would have existed under normal mining conditions, but for its discovery by the inspector; and that it is the particular facts surrounding the violation that determine whether it is S&S. Slip op. at 8.

I think it clear from the record that the judge failed to adequately consider all the facts surrounding the violation. Of particular importance is that it was established below that the road was only a temporary one, it having been built just that afternoon and slated to be removed within the next day or so. Tr. 113-14, 123-24, 134, 145. In addition, the road was described as relatively wide (Tr. 143), and among the pictures taken that established the violation was one that shows the none of the tracks on the road came anywhere near the edge of the road. BB Ex. 8; Tr. 104, 111-12, 133. Nor was any evidence introduced which showed that during the brief time the road existed, there was or would have been any two-way traffic over it.

Throughout the inspector's testimony and the judge's decision there are references to the possibility of vehicular loss of control or mechanical failure, and how that could cause a vehicle to go over the edge of a road where an adequate berm was lacking. I do not dispute that it would be quite dangerous for a truck to go careening towards the edge of the road where it lacked an adequate berm at a point at which there was the steep drop off over the road's edge. However, absent evidence that any vehicle that used the road went near its edge, or had a reason to go near the edge, or may have been operated in a fashion that would have resulted in its going near the edge (Tr. 144), I cannot agree that substantial evidence supports the judge's conclusion that the lack of berms was a S&S violation of the standard in this instance. This is particularly true here, where the road was a temporary one and thus would cease to exist during continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Given that we are remanding the case to the judge to reconsider other issues, I would include this issue as part of the remand, in order to allow the judge to review all of the relevant evidence surrounding the violation.

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

Commissioner Young, concurring in part and dissenting in part:

Like Commissioner Duffy, I too agree with Commissioners Cohen and Nakamura to affirm the judge's determinations that violations were established in Order Nos. 6671135 and 6671177 and that the latter violation was S&S, and to remand with regard to the question of the unwarrantability of both violations. I also agree with Commissioner Duffy's analysis of the two issues on which he writes separately, and would remand the S&S issue with respect to Order No. 6671135. However, in order for there to be a majority disposition with regard to the question of whether there was a violation as alleged in Citation No. 6671134, I will instead join Commissioners Cohen and Nakamura in result on the question of whether the bench was a roadway, and join them in remanding to the judge the factual question of whether the berms along the bench were adequate ones.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 7, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. SE 2009-401-M
ADMINISTRATION (MSHA)	:	SE 2009-402-M
	:	SE 2009-553-M
v.	:	SE 2009-554-M
	:	SE 2010-849-M
MIZE GRANITE QUARRIES, INC.;	:	SE 2010-850-M
ROBERT W. MIZE III; and	:	
CLAYBORN LEWIS	:	
Both Employed by MIZE GRANITE	:	
QUARRIES, INC.	:	

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

**DECISION**

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). This case involves eleven penalties proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Mize Granite Quarries, Inc. (“MGQ”), and four penalties proposed under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), against the mine’s owner, Robert W. Mize III (“Mize”), and, separately, against the mine’s foreman, Clayborn Lewis (“Lewis”). Administrative Law Judge Priscilla M. Rae substantially reduced five of the penalties proposed against MGQ and three of the penalties proposed against Mize and Lewis, and she dismissed one penalty proposed against Mize and Lewis. 33 FMSHRC 886, 914-18 (Apr. 2011) (ALJ).

The Commission granted the Secretary of Labor’s petition for discretionary review only as to the issue of whether the judge failed to adequately explain the basis for substantially reducing the penalties proposed against MGQ and for substantially reducing or entirely dismissing the penalties proposed against Mize and Lewis. Unpublished Order dated May 27, 2011. For the following reasons, we affirm the judge’s reduction of the penalties proposed against MGQ, affirm the judge’s dismissal of the penalties proposed against Mize and Lewis associated with Order No. 6505714, and remand the remaining penalties proposed against Mize and Lewis for further consideration consistent with our decision.

## I.

### **Factual and Procedural Background**

Mize owns and operates MGQ, a stone quarry located in Elberton, GA. 33 FMSHRC at 888. MGQ employs one foreman, Clayborn Lewis, and, at the time of the hearing, seven miners. *Id.* The citations and orders at issue before the judge arose during two inspections conducted by authorized MSHA inspectors on January 13, 2009, and March 11-12, 2009. *Id.* at 888-90. The Secretary also conducted a special investigation which resulted in proposed assessments against Mize and Lewis under section 110(c) of the Act.<sup>1</sup> *Id.* at 888.

At issue before the judge were eleven proposed penalties against MGQ and four proposed penalties against Mize and Lewis, separately. In the “Citations and Orders” section of her decision, the judge detailed the issues, arguments, evidence, applicable law, and her conclusions regarding each separate citation or order. *Id.* at 890-913. The judge then listed the six statutory criteria that she must consider in her assessment of penalties under section 110(i) of the Act, 30 U.S.C. § 820(i). *Id.* at 914. The judge observed that “[t]he penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria and the deterrent purpose of the Act are given due consideration.” *Id.*, citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). Of the eleven proposed penalties against MGQ, the judge vacated two citations, affirmed four citations and proposed penalties in full, and reduced the amounts of five penalties. *Id.* at 914-15. With regard to the four penalties proposed against Mize and Lewis, the judge dismissed the penalties for Order No. 6505714 and reduced the amounts of the remaining three penalties. *Id.* at 915-18.<sup>2</sup>

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<sup>1</sup> Section 110(c), 30 U.S.C. § 820(c), provides that:

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

<sup>2</sup> The proposed penalties, assessed penalties, and dispositions of these citations and orders are summarized below:

## II.

### Disposition

The Secretary argues that the judge failed to adequately explain the basis for substantially reducing five penalties against MGQ and three penalties against Mize and Lewis, and entirely dismissing one proposed penalty against Mize and Lewis. The Secretary maintains that the judge did not resolve the conflicting claims concerning the effect of the proposed penalties on MGQ's ability to remain in business, and that the judge did not discuss the submitted corporate

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<b>Citation or Order No.</b>	<b>Proposed Penalty</b>	<b>Assessed Penalty</b>
1. Citation No. 6507102	MGQ \$9,634 Mize \$3,600 Lewis \$3,600	\$4,440 \$500 \$300
2. Citation No. 6507104	MGQ \$2,976	\$2,976
3. Order No. 6505709	MGQ \$35,543 Mize \$6,000 Lewis \$6,000	\$10,000 \$500 \$300
4. Citation No. 6505710	MGQ \$362	\$100
5. Citation No. 6505711	MGQ \$807	\$250
6. Citation No. 6505712	MGQ \$243	Vacated
7. Citation No. 6505713	MGQ \$243	\$243
8. Order No. 6505714	MGQ \$4,440 Mize \$4,000 Lewis \$4,000	\$3,000 Dismissed Dismissed
9. Order No. 6505715	MGQ \$4,440 Mize \$4,000 Lewis \$4,000	\$4,440 \$500 \$300
10. Citation No. 6505716	MGQ \$362	\$362
11. Citation No. 6505717	MGQ \$190	Vacated

PDR at 5-12; 33 FMSHRC at 898, 906-07, 912-18.

tax returns. In assessing penalties against MGQ, the judge stated: “I have considered the criteria in 110(i) in view of the evidence of record in making my findings herein. The following penalties w[ill] not affect the operator’s ability to continue in business and are appropriate under the Act.” 33 FMSHRC at 914. The Secretary asserts that this conclusory statement fails to identify the basis for the judge’s penalty reductions, since it is unclear whether they were based on MGQ’s claim of financial hardship, the judge’s disagreement with the Secretary’s proposed penalty amounts, or some combination of both. Moreover, the Secretary asserts that since Lewis did not submit any financial information, and the judge did not address Mize’s net worth, the judge failed to resolve the conflicting claims concerning the individual financial abilities of Mize and Lewis to pay the proposed section 110(c) penalties. Finally, the Secretary states that there was no discernible method used by the judge in arriving at the penalty reductions.

In response to the Secretary’s brief, the respondents, appearing *pro se* (with Mize appearing on behalf of Lewis), submitted copies of MGQ’s corporate tax returns for fiscal years 2007-2009. In the accompanying cover letter, MGQ maintains that it is a small mine and that the proposed penalties will affect its ability to remain in business. These tax returns had previously been submitted to the Judge at the close of the evidentiary hearing.

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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

30 U.S.C. § 820(i).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

As the judge noted in her decision, the penalty assessment for a particular violation is within the sound discretion of the administrative law judge so long as the six statutory criteria are given due consideration. 33 FMSHRC at 914; *Sellersburg Stone Co.*, 736 F.2d at 1152; *Cantera Green*, 22 FMSHRC at 620. The parties stipulated that MGQ is a small operator with no prior history of accidents or injuries, and that it demonstrated good faith in abating the violations. Tr. 9, 151-52, 180, 187. Besides these stipulated factors, the judge also considered the negligence and gravity of the violations, the operator's history of violations, and the effect of the penalties on the operator's ability to remain in business. MGQ submitted tax returns indicating that it has been losing money and operating at a net loss in fiscal years 2007-2009. Resp. Ex. 1. Based on all of this information, the judge found "several of the penalty amounts proposed by the Secretary to be out of proportion to the size of the mine and the facts presented." 33 FMSHRC at 914. She further noted that the penalties she assessed "w[i]ll not affect the operator's ability to continue in business and are appropriate under the Act." *Id.* We find that the judge adequately considered the statutory criteria and, in her detailed analysis of each violation, applied her findings to her decision to reduce the operator's penalties, and that her findings are supported by substantial evidence. Therefore, we conclude that the judge did not abuse her discretion, and affirm her decision to reduce the operator's penalties.

The six statutory criteria also apply, with revisions appropriate to individuals, to the assessment of section 110(c) penalties against individuals. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997). As the judge noted, the relevant inquiries include whether the penalty will affect the individual's ability to meet his financial obligations and whether the penalty is appropriate in light of the individual's income and net worth. 33 FMSHRC at 916; *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 824 (May 1997).

At the outset of consideration of the judge's section 110(c) penalties against Mize and Lewis, we affirm the judge's dismissal of the penalties proposed by the Secretary that were associated with Order No. 6505714. 33 FMSHRC at 917. She had held that the underlying violation was not a result of the operator's unwarrantable failure to comply with the mandatory standard (although she determined that a finding that the operator was highly negligent was supported by the evidence). *Id.* 909-10. Her reasoning was that the "danger posed by this condition [in contrast with the unwarrantable failure violation in Citation No. 6505709 and Citation No. 6507102]<sup>3</sup> . . . was not of such grave concern that a failure to address it constituted aggravated conduct." *Id.* at 910. Additionally, the judge found that the fact that MSHA did not cite this same condition in the previous inspection two months earlier "does militate against a finding that [MGQ] was on notice that greater efforts were necessary to comply with the standard." *Id.* Her finding that the violation was not unwarrantable sufficiently explains why in her view no penalties against the individuals should be assessed, because she did not find them liable under section 110(c). *Id.* at 917.

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<sup>3</sup> The judge referred to Citation No. 6507104, but her reference described the facts in Citation No. 6507102. 33 FMSHRC at 891-97, 909-10.

Regarding the remaining individual penalties, after the parties filed post-hearing briefs, the judge ordered Mize and Lewis to provide documentary evidence of their personal income and financial responsibilities because it was germane to the determination of appropriate penalties for a section 110(c) assessment. Unpublished Order Reopening for Submission of Evidence at 1-2 (Mar. 4, 2011). The judge further noted that the corporate finances are not relevant to the issue of personal liability. *Id.* at 1 (citing *Sunny Ridge*, 19 FMSHRC 254). However, in her decision the judge stated that she had considered:

th[e] fact that [MGQ] has been assessed rather significant 110(i) penalties for the violations which will also be paid by Mr. Mize. I have taken this overlapping effect of the penalties into account in the assessment of the personal penalties. I find the penalties proposed by the Secretary are disproportionate to the size of the mine vis a vis the income of the agents, and their lack of personal histories for previous violations.

33 FMSHRC at 916-17.

However, we have made clear that the proper inquiries for the determination of individual penalties ought not include the size of the mine nor the penalties levied against the corporation. *Sunny Ridge*, 19 FMSHRC at 271-72. MGQ is a corporation, with the advantages of a corporate structure, including limited liability. By assuming that Mize would pay the penalties assessed against MGQ, the judge in effect was treating it as a partnership or an individual proprietorship. Thus, the judge's assumption that Mize would pay the operator's penalties is incorrect. Therefore, we remand for the judge to consider the individual penalties assessed against Mize based solely on Mize's personal financial status.

Regarding the penalties assessed against Lewis, the judge said, "[t]aking into account that Mr. Lewis is a paid employee of Mize, and not the owner, but otherwise for the same reasons set forth above regarding Mr. Mize, I assess the following penalties." 33 FMSHRC at 917. The judge also noted that Lewis did not respond to her March 4, 2011 Order reopening the record for the submission of financial information. *Id.* at 916. However, the judge stated, "[u]nder the circumstances, I find that making additional inquiries and delaying the case further would not be fruitful. Instead I make the finding that the penalties I assess will not adversely affect the ability to meet individual financial obligations of Mr. Lewis." *Id.* (citation omitted). We conclude that the Judge did not adequately explain her reasons for reducing the penalties for Lewis.

We note that the Judge's March 4, 2011 Order was not sent to Lewis directly but was addressed to him c/o Mize Granite Quarries, Inc. Moreover, the order was written in language which might not readily be understandable by a layman. Lewis was represented by Mize at the hearing and the answer to the petition was submitted on his behalf by Mize. Although Lewis testified at the hearing, his testimony was confined to the circumstances of the violations and did not touch on his personal financial situation. Tr. 161-78. Mize's closing statement at the end of

the hearing did not address the personal liability issues. Tr. 179-83. There is nothing in the record which indicates that Lewis understood that the amount of his penalty would be affected by consideration of his income and net worth, and his ability to meet his financial obligations.

As a result, we remand for the judge to reconsider the individual penalties assessed against Lewis, after he is directly notified of the penalties proposed by MSHA (a total of \$17,600), and given another opportunity to provide documentary evidence and an affidavit or declaration regarding his personal income and financial responsibilities.<sup>4</sup> Lewis should be specifically notified that (1) the amount of the penalties the judge will impose may be affected by the amount of his income and net worth, and by the impact of the penalties on his ability to meet his financial obligations; and (2) if Lewis fails to provide evidence of income, net worth, and financial obligations, the judge may presume that the imposition of the assessed penalties would not adversely affect his ability to meet financial obligations.

Although we remand for the judge's consideration of the individuals' personal financial information, in order to preserve the individuals' privacy, we do not expect a detailed financial analysis in the judge's decision. Rather, we seek an adequate explanation of which conflicting claims the judge considered with regard to each separate penalty, how the claims were resolved, and how the statutory criteria were applied to substantially reduce or entirely dismiss each proposed penalty.

Pursuant to our direction for review, the petition for discretionary review remains under seal because it contains confidential financial information, and any subsequent filings by the parties containing confidential financial information shall also be placed under seal.

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<sup>4</sup> We suggest that any notices or orders be mailed to Lewis at the address where he resides, S. Ex. 15, as well as to the mine.

### III.

#### Conclusion

For the reasons set forth above, we affirm the penalties imposed by the judge against MGQ, affirm the judge's dismissal of the penalties proposed against Mize and Lewis associated with Order No. 6505714, vacate the remaining penalties imposed against Mize and Lewis, and remand this matter for further proceedings consistent with our 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

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August 9, 2012

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

v.

MACH MINING, LLC

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Docket Nos. LAKE 2010-190  
LAKE 2009-716-R

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

DECISION

BY: Duffy, Young, Cohen, and Nakamura, Commissioners

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Mach Mining, LLC (“Mach”) is seeking review of an order alleging that Mach violated 30 C.F.R. § 75.370(d)<sup>1</sup> by resuming mining without an approved ventilation plan and that the violation was caused by the operator’s unwarrantable failure to comply with the standard. Administrative Law Judge Margaret Miller affirmed the order and allegation of unwarrantable failure. 33 FMSHRC 1674, 1681, 1682 (July 2011) (ALJ). For the reasons that follow, we affirm the violation, and vacate and remand the Judge’s determination of unwarrantable failure.

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<sup>1</sup> 30 C.F.R. § 75.370(d) provides:

No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

## I.

### **Factual and Procedural Background**

Mach operates the Mach No. 1 Mine, an underground coal mine near Johnston City, Illinois. Mach uses continuous miners to develop gate roads and a longwall shearer to retreat-mine blocks of coal referred to as “panels.” 33 FMSHRC at 1675. Mach submitted to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) a ventilation plan, which was approved in March 2008, which showed that three longwall panels (Panels 1 through 3) would be mined to 18,000 feet in length. *Id.* At times while Mach was mining Panel 2 and driving the headgate road for Panel 3, Mach was engaged in negotiations with MSHA over a general, or base, plan for the mine and site-specific plans for Panels 2 and 3. PDR at 5. Mach reached an impasse in plan negotiations with MSHA and resumed mining, which led to the issuance of citations and orders described briefly in the paragraphs that follow.

In February 2009, Mach and MSHA were involved in negotiations regarding the bleeder system for Panel 2. 33 FMSHRC at 1678. After an impasse was reached, on March 11, 2009, MSHA Inspector Bobby Jones issued a technical citation (No. 8414236) to Mach alleging a violation of 30 C.F.R. § 75.370(a)(1) for mining Panel 2 without an approved ventilation plan.<sup>2</sup> *Id.*; Mach Ex. C; Tr. 75. Mach contested the citation, and the matter was docketed as LAKE 2009-360-R and assigned to Administrative Law Judge Avram Weisberger, who scheduled a hearing for April 21, 2009. PDR at 5; Tr. 75. In the meantime, Mach mined Panel 2 in accordance with the plan provisions MSHA sought. Tr. 76-77; PDR at 5. MSHA vacated the citation on April 15, 2009, and the Judge dismissed the contest. Mach Ex. C; S. Br. at 3 n.3. After Citation No. 8414236 was vacated, Mach mined Panel 2 in accordance with the plan it had submitted. 33 FMSHRC at 1678; S. Br. at 3 n.3; PDR at 5; Tr. 77. Mach did not receive a notification from the District Manager approving the ventilation plan for Panel 2. 33 FMSHRC at 1678.

Meanwhile, on March 13, 2009, MSHA Inspector Bobby Jones discovered that Mach had mined Headgate No. 3 (“HG 3”) 1,000 feet beyond the set up-room established in its approved ventilation plan for Panel 3, which created a stair-step effect. *Id.* at 1675. Inspector Jones issued Order No. 8414238, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1),

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<sup>2</sup> 30 C.F.R. § 75.370(a)(1) provides in part:

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

alleging that Mach violated 30 C.F.R. § 75.370(d) for mining HG 3 without an approved ventilation plan. *Id.* That order was docketed as LAKE 2009-395-R and assigned to Judge Richard Manning.<sup>3</sup>

On June 4, 2009, Mach submitted a revised ventilation base plan to MSHA in order to fulfill requirements for a 6-month review of the plan, and new requirements for justifying the use of belt air. 33 FMSHRC at 1678; Tr. 82. Mach and MSHA entered into discussions regarding the suitability of the plan to conditions at the mine. 33 FMSHRC at 1678.

On August 6, 2009, District Manager Robert Phillips sent a letter to Mach identifying items that needed to be addressed in order for Mach to continue mining HG 3. Mach Ex. E. On September 3, 2009, Mach responded to MSHA's August 6 deficiency letter by submitting a revised ventilation plan to MSHA, specific to mining Panel 3. 33 FMSHRC at 1676; Mach Ex. F.

On September 9, 2009, MSHA Inspector Bobby Jones terminated Order No. 8414238. 33 FMSHRC at 1676. At the time that Inspector Jones terminated the order, he advised Mach's Mine Manager, Anthony Webb, to speak with Jones' supervisors regarding the reasons for the termination. *Id.* at 1679. When Webb spoke with Inspector Jones' supervisor, Mike Renni, Mr. Rennie did not give Webb an explanation but, instead, told him that the decision to terminate came from someone above Rennie. *Id.*; Tr. 88-89. Webb chose not to contact the District Manager. 33 FMSHRC at 1679.

MSHA Inspector Phillip Long recorded in his inspection notes of September 16 and 17, 2009 that he had discussions with Webb, who indicated that Mach was awaiting approval of its ventilation plan for Panel 3 from MSHA. *Id.* at 1677; Tr. 27-32; Gov't Exs. 9-10. As indicated in Inspector Long's notes for September 17, Webb asked him if Long would issue "paper" if they "started up." Tr. 32-33; Gov't Ex. 10. Long answered, "more than likely." *Id.*

Mach's counsel sent a letter dated September 17, 2009, to MSHA stating that, although MSHA had indicated "that Mach still does not have an approved ventilation plan," Mach would be resuming its development of HG 3 based upon counsel's interpretation that the September 9 termination of Order No. 8414238 amounted to approval of Mach's proposed ventilation plan, submitted on September 3. Gov't Ex. 11 at 1, 2 n.1.

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<sup>3</sup> Judge Manning granted in part the Secretary's motion for summary decision, holding that Mach had violated section 75.370(d). *Mach Mining, LLC*, 31 FMSHRC 709, 714-15 (May 2009) (ALJ). He denied the Secretary's motion for summary decision on the issues of unwarrantability and negligence and held a hearing on those issues. *Id.* at 715, 716; S. Br. at 4 n.5. On January 18, 2012, he issued a decision concluding that Mach did not engage in aggravated conduct and that the violation set forth in Order No. 8414238 was improperly designated as unwarrantable. *Mach Mining, LLC*, 34 FMSHRC 198, 209-10 (Jan. 2012) (ALJ).

On September 21, 2009, Inspector Long spoke with Chris England, an employee of Mach, who stated that Mach was still setting up HG 3 but that they were very close to beginning mining. 33 FMSHRC at 1677; Tr. 35; Gov't Ex. 7. Mr. England asked, "Are you going to issue an order if we start up?" and Inspector Long replied, "Yes, if the plan has not been approved." 33 FMSHRC at 1677; Tr. 35-36. Inspector Long then learned from Mine Manager Webb that mining had in fact begun. 33 FMSHRC at 1677. Inspector Long traveled to the area, confirmed that mining was occurring, and issued the subject section 104(d)(2) order (Order No. 8414529) alleging a violation of section 75.370(d). *Id.* The order stated that Mach had resumed mining before a ventilation plan had been approved by the District Manager. *Id.* at 1676.

The parties continued to discuss the provisions of both the base ventilation plan and the site-specific plan for Panel 3. *Id.* Eventually, the parties reached an impasse. *Id.* On September 29, 2009, MSHA issued two technical citations (Citation Nos. 6680550 and 6680551) to Mach, alleging violations of section 75.370(d). *Id.*; Jt. Mot. to Consol. Mach contested the citations, and the matter was assigned to Judge Miller. 33 FMSHRC at 1676. Those citations are the subject of *Mach Mining, LLC*, Docket Nos. LAKE 2010-1-R, et al., in which the Commission is separately issuing a decision on this date.

Mach contested the subject order (No. 8414529), and the matter proceeded to hearing before Judge Miller.

Judge Miller concluded that Mach had violated section 75.370 as alleged in Order No. 8414529 and that the violation had occurred as a result of the operator's unwarrantable failure to comply. *Id.* at 1681-82. In finding a violation, the Judge rejected the operator's argument that MSHA's termination of Order No. 8414238 amounted to an approval of Mach's ventilation plan for Panel 3. *Id.* at 1675-81. The Judge also found that Mach's resumption of mining without an approved ventilation plan was unwarrantable, rejecting Mach's argument that there was a good faith disagreement over the meaning of the termination of Order No. 8414238. *Id.* at 1681-82. Accordingly, the Judge assessed a penalty of \$5,000, rather than the proposed penalty of \$4,000. *Id.* at 1674-75, 1683.

Mach filed a petition requesting discretionary review of the Judge's decision, which the Commission granted. In addition, the parties filed a joint motion requesting that the Commission consolidate the instant proceedings with *Mach Mining, LLC*, Docket Nos. LAKE 2010-1-R, et al., where, Judge Miller had also found in favor of the Secretary, and the Commission had granted Mach's petition for discretionary review.<sup>4</sup>

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<sup>4</sup> Having considered the parties' motion to consolidate, we hereby deny it. Although we consider the instant proceeding with Docket Nos. LAKE 2010-1-R, et al., and issue our decisions in both cases on the same date, we decline to consolidate the cases given the great number and complexity of issues in dispute in Docket Nos. LAKE 2010-1-R, et al.

## II.

### Disposition

#### A. Whether termination of Order No. 8414238 amounted to approval of Mach's ventilation plan?

Mach contends that MSHA's termination of Order No. 8414238 constituted approval of Mach's proposed site-specific ventilation plan for Panel 3. PDR at 8-14. It explains that Order No. 8414238 alleged that the operator had mined HG 3 without an approved ventilation plan in place. *Id.* at 8. The operator asserts that because a termination means that the allegedly violative condition (mining without an approved plan) has been abated, the termination constituted a writing indicating that the proposed ventilation plan had been approved within the meaning of 30 C.F.R. § 75.370(c)(1).<sup>5</sup> *Id.* at 8-9. Mach maintains that because its ventilation plan had been approved, the subject order for mining without an approved plan should be vacated. *Id.* at 9. Finally, it argues that MSHA approved Mach's ventilation plan for Panel 2 by vacating a citation in a similar manner. *Id.* at 12-13.

The Secretary responds that the termination of the order did not constitute written notification of the disputed plan's approval as required by section 75.370(c)(1). S. Br. at 9-10. We agree.

We begin our analysis with the language of section 75.370(c)(1). As the Commission has recognized, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Section 75.370(c)(1) provides in pertinent part that, "The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision." 30 C.F.R. § 75.370(c)(1). By its terms, section 75.370(c)(1) clearly requires a written notification to an operator by the district manager that a ventilation plan has been

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<sup>5</sup> 30 C.F.R. § 75.370(c)(1) provides:

The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision. A copy of this notification will be sent to the representative of miners by the district manager.

approved or that approval has been denied. The standard sets forth two enforcement paths: approval of a ventilation plan or denial of approval of a ventilation plan, either of which must be taken by a written notification by the district manager. It does not provide for a constructive or implied approval process.

Here, the terms for approval required by section 75.370(c)(1) were not met. There was no written notification by the district manager approving Mach's ventilation plan for Panel 3. The termination of Order No. 8414238 was written by MSHA Inspector Jones, not the district manager. Moreover, the termination simply stated, "MSHA hereby terminates this order," and did not address the proposed plan, much less approve it. Mach Ex. D (Order No. 8414238-07). In fact, there were no representations from MSHA that the termination of Order No. 8414238 was intended to amount to an approval of Mach's ventilation plan.

We further conclude that Mach's experience with Panel 2 does not support its argument that termination of the order amounted to approval of its ventilation plan. There are factual differences that distinguish the circumstances that occurred with respect to Panels 2 and 3. Mach resumed mining Panel 2 after the technical citation issued for that panel had been vacated, while Order No. 8414238 was merely terminated. In addition, the enforcement document vacating Citation No. 8414236 regarding Panel 2 provided a lengthy explanation of Mach's obligations for ventilating its bleeder system. Mach Ex. C (Citation No. 8414236-06). In contrast, Order No. 8414238 was terminated with a few words. Mach Ex. D (Order No. 8414238-07).

Moreover, Mach's argument with respect to Panel 2 and the termination of Order No. 8414238 is not a defense to liability because it amounts to an estoppel argument. *See Austin Powder Co.*, 29 FMSHRC 909, 920 (Nov. 2007). Mach is essentially arguing that MSHA should be estopped from citing it for operating without an approved ventilation plan, because to do so would be inconsistent with MSHA's prior actions in terminating the order, and inconsistent with its actions with respect to Panel 2 (when Mach was permitted to mine with its proposed plan after MSHA vacated a citation). However, the Commission has "long held that an inconsistent enforcement pattern by MSHA inspectors does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Id.*, citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *see also Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) ("prior instances of inconsistent action by MSHA do not constitute a viable defense to liability."). Rather, confusing MSHA actions may be a mitigating factor in determining an operator's negligence. *King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981). Thus, as discussed further below, any inconsistent enforcement actions by MSHA are relevant in considering Mach's degree of negligence.

For these reasons, we affirm the Judge's determination that the termination of Order No. 8414238 did not amount to approval of Mach's ventilation plan, and affirm Order No. 8414529.

**B. Whether Mach's violation was caused by unwarrantable failure?**

The "unwarrantable failure" terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence, and we characterized it in such terms as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04.

The Commission has further 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. Factors relevant to that consideration 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).

The Commission has repeatedly made clear that it is necessary for a judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (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 or her 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 Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

The Judge here considered three of the factors determined by the Commission to be relevant to the consideration of whether a violation was caused by unwarrantable failure. The Judge considered the factors of obviousness and the operator's knowledge of the existence of the violation, concluding that the "violation was obvious and was done with full knowledge of the operator, as the mine intentionally began mining without a plan in place." 33 FMSHRC at 1682. In addition, the Judge considered the factor of the length of time that the violation has existed. *Id.* The Judge stated that "[w]hile the violative condition may not have existed for an extended period of time, I agree with the Secretary's argument that . . . 'the violative act itself outweighs the short period of time between action and discovery.'" *Id.*, quoting S. Post-Hearing Br. at 12. Thus, the Judge balanced the short duration of the violation against the factors of obviousness and the operator's knowledge of the existence of the condition, which she found to be aggravating.

Although the Judge addressed the operator's knowledge of the violation, we conclude that the Judge failed to adequately consider and address mitigating evidence relevant to that factor. As noted above, although MSHA's seemingly inconsistent actions in terminating Order No. 8414238 and its actions with respect to Panel 2 are not defenses to liability, such evidence is relevant to whether Mach's violation, alleged in Order No. 8414529, is unwarrantable. After Citation No. 8414236 (issued with respect to Panel 2) was vacated, Mach was permitted to mine in accordance with the plan it had submitted even though it never received written plan approval from the district manager. Tr. 77-78.

With regard to the site-specific plan for Panel 3, the MSHA district manager's letter of August 6, 2009 to Anthony Webb stated:

The following plan requests are based on conversations between District 8, yourself and Operations Manager, Mr. Drexel Short, as to how Mach intends to ventilate the mine with Headgate #3 mined to 19,000 feet. These plan items would need to be addressed and approved by the District Manager *in order to terminate the 104(d)(1) Order and permit the resumption of mining in HG #3.*

Gov't Ex. 4, Mach Ex. E (emphasis added). The letter then set forth two acceptable options for connecting a 19,000 foot Panel 3 into the existing bleeder system. This letter, in effect, linked the termination of Order No. 8414238 with permitting the resumption of mining in HG 3. In response, Mach's letter of September 3, 2009 to the district manager stated, "This letter, along with the enclosures, responds to your letter of August 6, 2009 with the aim of abating Order No. 8414238 issued under Mine Act § 104(d) on March 13, 2009." Mach Ex. F. Order No. 8414238 was terminated on September 9, within a week of submission of the the proposal contained in Mach's September 3 letter. MSHA's statement in the August 6 letter, together with its prompt termination of the Order after receiving Mach's September 3 letter, constitutes a mixed signal to Mach as to the significance of the termination of the Order.

When Mach asked Inspector Jones the meaning of the termination, Inspector Jones, and Jones' supervisor, were unable to provide an explanation. Tr. 88-89, 101. In fact, Inspector Long testified that since there was no "clearcut answer" for why the order had been terminated, he could understand why Mach "could assume that [it] could resume mining." Tr. 53. Mach contacted its counsel regarding resuming mining, and its counsel advised Mach that it could resume mining. Tr. 91.

Moreover, it is undisputed that Judge Miller did not explicitly consider all of the factors that the Commission has determined are relevant to an unwarrantable failure determination. The Secretary acknowledges that the Judge did not discuss the extent of the violation in her

unwarrantable failure analysis.<sup>6</sup> S. Br. at 16 n.13. The Secretary notes, however, that the Judge recognized in a different section of her decision that Mach had mined an additional ten feet in HG 3 without an approved ventilation plan. *Id.*, citing 33 FMSHRC at 1676. The portion of the decision referred to by the Secretary, however, is merely the Judge's recitation of Order No. 8414529, which provides in part, "Approximately 10' of advanced had been made on the curtain side of the entry." 33 FMSHRC at 1676. That alone does not constitute consideration of the extent of the violation as a factor in determining whether the violation was owing to Mach's unwarrantable failure. On remand, the Judge shall specifically address this factor and make findings, including whether it is a mitigating or aggravating factor.

Similarly, as Mach argues, the Judge did not address whether the violation posed a high degree of danger.<sup>7</sup> Mach Reply Br. at 7. In the significant and substantial ("S&S") part of her decision, the Judge stated that Inspector Long did not designate the violation as S&S because the inspector thought it was unlikely that the cited condition would result in the injury of a miner. 33 FMSHRC at 1681. The Judge concluded that the violation was "serious," nonetheless, because the mine had mined a stair-step configuration in the bleeder system without seeking approval and "had resumed mining with no clear direction or specifically written, thought-out plan for the ventilation of the working area." *Id.* Inspector Long testified, however, that he had indicated in the order that injury was unlikely because the ventilation controls of the plan that had been previously approved were still being followed, and Mach did not have a history of accidents or injuries that he could relate to the ventilation plan. Tr. 40. On remand, the Judge must consider and make findings on this factor, balancing it against other factors.

The Judge must also consider and make findings regarding whether the operator had been placed on notice that greater efforts at compliance with the cited standard were necessary. The Commission has determined that repeated similar violations may be relevant to an unwarrantable failure determination to the extent they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11 (Jan. 1997) (citations omitted). Here, evidence regarding the issuance of Citation No. 8414236 (issued with respect to Panel 2) and Order No. 8414238 would be relevant to whether the

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<sup>6</sup> Although, as the Secretary argues, the operator did not refer to this specific factor, S. Br. at 16 n.13, Mach raised the general issue of whether the Judge addressed relevant unwarrantable failure factors, and therefore sufficiently raised this specific factor within the ambit of its argument. PDR at 14-15; *see Hubb Corp.*, 22 FMSHRC 606, 610-11 (May 2000) (concluding that issue was sufficiently raised in PDR).

<sup>7</sup> The Secretary groups the degree of danger factor with the obviousness factor and responds that the Judge explicitly discussed "the obviousness and dangerousness of the violation." S. Br. at 16 n.13. Obviousness and dangerousness are separate factors, and while the Judge considered the obviousness of the violation, she did not discuss the degree of danger posed by the violation in her unwarrantable failure analysis.

operator had been placed on notice that it must not resume mining without an approved ventilation plan.

Finally, the Judge did not address the factor of the operator's efforts in abating the violation. Mach states that the Secretary did not introduce any evidence regarding Mach's efforts to abate the violative condition. PDR at 16. Mach then describes actions that it had taken in an effort to have Order No. 8414238 terminated, although it does not state what actions it took to abate the subject order, Order No. 8414529. *See id.*; Mach Reply Br. at 7 (discussing actions that occurred prior to the issuance of Order No. 8414529). The Secretary responds that she never contended that Mach failed to timely abate the violation once Order No. 8414529 was issued. S. Br. at 16 n.13. Under the circumstances, this factor is irrelevant to an unwarrantable failure analysis. Accordingly, although the Judge was required to address this factor, we conclude that her failure to do so amounts to harmless error.

Accordingly, we vacate the Judge's unwarrantable failure determination and assessment of penalty. We remand with instructions that the Judge reconsider whether the operator's knowledge of the violation is an aggravating factor given seemingly inconsistent or confusing MSHA actions, and that the Judge consider and make findings on the factors of the extent of the violation, whether the violation posed a high degree of danger, and whether the operator had been placed on notice that greater efforts at compliance with section 75.370(d) were necessary.

### III.

#### Conclusion

For the foregoing reasons, we affirm the Judge's determination that the termination of Order No. 8414238 did not amount to approval of Mach's ventilation plan and affirm Order No. 8414529. We vacate the Judge's unwarrantable failure determination and remand the matter to the Judge. On remand, consistent with this decision, the Judge shall reconsider whether the operator's knowledge of the violation is an aggravating factor. The Judge shall also consider and make findings on the extent of the violation, whether the violation posed a high degree of danger, and whether the operator had been placed on notice that greater efforts at compliance with section 75.370(d) were necessary. After such consideration and determination of the unwarrantable failure issue, the Judge shall assess an appropriate civil penalty in accordance with the provisions of section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

/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

Chairman Jordan, concurring in part and dissenting in part:

I join the majority in affirming the order issued to Mach Mining for resuming mining before a ventilation plan was approved. I agree that the Judge correctly ruled that the termination of a prior order did not constitute approval of Mach's ventilation plan. For the reasons stated below, however, I would also affirm the Judge's unwarrantable failure determination.

In concluding that the violation was the result of Mach's unwarrantable failure because "at best" the mine showed a serious lack of reasonable care, the Judge relied on her finding that the operator was on notice both that it had no ventilation plan in place and that it could not mine without an approved plan. 33 FMSHRC 1674, 1682 (July 2011) (ALJ).<sup>1</sup> Substantial evidence in the record supports this finding.<sup>2</sup>

Inspector Long's notes are particularly persuasive evidence in this regard. The notes indicate that even after the prior order was terminated, Anthony Webb, the President of Mach, knew he needed plan approval before mining resumed. For example, the inspector's notes of September 16, 2009 (written after Order No. 8414238 had been terminated) indicate that he spoke with Webb and discussed the fact that the mine was still waiting for approval of the ventilation plan. Gov't Ex. 9 ("Discussed inspection and work being doing [sic] in Unit 3. *Company is awaiting plan approval*") (emphasis added). See also Tr. 98-99. As the Judge explained, 33 FMSHRC at 1677, the notes reflected Webb's concern that it might take time to receive approval. This indicates that Webb knew that such approval was necessary to begin mining.

The inspector's notes from September 17, 2009 are also instructive. They indicate that Long and Webb again talked about the fact that the mine continued to wait for MSHA to approve the plan. Webb asked Long whether "paper would be issued" if Mach mined without a plan, and the inspector responded that this was "more than likely." *Id.*; Gov't Ex. 10 ("Anthony stated they are waiting on MSHA"); Tr. 63, 99-100.

Webb's conversations with the inspector, as corroborated by these notes, belie Webb's claim that he had a good faith belief that a plan was in place and mining could legally resume

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<sup>1</sup> The Judge had previously determined that the violation was serious. 33 FMSHRC at 1681.

<sup>2</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

once the prior order was terminated. The Judge refused to credit Webb's testimony that he thought the ventilation plan was approved when the prior order was terminated on September 9, 2009, remarking that, "I do not find Webb to be a credible witness, and find that his testimony was an after-the-fact attempt to make excuses for his actions." 33 FMSHRC at 1679.<sup>3</sup> Her unwarrantable failure finding was based, in large part, on her view that Webb did not have "a good faith belief that there was a plan in place based upon the termination of the order." *Id.* at 1682. She went on to state: "I am not persuaded by Webb's arguments and find them disingenuous given his background and his involvement in the plan approval process." *Id.* The Judge correctly noted that Webb failed to contact the MSHA district manager, "the one person who could provide a definitive answer" about whether the plan had been approved. *Id.* Webb did not do so, even though the inspector told him several times that he could not mine without the approved plan. *Id.* Instead, he moved forward and began mining. *Id.*

My colleagues in the majority cite to ambiguities which, in their mind, might have constituted mitigating evidence regarding the operator's knowledge of the violation. Slip op. at 8. The Judge found, however, that the inspector told Mach that a citation would be issued if mining resumed. *Id.* Judge Miller found that the inspector "advised Webb multiple times that he could not begin mining without [the ventilation] plan," and that "the mine intentionally began mining without a plan in place." *Id.* Because this finding is supported by substantial evidence as demonstrated above, there is no need to remand in order to require the Judge to discuss possible "mixed signal[s]," slip op. at 8, to Mach from MSHA, as the Judge relied on evidence demonstrating that, in fact, MSHA sent clear signals to the operator informing it that it could not mine without an approved plan.

By resuming mining under the circumstances outlined above, Mach engaged in intentional misconduct, which is aggravated conduct constituting more than ordinary negligence. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Nonetheless, my colleagues remand for the Judge to consider additional factors that may be relevant to an unwarrantable failure determination. Slip op. at 8-10. I believe, however, that in an unwarrantable failure analysis, a Judge must be permitted to look at the "big picture" and should not be required to discuss every single factor, particularly those not relevant to the violation at issue. (For example, my colleagues instruct the Judge to analyze the factor of the extensiveness of the violation which, in terms of a vent plan violation, may be difficult to quantify). *Id.* The

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<sup>3</sup> A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

list of factors enumerated in our prior unwarrantable failure cases should provide helpful guidance to our Judges, not an unnecessary hindrance to a thoughtful unwarrantable failure analysis.

In conclusion, the Judge found this violation to be a result of the operator's unwarrantable failure because it had been informed by MSHA that it could not legally mine without an approved plan, yet the operator made an intentional choice to nonetheless begin mining. In my view, this is a quintessential example of aggravated conduct. Accordingly, I would affirm the Judge's finding of unwarrantable failure.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 9, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2010-1-R
	:	LAKE 2010-2-R
v.	:	LAKE 2010-714
	:	
MACH MINING, LLC	:	

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

DECISION

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

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Mach Mining, LLC (“Mach”) is seeking review of two citations alleging violations of 30 C.F.R. § 75.370(d)<sup>1</sup> that were issued after Mach and the Department of Labor’s Mine Safety and Health Administration (“MSHA”) reached an impasse during the approval process for Mach’s ventilation plans. Administrative Law Judge Margaret Miller affirmed the citations. 32 FMSHRC 149, 168 (Jan. 2010) (ALJ). For the reasons that follow, we affirm in part and vacate and remand in part.

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<sup>1</sup> 30 C.F.R. § 75.370(d) provides:

No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

## I.

### **Factual and Procedural Background**

Mach operates the Mach No. 1 mine, an underground coal mine near Johnston City, Illinois. Coal is mined using continuous miners to develop gate roads and a longwall shearer that extracts a block of coal by retreating from east to west. PDR at 2. Mach uses a three-entry system for development of the gate entries. Tailgate (“TG”) 1 was the first set of gate entries developed. Tr. 148. Three entries in TG 1 are connected by crosscuts. 32 FMSHRC at 152; Tr. 148. Headgate (“HG”) 1 is a set of three entries connected by crosscuts that were developed parallel to TG 1. Tr. 148. Between TG 1 and HG 1 was a block of coal, referred to as Panel 1, that was extracted by retreat longwall mining. Tr. 143-44, 150.

After Panel 1 had been mined, HG 1 became a tailgate, and a new set of parallel entries was developed. Tr. 150. The new set of entries is referred to as Headgate 2 (“HG 2”).<sup>2</sup> Tr. 150. Between HG 1 and HG 2 is the second panel of coal, or Panel 2. Tr. 150. Likewise, Panel 3 is adjacent to Panel 2 between HG 2 and HG 3. Tr. 151.

The method for ventilating this mine is new to the mining industry. 32 FMSHRC at 165. It relies upon an unusually large volume of air to prevent coal dust and methane accumulation, and uses fewer stoppings and curtains than other systems. 32 FMSHRC at 151, 165. Air is forced into the mine with a blower fan at the intake shaft in the northeast corner of the mine (the south main). Tr. 148-49; 32 FMSHRC at 156. At the northwest corner of the mine, an exhaust fan (the “bleeder shaft fan”) pulls air out of the mine. 32 FMSHRC at 151. There are two bleeder shafts, one cross-cut apart, that join together before reaching the bleeder shaft fan. *Id.* at 156. Air reaches the bleeder shafts through the bleeder entries, which are perpendicular to the longwall panels and the gate entries. *Id.*

Roof conditions in the bleeder entries worsened dramatically during the mining of Panels 1 and 2. Tr. 154; 32 FMSHRC at 152. In an effort to avoid further adverse roof conditions, Mach developed HG 3 to a length of approximately 19,000 feet, which was 1,000 feet further than shown in the maps included in Mach’s previously approved ventilation plan for Panels 1 and 2. 32 FMSHRC at 152. The longer Panel 3 entries created a “stair step” in the bleeder entries inby Panel 3.<sup>3</sup> *Id.* at 157.

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<sup>2</sup> Even though HG 1 became a tailgate, for identification purposes it is still referred to as HG 1. Tr. 150.

<sup>3</sup> The entries for Panel 3 (HG 2 and HG 3, which ran east and west) were approximately 1000 feet beyond the existing bleeder entries behind Panels 1 and 2 (which ran north and south). The extension of the HG 2 and HG 3 entries beyond the bleeder entries behind Panels 1 and 2 was described as having the appearance of a stair step. Tr. 194-95; 32 FMSHRC at 157.

On March 13, 2009, MSHA Inspector Bobby Jones issued a section 104(d)(1) withdrawal order (Order No. 8414238) to Mach for mining HG 3 without an approved ventilation plan in violation of 30 C.F.R. § 75.370(d).<sup>4</sup> *Mach Mining, LLC*, 33 FMSHRC 1674, 1675 (July 2011) (ALJ). Mach challenged Order No. 8414238, which was subsequently docketed as LAKE 2009-395-R and assigned to Administrative Law Judge Richard Manning.<sup>5</sup> *Id.*

MSHA subsequently conducted two ventilation surveys at the mine. 32 FMSHRC at 155. The first survey was conducted from March 31 through April 2, 2009. *Id.*; Gov't Ex. 4. At the time of the first survey, the mine had completed mining Panel 1, and the longwall had retreated about 800 feet in Panel 2. 32 FMSHRC at 155; Gov't Ex. 4 at 2. MSHA conducted an air pressure and air quantity investigation. 32 FMSHRC at 155. In so doing, MSHA conducted a tracer gas study, collected bottle samples, took underground readings at various locations, measured pressure differentials, and used chemical smoke and hand-held gas detectors to determine the direction of airflow and the levels of methane and oxygen. *Id.* MSHA conducted the second ventilation survey from June 9 to 11, 2009. *Id.*; Gov't Ex. 5. At the time of the second survey, the longwall had retreated approximately 5,400 feet in Panel 2. Gov't Ex. 5 at 2. Both surveys revealed that the bleeder system was working effectively on the dates of the surveys. 32 FMSHRC at 157.

On June 4, 2009, Mach submitted a revised ventilation plan to MSHA, which included a base, or general, plan for the mine. Tr. 46; Gov't Ex. 1. Mach and MSHA then entered into discussions regarding the suitability of the plan to conditions at the mine. Tr. 52.

On August 6, 2009, District Manager Robert Phillips sent a letter to Mach rejecting the plan and identifying items that needed to be addressed in order for Mach to continue mining Panel 3. Tr. 120; Gov't Ex. 11. In the letter, MSHA provided Mach with two possible options for mining Panel 3 and ventilating the stair step: (1) developing new bleeder entries 1,000 feet

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<sup>4</sup> On March 11, 2009, MSHA had issued Citation No. 8414236 to Mach alleging a violation for mining Panel 2 without an approved ventilation plan. Tr. 328; Gov't Ex. 8. Mach contested the citation, and the matter was docketed as LAKE 2009-360-R and assigned to Judge Weisberger. MSHA vacated the citation on April 15, 2009. Gov't Ex. 8.

<sup>5</sup> Judge Manning granted in part the Secretary's motion for summary decision, holding that Mach had violated section 75.370(d). *Mach Mining, LLC*, 31 FMSHRC 709, 714-15 (May 2009) (ALJ). He denied the Secretary's motion for summary decision on the issues of unwarrantability and negligence and held a hearing on those issues. *Id.* at 715, 716. On January 18, 2012, he issued a decision concluding that Mach did not engage in aggravated conduct and that the violation set forth in Order No. 8414238 was improperly designated as unwarrantable. *Mach Mining, LLC*, 34 FMSHRC 198, 208-10 (Jan. 2012) (ALJ). Neither party sought review of that decision.

behind Panels 1 and 2, which connect to each of the three existing gate entries (TG 1, HG 1, HG 2); or (2) connecting HG 3 to the existing bleeder system for HG 2 in a wrap-around fashion.<sup>6</sup> Tr. 120-22; Gov't Ex. 11.

On September 3, 2009, Mach responded to MSHA's August 6 deficiency letter by submitting a revised ventilation plan to MSHA specific to mining Panel 3. Tr. 47; Gov't Ex. 2. In the proposed site-specific plan, Mach indicated that it chose the second option described by MSHA so that it would connect HG 3 to the existing bleeder entry for HG 2 in a wrap-around fashion. Gov't Ex. 2. On September 9, 2009, MSHA terminated Order No. 8414238. M. Ex. 46. On September 20, 2009, Mach resumed mining in HG 3. PDR at 12.

The next day, on September 21, 2009, MSHA issued a section 104(d)(2) order (Order No. 8414529) alleging a violation of section 75.370(d) because Mach had resumed mining before a ventilation plan had been approved by the district manager. M. Ex. 51. Mach contested that order and the associated civil penalty, and the contests were docketed as LAKE 2010-190 and 2009-716-R and assigned to Judge Miller.<sup>7</sup>

On September 29, 2009, MSHA issued the two subject technical citations to Mach, alleging violations of section 75.370(d).<sup>8</sup> Tr. 51. Citation No. 6680550 alleges that Mach mined without an approved ventilation plan specific to Panel 3, while Citation No. 6680551 alleges that Mach mined without an approved base ventilation plan. 33 FMSHRC at 149-50. In addition, on September 29, MSHA sent Mach two letters describing the deficiencies in Mach's June 4 proposed base plan and September 3 proposed site-specific plan. Gov't Ex. 12; Tr. 310-11.

Mach contested the two citations and the matter was assigned to Judge Miller. The matter proceeded to hearing before the Judge on November 3 through 5, 2009.<sup>9</sup>

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<sup>6</sup> The term "wrap-around" describes a bleeder system that relies on ventilation controls to create a pressure differential and cause air to move away from the active workings. Tr. 196.

<sup>7</sup> On July 27, 2011, the Judge issued a decision affirming Order No. 8414529. *Mach Mining*, 33 FMSHRC at 1681. The Commission subsequently granted Mach's petition for review of the Judge's decision. We are issuing our decision in Docket Nos. LAKE 2010-190, et al. on the same date as this Decision.

<sup>8</sup> When the operator and the Secretary are unable to resolve a dispute concerning a plan's provisions, the Secretary may issue a citation alleging a violation for operating without an approved plan, which is sometimes referred to as a "technical citation," so that the matter may be litigated before, and resolved by, the Commission.

<sup>9</sup> Mach inadvertently paid the penalties for the two citations. The Commission subsequently granted Mach's motion to reopen (*Mach Mining, LLC*, 32 FMSHRC 870, 872

(continued...)

The Judge affirmed the two technical citations. 32 FMSHRC at 168. She rejected Mach's argument that the citations were void because MSHA had effectively approved its ventilation plan when it terminated Order No. 8414238 on September 9, 2009. The Judge reasoned that section 75.370 requires that a ventilation plan must be approved in writing by the district manager, and it was undisputed that this had not occurred. *Id.* at 167. In addition, the Judge determined that Mach's general ventilation plan that was in effect when Phillips became the district manager of District 8 was unsuitable to conditions at the mine and that MSHA's proposed plan was suitable as to seven of nine areas of dispute.<sup>10</sup> *Id.* at 153-64. In reaching that determination, the Judge applied the "arbitrary, capricious or abuse of discretion" standard of review applied by the Commission in *Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008). *Id.* at 162-67. She also found no merit in Mach's argument that it should not be subject to both a base plan and a site-specific plan. *Id.* at 167. Finally, the Judge stated that she had refused to admit evidence during the hearing concerning ventilation plans and ventilation or dust surveys at other mines and information that had not been provided to the district manager during the course of the negotiations over the ventilation plans. *Id.* She explained that since she must examine whether the actions of the district manager were arbitrary and capricious, she must consider how he made his decision based on the information he had before him, and that the excluded evidence was not relevant to the decision regarding suitability of provisions at Mach's mine. *Id.*

Mach petitioned for review of the Judge's decision, which the Commission granted.

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<sup>9</sup>(...continued)  
(Aug. 2010)), and consolidated the proceedings. Unpublished Ord. dated Jan. 12, 2011.

<sup>10</sup> With respect to the other two issues, which involved a requirement to change the manner of shuttle car operation and a requirement to use something other than check curtains in the headgate entry, the Judge concluded that the Secretary did not present evidence regarding the issues or brief them. 32 FMSHRC at 162. The Secretary acknowledges on review that she did not adduce any evidence regarding the two issues, and therefore failed to sustain her burden of proof. S. Br. at 30 n.16. Accordingly, the Secretary concedes that she may not require either of the two provisions to be included in Mach's base ventilation plan. *Id.* We will not further address those issues.

## II.

### Disposition

#### A. Whether termination of Order No. 8414238 amounted to approval of Mach's ventilation plan?

Mach contends that MSHA's September 9 termination of Order No. 8414238 constituted approval of Mach's ventilation plan with respect to both the base and site-specific issues. It explains that Order No. 8414238 alleged that no approved ventilation plan was in place for HG 3 on March 13, 2009. The operator submits that because a termination means that the allegedly violative condition (mining without an approved plan) has been abated, the termination of the order on September 9 (M. Ex. 46) constituted a writing indicating that the proposed ventilation plan had been approved. Mach maintains that because its ventilation plan had been approved, the two subject citations for mining without an approved plan are void.

The Secretary responds that the termination of the order did not constitute written notification of the disputed plans' approval as required by 30 C.F.R. § 75.370(c)(1). For the reasons set forth more fully in our decision issued this date in *Mach Mining, LLC*, Docket Nos. LAKE 2010-190 and 2009-716-R, we agree with the Secretary.

Briefly, section 75.370(c)(1) provides in part that, "The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision." 30 C.F.R. § 75.370(c)(1). By its terms, section 75.370(c)(1) clearly requires a written notification to an operator by the district manager that a ventilation plan has been approved or that approval has been denied. The standard sets forth two enforcement paths: approval of a ventilation plan or denial of approval of a ventilation plan, either of which must be taken by a written notification by the district manager. It does not provide for a constructive or implied approval process.

Here, the terms for approval required by section 75.370(c)(1) were not met. There was no written notification by the district manager approving Mach's ventilation plan for Panel 3. The termination of Order No. 8414238 was written by MSHA Inspector Bobby Jones, not the district manager. Moreover, the termination simply stated, "MSHA hereby terminates this order" and did not address the proposed plan, much less approve it. *Mach Mining, LLC*, 34 FMSHRC \_\_\_, slip op. at 6, No. LAKE 2010-190 (Aug. 9, 2012).

Accordingly, we affirm the Judge's determination that the termination of Order No. 8414238 did not amount to approval of Mach's ventilation base and site-specific plans.

**B. Whether the Judge applied the correct standard in reviewing the district manager's denial of approval of the plans?**

The Judge applied an “arbitrary, capricious or abuse of discretion” standard in reviewing the district manager’s denial of approval of Mach’s ventilation plans.<sup>11</sup> She stated that the issue was “whether the Secretary properly exercised her discretion and judgment in the plan approval process.” 32 FMSHRC at 162. The Judge reasoned that “the Secretary must show that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plan and its suitability.” *Id.* at 163. She explained that the district manager must examine the relevant data and articulate a satisfactory explanation for the action taken including a rational connection between the facts and the choice made. *Id.* at 165.

Mach argues that the Judge erred in applying an arbitrary and capricious standard. The operator maintains that such a standard is applicable only to emergency response plan (“ERP”) cases,<sup>12</sup> while in ventilation plan cases, the Secretary bears the burden of proving by a preponderance of the evidence the unsuitability of the operator’s plan and the suitability of MSHA’s plan.

The Secretary responds that the arbitrary and capricious standard applies to the district manager’s determination of a ventilation plan’s suitability or non-suitability. The Secretary maintains that the arbitrary and capricious standard is not confined to ERP cases, and that when the Commission applied the standard in the first ERP case, *Emerald Coal Res., LP*, 29 FMSHRC 956, 966 (Dec. 2007), the Commission held that application of the standard was consistent with prior Commission precedent.

We conclude that the Judge applied the correct standard of review. The question before the Judge was whether the Secretary proved that MSHA’s action in denying approval of Mach’s proposed plans submitted on June 4 and September 3 was not arbitrary, capricious or an abuse of discretion.<sup>13</sup> As the Judge recognized (32 FMSHRC at 165), the Commission has previously explained that under an arbitrary and capricious standard, an “agency must examine the relevant

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<sup>11</sup> An “arbitrary, capricious or abuse of discretion” standard is derived from the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

<sup>12</sup> Section 316 of the Mine Act, as amended, requires underground coal mine operators to develop and submit for MSHA approval and periodic review an emergency response and preparedness plan. *See* 30 U.S.C. § 876(b)(2)(A). Disputes regarding the contents of the plan are resolved by the Commission. 30 U.S.C. § 876(b)(2)(G).

<sup>13</sup> We do not dispute our concurring and dissenting colleagues’ assertion that the Secretary bears the burden of proof in a dispute over a plan’s provisions. *Slip op.* at 26-28. Imposing the burden of proof on the Secretary is not inconsistent with our holding that the standard of review is arbitrary and capricious.

data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Twentymile*, 30 FMSHRC at 754, 773-74 (citations omitted).

The application of this standard to the review of a ventilation plan’s provisions is supported by the plain language of section 303(o) of the Mine Act. That section provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and *approved by the Secretary shall be adopted by the operator* and set out in printed form within ninety days after the operative date of this title. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment *as the Secretary may require*, the quantity and velocity of air reaching each working face, and such other information *as the Secretary may require*. Such plan shall be reviewed by the operator and the Secretary at least every six months.

30 U.S.C. § 863(o) (emphasis added). The requirement in section 303(o) that a plan approved by the Secretary must be adopted by the operator and that the plan must contain such information “as the Secretary may require” shows that the Secretary exercises discretion in determining ventilation plan contents and that an operator must comply with a plan approved by the Secretary. Since the Secretary is exercising discretion in determining which provisions should be included in a ventilation plan, it is appropriate to review that exercise against an “arbitrary, capricious or abuse of discretion” standard.

The application of an arbitrary and capricious standard to the review of the district manager’s approval or denial of a proposed ventilation plan is also supported by the legislative history of the Mine Act. The Senate Committee Report on the Mine Act stated that “while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan.” S. Rep. No. 95-181, at 25 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

In considering this language, the D.C. Circuit observed that “while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989).<sup>14</sup> Thus, MSHA and an operator are not on equal footing in negotiating a ventilation

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<sup>14</sup> *UMWA v. Dole* did not involve ventilation plans but the analogous subject of roof (continued...)

plan's contents. *See also C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996) (referring to legislative history and recognizing that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market"). An arbitrary and capricious standard is a more deferential standard, which allows appropriate weight to be accorded to the Secretary's position of "retain[ing] final responsibility for deciding what ha[s] to be included in the plan." *UMWA v. Dole, supra*, 870 F.2d at 669 n.10; *see Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 966 (Sept. 1998) (recognizing arbitrary and capricious standard as more deferential).

The application of an "arbitrary, capricious or abuse of discretion" standard is consistent with Commission precedent, which recognizes the Secretary's role in the plan approval process. As the Commission has explained, "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746. The Commission has applied this standard in reviewing the Secretary's denial of approval of an Emergency Response Plan in recognition that the plan approval process involves an element of judgment on the Secretary's part.<sup>15</sup> *Emerald Coal*, 29 FMSHRC at 966; *Twentymile*, 30 FMSHRC at 747-49. The Commission explained that an arbitrary and capricious standard "appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence standard." *Emerald Coal*, 29 FMSHRC at 966; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (concluding that MSHA's withdrawal of approval of a water impoundment plan was not "arbitrary and capricious").

Finally, the application of the arbitrary and capricious standard is consistent with court precedent.<sup>16</sup> The D.C. Circuit has reviewed the Secretary's insistence upon the inclusion of a

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<sup>14</sup>(...continued)

control plans under section 302(a) of the Mine Act, 30 U.S.C. § 862(a). In terms of the statutory language relevant hereto, there is no difference between a section 302(a) roof control plan and a section 303(o) ventilation plan.

<sup>15</sup> We see no valid distinction between ERP cases and ventilation plan cases in terms of the appropriate standard to apply to the district manager's approval or denial of approval of the plan. While the consideration of whether a ventilation plan provision is suitable to conditions of a mine is factual in nature, the review of an ERP provision is also factual in nature. *See, e.g., Twentymile*, 30 FMSHRC at 756-61. Although a Judge must apply an arbitrary and capricious standard to the district manager's decision to approve or deny approval of a plan, the Commission applies a substantial evidence standard in reviewing the Judge's factual determinations underlying his or her determination.

<sup>16</sup> Analogously, we note that approved plan provisions are enforceable as mandatory standards. *See Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 254-55 (May 2006). Courts apply an arbitrary and capricious standard in reviewing the validity of mandatory standards. *See, e.g.,*  
(continued...)

plan provision under this standard. *See UMWA v. Dole, supra*, 870 F.2d at 671 (“... the Secretary could abuse her discretion by utilizing plans rather than explicit mandatory standards to impose general requirements if by doing so she circumvented procedural requirements for establishing mandatory standards.”); *see also Peabody Coal Co. v. FMSHRC*, 111 F.3d 963, 1997 WL 159436 (D.C. Cir. 1997) (reviewing MSHA’s insistence on a provision in a ventilation plan under an arbitrary and capricious standard of review).

Accordingly, we conclude that the Judge applied the correct standard of review in her consideration of MSHA’s denial of Mach’s proposed ventilation plans. We turn now to the specific plan provisions at issue.

**C. Whether the Judge correctly determined that the district manager was not arbitrary or capricious and that the district manager did not abuse his discretion in denying approval of Mach’s proposed plans**

Preliminarily, it appears that the Judge may not have considered the provisions of Mach’s proposed plans submitted on June 4 and September 3, 2009 in her determination of whether the district manager was arbitrary or capricious or abused his discretion in denying approval of the plans. Rather, the Judge stated that she considered the plan that was already in existence when District Manager Phillips came to District 8. *See* 32 FMSHRC at 162 (in the section titled “Unsuitability of the *Current* Mach Plan,” (emphasis added), the Judge states, “The ventilation plan that was in place at the Mach #1 Mine was found to be unsuitable in a number of ways.”).<sup>17</sup> Except where specifically indicated below, we consider such error to be harmless.<sup>18</sup>

**1. Bleeder evaluation points**

In his letter dated August 6, 2009, District Manager Phillips provided Mach with two alternatives for determining the effectiveness of the bleeder system for Panel 3. Gov’t Ex. 11. The first alternative required Mach to submit a map showing Panels 3, 4, 5, and 6 developed to a

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<sup>16</sup> (...continued)  
*Nat’l Mining Ass’n v. MSHA*, 116 F.3d 520, 533 (D.C. Cir. 1997).

<sup>17</sup> It is not clear whether the Judge focused on Mach’s current plan rather than on the proposed plans, since the Judge also stated, “[t]he dispute in this case centers on whether Mach’s proposed system of ventilating panel 3 is suitable, as well as whether the base, or general, plan is suitable to the conditions at the mine.” 32 FMSHRC at 151.

<sup>18</sup> With respect to some issues – denoted herein as Nos. 1, 3, 5 and 6 – MSHA insisted upon the inclusion of a provision that has no counterpart in Mach’s current or proposed plans. Accordingly, the Judge’s possible failure to consider Mach’s proposed plan amounts to harmless error for those issues. With respect to issue No. 4, there was no difference between the current plan and Mach’s proposed plan. With respect to issue No. 7, the Judge clearly considered Mach’s proposed plan.

depth of 19,000 feet and showing new bleeder entries 1,000 feet behind Panels 1 and 2, which connect to each of the three existing gate entries (TG 1, HG 1, HG 2). Gov't Ex. 11 at 1. The second alternative required Mach to submit a plan connecting HG 3 to the existing bleeder entry for HG 2 in a wrap-around fashion, showing an evaluation point ("EP") at the stair step point where the bleeder of HG 3 intersects with the existing bleeder system at HG 2.<sup>19</sup> *Id.*

In the proposed site-specific plan submitted on September 3, Mach set forth provisions consistent with the second alternative. Gov't Ex. 2 at 1. Mach indicated that it would connect HG 3 to the existing bleeder entry for HG 2 in a wrap-around fashion. *Id.* The proposal did not, however, include the EP at the stair step that MSHA had required. *Id.*

On September 29, 2009, District Manager Phillips sent Mach a letter, rejecting Mach's proposed base and site-specific ventilation plans in part because they showed inadequate evaluation points in the bleeder system. Gov't Ex. 12 at 2-3. On the same date, MSHA cited Mach for the same plan deficiencies. *See* Item No. 1 of Citation No. 6680550; Item No. 6 of Citation No. 6680551.

At the hearing, MSHA described the EP that it required Mach to adopt. MSHA proposed that Mach establish a permanent EP at the back of HG 2, near cross-cut No. 161. S. Post-Hr'g Br. at 9; Tr. 202, 209; M. Ex. 101. Dennis Beiter, the supervisor of the ventilation division at MSHA's Pittsburgh Safety and Health Technology Center, testified that a permanent EP would be required at the same location (behind the middle entry) at the back of HG 4, 5, and 6. Tr. 136, 234-37, 243-44.

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<sup>19</sup> An evaluation point is a fixed location in the bleeder system where information about air qualities and quantities is gathered. Tr. 177, 179.

Mach submits that pursuant to section 75.364(a)(2)(iv),<sup>20</sup> it developed an alternative method of bleeder system evaluation that does not require a miner to enter the bleeder system to make the required evaluation. Instead, Mach would evaluate its system at strategic points around the perimeter, including at the shaft on the surface where air exits the mine. By taking such measurements around the perimeter, Mach would avoid exposing its miners to the hazardous roof conditions in the bleeders. Mach contends that there was insufficient weight given to the gravity of the roof hazards to which Mach is seeking to avoid exposing its miners.

We conclude that the Judge correctly determined that the district manager did not abuse his discretion by requiring additional evaluation points in the bleeder system. 32 FMSHRC at 165-66. We find substantial evidence in the record to support the Judge's conclusion that Mach's method of evaluating the effectiveness of the bleeder system was unsuitable and MSHA's proposal was suitable to conditions at the mine. 32 FMSHRC at 155-58, 162-64.

MSHA's ventilation expert, Beiter, testified that an EP at crosscut 161 in the stair step behind HG 2 was critical to evaluating the effectiveness of the bleeder system. Tr. 226, 276. Beiter testified that the air from the caved area moved through the middle entry of each gate entry, and that it was important to take measurements where the middle entry intersected the

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<sup>20</sup> 30 C.F.R. § 75.364(a)(2) provides in part:

(a)(2) At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

(i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.

....

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

(iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

bleeder entry in order to evaluate the airflow from the worked out area. Tr. 187, 240-41. He explained that as each successive panel is mined, the ventilation system becomes more complex. Tr. 223-24. Beiter testified that such information could not be obtained at the top of the system. Tr. 224. The Judge credited Beiter's testimony, concluding that the evaluation points recommended by Beiter gave a complete view of the effectiveness of the bleeder system. 32 FMSHRC at 158.

There is no reason to overturn the Judge's credibility determination. *See, e.g., Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that judge's credibility determinations are entitled to great weight and may not be overturned lightly). Mach's expert, Gary Hartsog, acknowledged that taking measurements at the exhaust fan would not indicate where, and in what quality, the air has traveled in the bleeders. Tr. 574-76; 32 FMSHRC at 158. Although two ventilation surveys conducted in March 31 through April 2, 2009 and June 9 through 11, 2009, recognized that the bleeder system was effective on the dates of the survey, the report of the June survey concluded that the "adequacy of the airflow distribution in the bleeder system and the dilution of methane elsewhere in the bleeder system in addition to the 30 C.F.R. Part 75.323(e) location(s), could not be determined from information collected [by the mine] at the required weekly examination locations for the bleeder system." 32 FMSHRC at 157, *quoting* Gov't Ex. 5 at 8.

In addition, there is evidence in the record that establishes that MSHA adequately considered the hazards posed by the roof conditions in the bleeder system. In MSHA's September 29, 2009, letter rejecting Mach's proposed plan, District Manager Phillips acknowledged the severe roof conditions:

The continuing deterioration of the mine roof and the existing roof falls prevent proper bleeder and gob system evaluation. These worsening roof conditions threaten the viability of these entries to service projected panels #3, #4, #5, and #6 and are reasonably likely to threaten the internal flow paths of the worked-out panels of HG #1 and HG #2.

Gov't Ex. 12 at 3. As Beiter testified, MSHA concluded that if the roof conditions prevented access to MSHA's proposed EP, "that was such a critical piece of information that proper evaluation could not be conducted without that information," Tr. 276, and the bleeder and gob system would have to be sealed. *Id.* Thus, MSHA considered that there were hazardous roof conditions but determined that if measurements could not be taken at MSHA's proposed EP in the stair step, the bleeder system must be sealed.

Such evidence shows that MSHA examined the relevant data and articulated a satisfactory explanation for its requirement of additional EPs in the bleeder system. Accordingly, we affirm the Judge's determination that the district manager did not abuse his discretion in requiring the additional EPs.

## 2. Ventilation controls in the bleeder entries

MSHA cited Mach for failing to include sufficient bleeder controls to control air movement in the bleeder system in both its proposed site-specific plan for Panel 3 and its general base plan. *See* item No. 2 of Citation No. 668550; item No. 15 of Citation No. 6680551.

Mach argues that it should not be required to use ventilation controls at the back of Panel 3. It contends that Panels 1 and 2 were mined without ventilation controls safely and effectively, and that there is no evidence that the additional 1,000 feet of Panel 3 will adversely affect Mach's system. The operator emphasizes that MSHA's ventilation expert, Beiter, admitted that the ventilation controls proposed for the bleeder entries are "not necessarily" needed. It maintains that MSHA is requiring them only because erecting regulators and stoppings is a typical practice in other mines.

The Secretary asserts that the Judge properly found that she had demonstrated the need for ventilation controls in the bleeder entries. She submits that Beiter explained that because of the stair step configuration of the bleeder system, ventilation controls were needed to ensure that air does not short circuit through the caved area, and to ensure that air travels around the corner of the stair step.

We conclude that there is not sufficient clarity in the record and in the Judge's analysis to permit us to review this issue. It is not clear in the record which ventilation controls were being required by MSHA.

The proposed site-specific plan that Mach submitted on September 3 showed stoppings<sup>21</sup> in HG 2 between entries 1 and 2 from crosscut 162 to crosscut 176, and ventilation controls across entries 2 and 3 between crosscuts 161 and 162. Tr. 195-96. Mach submitted three maps that showed that the ventilation controls would remain in place until the longwall had retreated past the stair step, and then the ventilation controls would be removed. Gov't Ex. 2, Attaches (labeled "Exhibits") 1, 2, 3; Tr. 195, 196.

Beiter explained that the stair step needed to be ventilated like a wrap-around bleeder. Tr. 196. Air must be moved for a distance of approximately 19,000 feet, north across the back bleeder entry of Panel 3 for a distance of approximately 1,250 feet (the width of the panel), then outby HG 2 for a distance of 1,000 feet (the distance that HG 2 was mined beyond Panels 1 and 2), and then north into the existing bleeder entries and across two worked-out panels to the bleeder shaft. S. Post-Hr'g Br. at 12. Beiter testified that the stoppings that are shown in the map submitted by Mach (Gov't Ex. 2, Attach 1) "are critical to establishing ventilation through the worked out area of panel number one through the mining of panel number three through the mining of panel number three past the stair step." Tr. 196. Beiter also stated, "The stoppings

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<sup>21</sup> Stoppings are walls erected between air courses to direct and control airflow through the mine, and are typically constructed of concrete blocks or metal. Tr. 167.

that . . . we talked about earlier from in the stair step . . . [-] those are critical ventilation controls that are necessary for the mining of panel 3 *at least through the stair step.*” Tr. 205 (emphasis added).

Given Beiter’s testimony, it would appear MSHA is requiring Mach to maintain the ventilation controls in the stair step only until the longwall retreats past the stair step, and then it would be permissible for Mach to remove the controls. If MSHA is requiring Mach to maintain the ventilation controls only until the longwall has retreated beyond the stair step, consistent with Beiter’s testimony, then Mach submitted a plan that proposed to include the ventilation controls required by MSHA.<sup>22</sup>

With respect to other ventilation controls behind Panel 3, it is not clear from the record which specific ventilation controls were required by MSHA. Before the Judge, the parties did not specify in their briefs which ventilation controls MSHA sought to require beyond the ventilation controls that would ventilate the stair step. M. Post-Hr’g Br. at 16-18; S. Post-Hr’g Br. at 12-14. The parties referred to the ventilation controls in the bleeder entries of Panel 3 in a general manner at the hearing. Beiter testified that there were no ventilation controls behind Panel 3 in the proposed plan submitted by Mach. Tr. 205-06. When asked what ventilation controls should be in the bleeder entries of Panel 3, Beiter replied, “Controls that are sufficient to control and distribute the airflow.” Tr. 206. Beiter was asked, “as we look at [Mach’s proposed plan, Gov’t Ex. 2, Attach. 1], is there a need to separate any of the bleeder entries from another or any other ventilation controls in the bleeder entries?” Beiter replied, “Not necessarily. Just the lack of those controls across the back end limits the ability to control the airflow distribution in the system not only in the front, but also from the back so that use of those controls is a typical practice that enables more hands-on ability to control that distribution of airflow.” Tr. 206-07.

As previously discussed, it appears that the Judge may have failed to consider the provisions that Mach submitted in its proposed September 3 plan. Rather, the Judge may have considered only Mach’s “current” plan. 32 FMSHRC at 162.

Accordingly, we vacate the Judge’s determination that the district manager did not abuse his discretion by requiring ventilation controls in the bleeders. 32 FMSHRC at 165-66. We remand to the Judge so that she may examine the evidence and clarify which ventilation controls were required by MSHA, including whether the ventilation controls depicted in the stair-step were required to remain indefinitely. We instruct the Judge, in examining the evidence, to consider Mach’s proposed site-specific plan for Panel 3 submitted on September 3, 2009. After

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<sup>22</sup> However, we also note that Beiter testified that the line of stoppings depicted on Mach’s map “doesn’t extend . . . past the face of the beginning of panel two. And without something in place to direct the air flow inby towards the longwall face, air flow can just short circuit into the bleeder entries.” Tr. 199. It is not clear from the record whether MSHA was requiring Mach to build additional ventilation controls to prevent such short-circuiting prior to the time that the longwall retreated past the stair step.

clarifying the ventilation controls required by MSHA, the Judge should determine whether the district manager abused his discretion in concluding that Mach's proposed depiction of ventilation controls was unsuitable, and that the ventilation controls required by MSHA were suitable.

We also take judicial notice of Judge Manning's statement in his decision in *Mach Mining, LLC*, that in "March or April of 2010, MSHA approved the stair step design for the bleeders and Mach began mining Panel No. 3." 34 FMSHRC at 205. Judge Miller shall take such further evidence and receive parties' submissions as she deems necessary to determine whether the issue discussed herein is moot.

### **3. Stoppings in the active tailgate entry**

MSHA denied approval of Mach's proposed site-specific and base plans because they did not depict ventilation controls in the tailgate entry that would assure that air from the worked-out areas is directed away from the longwall face. *See* Item No. 3 of Citation No. 6680550; Item No. 14 of Citation No. 6680551.

The Judge concluded that Mach presented no real evidence that the tailgates would be adequately ventilated without the stoppings required by MSHA. 32 FMSHRC at 159. She summarized MSHA's evidence that the ventilation survey established that air was moving toward the active tailgate entry, rather than away from the active tailgate entry, and that stoppings should have been in place to assure the correct movement of air. *Id.* The Judge noted Beiter's testimony that the stopping line required by MSHA would protect the active tailgate entry from methane and move air away from that entry, and that such ventilation controls were not included in Mach's proposal. *Id.*

Mach argues that the use of stoppings in its active tailgate would undermine its proven ventilation system. Mach states that it safely and effectively mined and ventilated the first two longwall panels without using a stopping line in the active tailgate. It submits that MSHA's subsequent surveys showed that Mach's ventilation system was working effectively and did not provide any evidence indicating that air flowed from the gob to the active tailgate.

The Secretary asserts that MSHA's ventilation surveys fully support MSHA's position. She explains that the first ventilation survey stated that "gases exiting the adjacent worked-out area of Panel 1 into the No. 2 Entry of HG #1 . . . would flow into the tailgate travelway and be carried inby toward the longwall face." Gov't Ex. 4 at 7. The Secretary further contends that Beiter described the test results that led to this conclusion in his testimony. She emphasizes that similarly, the second ventilation survey showed that (according to Mach's own pre-shift examination records), on April 2 and 4, 2009, the airflow was carrying gases "from the worked out area toward the tailgate travelway for the active longwall section." Gov't Ex. 5 at 7.

At the hearing, MSHA submitted evidence demonstrating that air from the worked-out area moved toward, rather than away from, active workings.<sup>23</sup> MSHA's April 2009 survey showed that air was moving from the caved material in Panel 1 toward the active tailgate (HG 1). Gov't Ex. 4, Figs. 4 & 5. Beiter testified that during the ventilation surveys he conducted tracer gas tests to test the movement of air. The tracer gas tests revealed that air from the worked out area of Panel 1 moved into the No. 2 entry of HG 1 and would also be carried to the No. 3 entry, which was the active tailgate travelway. Tr. 210. There was no separation between the No. 2 and 3 entries, so air moved from the No. 2 entry to the No. 3 entry. Tr. 210. The Secretary submitted to the Judge that MSHA's smoke tests and tracer gas tests revealed that air was moving toward the active tailgate travelway in HG 1 in 26 locations. S. Post-Hr'g Br. at 16.

Moreover, a ventilation change that occurred during the June 2009 ventilation survey showed that stoppings helped move air away from the active workings and toward the bleeder shaft. On June 9, 2009, the stoppings that had been constructed between Entries Nos. 2 and 3 in HG 2 during mining had been removed. Tr. 216; Gov't Ex. 5, Fig. 1. On June 11, during the survey, the stoppings had been reconstructed. Tr. 217; Gov't Ex. 5, Fig. 2. MSHA observed a significant difference in airflow patterns between June 9 and June 11. Tr. 217. Beiter testified that without the ventilation controls, air in Panel 2 would have been carried from HG 1 to HG 2 (from the worked out area to the active travelway). Tr. 218. After the controls were put in place, the pressure differential changed so that there was an increase in pressure differential across the worked out area. Tr. 221. This resulted in air moving from HG 2 to HG 1. Tr. 221. Cf. Gov't Ex. 5, Figures 1 and 2. Beiter stated that Mach's site-specific plan for Panel 3 and base plan did not call for the reconstruction of the stoppings. Tr. 171.

This evidence constitutes substantial evidence supporting the Judge's determination that there was a rational connection between the facts found and MSHA's determination to require the ventilation controls. 32 FMSHRC at 159, 165-66. Accordingly, we affirm the Judge's determination that the district manager was not arbitrary or capricious or abused his discretion in requiring the ventilation controls in the active tailgate.

#### **4. Use of belt air**

MSHA cited Mach for proposing in its site-specific and base plans to use air from the belt conveyor haulage entry to ventilate the longwall working section of Panel 3 without adequate justification. See Item No. 4 of Citation No. 6680550; Item No. 9 of Citation No. 6680551.

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<sup>23</sup> Mach is required to move air from a worked out area away from active workings. See 30 C.F.R. § 75.334(b)(1) (requiring an operator to “. . . control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings into a return air course or to the surface of the mine”) (emphasis added).

The Judge found that although Mach had been previously approved by MSHA to use belt air to ventilate the working section of Panel 2, Mach did not justify the use of belt air to ventilate the working section of Panel 3. 32 FMSHRC at 153-54. The Judge noted that a new belt air rule, amending 30 C.F.R. § 75.350(b), had been implemented in March 2009, and that the Mach “conditional” plan had been approved prior to the new rule. *Id.* at 153. The Judge concluded, therefore, that the district manager did not abuse his discretion in determining that “the use of belt air needed further examination” and in denying approval of Mach’s proposed plans. *Id.* at 165.

Mach argues that the Judge’s finding that it did not justify the use of belt air is not supported by substantial evidence. Mach explains that it submitted a justification with its proposed ventilation plan on June 4, explaining to MSHA the hazards associated with eliminating the use of belt air. It states that if it were not permitted to use belt air, the chances would increase for methane accumulations at the face; respirable dust would increase on the face; the chance of dead spots and air reversals in adjoining entries would increase; and air in the escapeways would be compromised.

The Secretary responds that Mach failed as a matter of law to establish a justification for the use of belt air, in that Mach did not address how its ventilation system provided the same level of protection against smoke and fire risks involved with using belt air.

We begin our analysis with the language of 30 C.F.R. § 75.350(b), which sets forth the requirements regarding belt air. That section states in part:

The use of air from a belt air course to ventilate a working section . . . shall be permitted only when evaluated and approved by the district manager in the mine ventilation plan. *The mine operator must provide justification in the plan that the use of air from a belt entry would afford at least the same measure of protection as where belt haulage entries are not used to ventilate working places.*

30 C.F.R. § 75.350(b) (emphasis added).

We conclude that Mach failed to comply with the requirements of the standard in order to justify its use of belt air in Panel 3. As District Manager Phillips testified, MSHA’s new belt air rule requires that operators address the hazard of fire and smoke from using belt air. Tr. 314-17. As stated in the preamble to the new belt air regulation, “[t]here are potential sources of fire in belt conveyor entries, and the use of air from the belt entry to ventilate working sections can result in contaminants from a fire being carried to the working section.” 73 Fed. Reg. 80580, 80592 (Dec. 31, 2008). Mach did not provide a justification that would demonstrate that using belt air to ventilate the working section of Panel 3 would provide the same level of safety, in terms of the hazard of fire and smoke, as an entry not using belt air. Rather, the operator focuses on other potential dangers that could occur if it is not allowed to use belt air.

Accordingly, we affirm the Judge's determination that the district manager did not act arbitrarily, capriciously or abuse his discretion in denying approval of Mach's proposed plans and in requiring Mach to provide further justification for the use of belt air.<sup>24</sup>

**5. Requirement to identify means of compliance with 30 C.F.R. § 75.332**

MSHA cited Mach for failing to specify its means of compliance with 30 C.F.R. § 75.332(a)(2). *See* Item No. 1 of Citation No. 6680551. Section 75.332 requires in part that, “[w]hen two or more sets of mining equipment are simultaneously engaged in . . . mining, . . . within the same working section, each set of mining equipment shall be on a separate split of intake air.” 30 C.F.R. § 75.332(a)(2).

It is undisputed that on about June 16, 2009, MSHA Inspector Keith Roberts issued an order to Mach alleging that Mach violated section 75.332(a)(2) by operating two continuous miners on a single split of air. Mach contested the order. S. Br. at 26 n.15; Tr. 57-58.

The Judge concluded that it was appropriate for MSHA to require Mach to include a provision requiring that Mach specify its means of complying with the standard. 32 FMSHRC at 161. She reasoned that Inspector Roberts, in advising the district manager to include the provision, explained that MSHA wants to assure that the mine has a plan in place to deal with two continuous miners working on the same split of air. *Id.*

Mach argues that there is no basis for requiring it to specify the means of compliance with section 75.332 in its ventilation plan. It acknowledges that it is required under the standard to not allow two or more mining machines to operate at the same time on the same split of air. The operator explains that it uses a “go/no go” system to ensure that its two continuous miners do not operate simultaneously on a single split of air, and that MSHA conceded that such a system is an acceptable means of complying with the standard.

The Secretary responds that where, as here, Mach had been recently cited for violating section 75.332(a)(2), it was entirely rational for the district manager to require Mach to include in its plan a provision specifying its means of compliance.

Consistent with 30 C.F.R. § 75.371, the Commission has explained that plan provisions may both implement “the substantive provisions of the Secretary’s regulations and criteria” and “provide for protection in addition to those standards.” *C.W. Mining*, 18 FMSHRC at 1745. MSHA is not requiring Mach to include a plan provision that reiterates the requirements of

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<sup>24</sup> We note that the Judge, in concluding that “Mach ha[d] not provided sufficient information to justify the use of belt air, “ included the phrase “[a]t the present time,” which makes clear that Mach may again seek to justify the use of belt air at its No. 1 Mine. 32 FMSHRC at 154.

section 75.332(a)(2). Rather, MSHA is requiring Mach to adopt a plan provision that specifies how it will implement the section. Given that Mach had been cited for violating section 75.332(a)(2), the district manager did not abuse his discretion in requiring inclusion of the provision. Accordingly, we affirm the Judge's determination.

## **6. Ventilation of idle places and places where the roof bolter operates**

MSHA cited Mach for not providing an adequate means of ventilating idle places and places where the roof bolter operates. *See* Item No. 3 of Citation No. 6680551.

The Judge concluded that the district manager did not abuse his discretion in determining that the plan change requested by MSHA – that the area where roof bolters are operating must be ventilated by a line curtain – was suitable to the mine. 32 FMSHRC at 165-66. The Judge noted Mach's contention that, by not using the line curtain, the operator avoids directing dust from the continuous miners that may be working in the area on to the roof bolters; that the mine has not experienced a methane buildup in idle areas or areas where roof bolts are being installed; and that roof bolting machines are equipped with methane monitors. *Id.* at 160. However, the Judge found persuasive the Secretary's argument that it would be safer to avoid a methane buildup in idle areas than to not have a curtain for fear of more dust reaching the roof bolter. *Id.* at 161.

Mach asserts that there is no basis for requiring it to change its plan with respect to ventilating idle places and places where the roof bolter is operating. Mach argues that it "has no history of methane in its development sections, either in idle rooms (places that have been cut but not bolted) or where roof bolters are working, and therefore does not direct air into those places by . . . a line curtain." PDR at 31. Mach emphasizes that by not using the line curtain, it avoids directing respirable dust from the continuous mining machines on to its roof bolters, and that the Judge ignored this evidence. The operator contends that Inspector Roberts made the recommendation to District Manager Phillips and that neither was aware of the lack of methane accumulations at the mine. Mach argues that Inspector Roberts based his recommendation on conditions at other mines, and that such conditions are irrelevant to Mach's mine.

Substantial evidence in the record reveals a rational connection between conditions at the mine and the district manager's determination that the plan provision must be included because it was suitable to conditions at the mine. Inspector Roberts testified that places that are advanced to greater depths, such as more than 20 feet in by the rib, have more potential to accumulate methane if inadequately ventilated. Tr. 66. He stated that Mach's mine was gassy and subject to spot inspections. Tr. 66-67. Roberts further testified that in Mach's developmental entries, the distance between crosscuts is typically 120 feet, and that the area is advanced approximately 30 to 40 feet in by where the next projected crosscut would be. Tr. 68. Roberts explained that when the continuous mining machine is in that working place, a ventilation control device is installed to provide ventilation for both methane and dust control purposes, but that once the continuous mining machine is withdrawn, there is no requirement to maintain the curtain. Tr. 68. He observed that, as a result, there could be an area of 150 to 160 feet of entry, 8 to 10 feet high, 18 to 20 feet wide, with no air being forced into it to dilute and sweep the methane. Tr. 68. Roberts

testified that roof bolting, by its nature can be spark-producing, and that the curtain could be adjusted so that only a portion of the ventilating current (and whatever dust it carried) would travel up the curtain.<sup>25</sup> Tr. 69, 71.

In addition, it appears that only a portion of the air, and therefore, only a portion of the respirable dust, would be moved toward the roof bolt operator if the curtain were adjusted. Mach's general manager, Webb, acknowledged that the line curtain could be adjusted to decrease the amount of respirable dust that reaches the roof bolter. Tr. 368, 440-41. He also stated that there is a dust collection system on the bolter that collects dust. Tr. 442. Moreover, the ability to measure methane does not offer the same protection as adequately ventilating an area. As Roberts testified, "methane testing is a supplement to and not a substitute for the . . . adequate ventilation of working places." Tr. 94. Accordingly, we affirm the Judge's determination that the district manager did not act arbitrarily or capriciously in requiring Mach's plan to include a provision requiring the ventilation of idle places and where the roof bolter operates.

#### **7. Inclusion of depth-of-water action level**

In its June 4 submittal of its proposed base ventilation plan, Mach provided that, whenever the depth of water in the travelable bleeder entry exceeded 12 inches for a distance of 100 feet from rib to rib, pumps or bridges would be used to reduce the water. Gov't Ex. 1 at 3 of 30; Tr. 411-12. MSHA denied approval of the proposal and cited Mach for including a depth-of-water action level in its proposed plan. Gov't Ex. 12 at 2; *see* Item No. 4 of Citation No. 6680551.

The Judge stated that MSHA refused the provision as an attempt by Mach to circumvent the requirements of 30 C.F.R. § 75.371(aa), which requires an operator to include in its ventilation plan "[t]he means for adequately maintaining bleeder entries free of obstructions such as roof falls and standing water." 32 FMSHRC at 161. The Judge concluded that the district manager was well within his discretion to deny a proposed plan that places limits on a mandatory standard. *Id.*

Mach's proposed provision is unsuitable as a matter of law because section 75.371(aa) does not speak in terms of action levels, but rather requires operators to specify in a ventilation plan the means for maintaining bleeder entries free from obstructions of water. Thus, we affirm the Judge's determination that the district manager did not abuse his discretion in denying approval of Mach's proposed provision.

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<sup>25</sup> Given such evidence, we reject Mach's argument that Inspector Roberts based his recommendation on conditions at other mines.

**D. Whether Mach may permissibly be subject to both a site-specific ventilation plan and a general ventilation plan?**

The Judge found no merit in Mach's argument that it should not be subject to both a general plan and a site-specific plan for Panel 3. 32 FMSHRC at 167. She reasoned that separating the discussions regarding Panel 3 from the general plan provided Mach with an opportunity to focus on what was most important to it, i.e., having a plan in place to move forward with its mining schedule. *Id.*

Mach asserts that the Judge's conclusion that MSHA may impose upon Mach more than one ventilation plan is erroneous. PDR at 33. The operator explains that MSHA has forced it to address general issues typically encountered on development sections in the base plan, while issues relating to each longwall panel are addressed in the site-specific plan. *Id.* It contends that the Mine Act and its regulations contemplate a single, mine-wide ventilation plan. *Id.* Mach also submits that this practice is inconsistent with the procedures set forth in MSHA's Mine Ventilation Approval Procedures Handbook No. PH92-V-6, available at <http://www.msha.gov/READROOM/HANDBOOK/PH92-V-6.pdf> ("MSHA's Handbook"). *Id.* at 34.

The Secretary responds that neither section 303(o) of the Mine Act, 30 U.S.C. § 863(o), nor section 75.370(a)(1) requires a single, mine-wide ventilation plan. She interprets section 75.370(a)(1) to permit both a base and a site-specific ventilation plan, and to permit panel-by-panel approval of plans. The Secretary submits that her interpretation is consistent with procedures in MSHA's Handbook.

Section 303(o) of the Mine Act was carried over unchanged from section 303(o) of the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("1969 Coal Act"). Section 303(o) of the Mine Act provides:

A ventilation system and methane and dust control *plan and revisions thereof* suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title. The *plan* shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such *plan* shall be reviewed by the operator and the Secretary at least every six months.

30 U.S.C. § 863(o) (emphasis added). Although section 303(o) refers to a “ventilation plan” in the singular, the section refers to revisions of the plan, so that a ventilation plan could encompass multiple revised versions of the plan.

Similarly, regulations implementing section 303(o) of the Mine Act refer to a ventilation plan in the singular. *See* 30 C.F.R. §§ 75.370, 75.371, 75.372. However, such regulations also provide that a mine ventilation plan may encompass multiple revised versions of the plan. For instance, section 75.370(a)(2) provides:

The proposed ventilation plan and any revision to the plan shall be submitted in writing to the district manager. When revisions to a ventilation plan are proposed, only the revised pages, maps, or sketches of the plan need to be submitted. When required in writing by the district manager, the operator shall submit a fully revised plan by consolidating the plan and all revisions in an orderly manner and by deleting all outdated material.

30 C.F.R. § 75.370(a)(2).

The statutory and regulatory language above does not clearly address this issue, and we conclude that the Secretary’s interpretation of section 303(o) of the Mine Act and section 75.370 is reasonable and entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). The statutory and regulatory context of the term “ventilation plan” reveals that such a plan need not be a single plan, but may be a compilation of multiple plans.

Moreover, contrary to Mach’s assertion, the Secretary’s interpretation is consistent with MSHA’s Handbook. MSHA’s Handbook indicates that the district manager has discretion to determine whether the general plan is adequate and to determine when one plan will not suffice. MSHA’s Handbook, Ch. 7 (“Specific plans should not be required *when the general plan is adequate.*”) (emphasis added). For instance, a district manager may require the submission of a ventilation plan on a panel-by-panel basis when the entire bleeder system design and mining projections are not shown on a general map. *Id.* Mach’s mine illustrates such circumstances since the ventilation system employed by Mach is not a traditional system (32 FMSHRC at 151, 165; Tr. 632), and ventilation of the system becomes more complex as each subsequent panel is mined. 32 FMSHRC at 164; Tr. 223.

Accordingly, we affirm the Judge’s determination that MSHA may permissibly require Mach to have a site-specific plan in addition to a general plan.

**E. Whether the Judge erred by excluding certain evidence and expert witness testimony?**

During the course of the hearing, Mach attempted to introduce evidence concerning the ventilation plans at other mines, ventilation or dust surveys at other mines, and information that had not been provided to the district manager during the course of the negotiations regarding Mach's ventilation plans. 32 FMSHRC at 167. The Judge explained that she refused to allow that evidence because it was not relevant to the decision regarding the circumstances and suitability of the plan to Mach's mine. *Id.* She reasoned that while many plans are based on the experiences at other mines, it is extremely unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plans. *Id.* The Judge further stated that since she must examine whether the actions of the district manager were arbitrary or capricious, she must consider how the district manager made his decision, what he had before him at the time, and what information he used. *Id.* She stated that any document generated after that time was not relevant and would not assist her in making an informed decision. *Id.* The Judge thus reasoned that the testimony of former District Manager Lawless had no probative value because he did not have the same information before him as District Manager Phillips did. *Id.*

Mach argues that it was prejudiced by the Judge's exclusion of evidence and expert testimony. It asserts that her exclusion of evidence not specifically submitted to MSHA overlooks the purpose of a de novo hearing. It contends that the Judge's exclusion of testimony of Mr. Lawless about his knowledge of the plan approval process and the proper roles of MSHA and operators in that process limited Mach's ability to demonstrate "the full picture of MSHA's unlawful conduct." PDR at 35.

Under Commission Procedural Rule 63(a), a Judge may exclude any evidence that is irrelevant, unduly repetitious, or cumulative. 29 C.F.R. § 2700.63(a). The Commission reviews a Judge's evidentiary rulings under an "abuse of discretion" standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (citations omitted).

The Commission addressed a similar question in *Twentymile*, 30 FMSHRC at 764-66, 778-79. Consistent with the opinion of Chairman Jordan and Commissioner Cohen in that decision, we conclude that the Judge did not abuse her discretion in excluding the evidence that had not been presented to MSHA before September 29, 2009. The Judge had a legally correct basis for excluding evidence regarding plans and surveys at other mines since only conditions at Mach's mine are relevant to the district manager's determination of which plan provisions should be approved or denied approval. The ventilation system at Mach's mine was somewhat novel so that comparison with the ventilation plans and surveys of other mines would be of limited, if any, value.

In any event, the Judge did not wholly exclude such evidence. The Judge stated that she would not review other mines' ventilation plans but she permitted witnesses to rely upon their experiences with other mines. Tr. 247. In addition, although Mach could not submit any of the information relied upon by Hartsog in his testimony because such information had not been presented to MSHA before September 29, 2009, the Judge considered the conclusions reached by Hartsog regarding Mach's proposed plans. Tr. 497-98, 570-73.

Regarding whether the Judge erred in excluding former District Manager Lawless' testimony regarding his knowledge of the plan approval process and the proper roles of MSHA and operators in that process, such matters are legal rather than factual and need not be developed as testimony in a record. Moreover, a comparison of decisions among district managers could potentially have a detrimental impact on safety. As Chairman Jordan and Commissioner Cohen said in *Twentymile*:

[D]istrict [m]anagers are individuals. Like baseball umpires, they each have a slightly different strike zone. Additionally, there are differences from mine to mine, and the ERP for each mine must be considered on its own merits. If we tell administrative law judges that, in weighing whether a particular [d]istrict [m]anager acted in an arbitrary and capricious manner, they should consider what other [d]istrict [m]anagers do in allegedly comparable situations, it would encourage a race to the bottom. That is, a [d]istrict [m]anager would necessarily have to be looking over his or her shoulder to consider whether his or her decision would eventually be found arbitrary and capricious because it was more stringent than the decision of another [d]istrict [m]anager. A [d]istrict [m]anager in this situation would have an inducement to shade the requirements of the law in an operator's favor so as to avoid unfavorable comparison with other [d]istrict [m]anagers. This would lead to the standard essentially being set by the most lenient [d]istrict [m]anager, a process which would be detrimental to mine safety.

30 FMSHRC at 765-66. Accordingly, we conclude that the Judge did not err in her exclusion of evidence and testimony.

### III.

#### Conclusion

For the foregoing reasons, we affirm the Judge's determination that the termination of Order No. 8414238 did not amount to approval of Mach's ventilation plans. We affirm the judge's application of the arbitrary, capricious or abuse of discretion standard to her review of the district manager's denial of Mach's proposed ventilation plans. As more particularly stated in this decision, we affirm the Judge's determination that the district manager did not act arbitrarily or capriciously or abuse his discretion with respect to the plan provisions regarding bleeder evaluation points, stoppings in the active tailgate entry, use of belt air, requirement to identify means of compliance with section 75.332, the ventilation of idle places and places where the roof bolter operates, and the inclusion of a depth-of-water action level. We vacate the Judge's determination regarding ventilation controls in the bleeder entries and remand for further action as described in this decision.<sup>26</sup> We affirm the Judge's determination that MSHA may permissibly require Mach to have a site-specific ventilation plan in addition to a general ventilation plan. Finally, we conclude that the Judge did not err in her exclusion of evidence and testimony.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

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<sup>26</sup> As stated *supra*, this issue may be moot. Slip op. at 15.

Commissioners Duffy and Young, concurring in part and dissenting in part:

We join our colleagues in the results they reach in Parts II.A, D, and E of their opinion. We agree that the termination of Order No. 8414238 did not constitute approval of Mach's ventilation plan; that MSHA may require both a general mine ventilation plan and a more specific plan for certain parts of a mine; and that the judge did not abuse her discretion in excluding certain evidence and expert witness testimony.

We cannot agree, however, with our colleagues' disposition of the primary issue in this case, which is the judge's decision on the ventilation plan approval dispute between MSHA and the operator. In our opinion, the judge committed fundamental errors in affirming Citation Nos. 6680550 and 6680551. Consequently we would vacate the judge's decision and remand it so those errors can be rectified.

The underground coal mine ventilation plan approval process is governed by section 303(o) of the Mine Act, 30 U.S.C. § 863(o), along with implementing regulations, including the standard Mach was found to have violated here, 30 C.F.R. § 75.370(d). Under the process, an operator submits a proposed ventilation plan or revisions to that plan to MSHA for approval. When MSHA rejects a plan or a revision of a plan, it and the operator are then required to negotiate in good faith. *Carbon Cnty. Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985).

As outlined in the majority opinion, this is what occurred in this case with respect to the dispute between MSHA and Mach over the latter's ventilation plan for its mine's longwall Panel 3: Mach proposed to ventilate the panel the same way it did the first two panels, MSHA rejected that proposal, and Mach submitted ventilation plan revisions. When the two parties reached an impasse, consistent with the further procedure outlined in *Carbon County*, Mach mined without the required plan approval in order that MSHA could issue it a technical citation and the dispute could be litigated before the Commission.

According to the judge, and now the majority, the Commission resolves the dispute merely by determining whether MSHA acted "arbitrarily and capriciously" or "abused its discretion" in rejecting the operator's proposed plan as unsuitable and imposing an alternative plan the agency deemed suitable. 32 FMSHRC at 165-66; slip op. at 6-9. The majority recognizes that such standards are exceedingly deferential (slip op. at 8), as they essentially place the burden on the operator to demonstrate to the judge hearing the case that MSHA erred. See *UMWA v. Dole*, 870 F.2d 662, 666 (D.C. Cir. 1989) (arbitrary and capricious standard is "highly deferential and presumes the validity of agency action"); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (abuse of discretion can only be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law). Given the terms of the Mine Act and established Commission procedure and precedent, we disagree that the application of the arbitrary and capricious or abuse of discretion standards to MSHA's actions and decisions is the appropriate way to resolve a dispute over the substance of a ventilation plan.

To be sure, application of the arbitrary and capricious standard has a role in the mine plan dispute process. Where the question is solely one of the procedure followed, such as whether the parties negotiated a plan's provisions in good faith, the Commission has applied the arbitrary and capricious standard. *See C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996).<sup>1</sup> Moreover, should a breakdown in the process be traceable to the operator's conduct in the negotiations, MSHA is free to withdraw approval of an existing plan as long as it does not do so in an arbitrary or capricious manner. *See Monterery Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983).

Beyond the issue of whether MSHA and an operator cooperated in the mine plan approval process, however, is the substance of the dispute, which the Commission has recognized is an entirely separate matter. *See Peabody Coal Co.*, 15 FMSHRC 381, 388 (Mar. 1993) ("*Peabody I*"). With regard to ventilation, section 75.370(d)'s proviso that "[n]o proposed ventilation plan shall be implemented before it is approved by the [MSHA] district manager" is derived from the language of section 303(o) of the Mine Act. It requires that "[a] ventilation system and methane dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator." 30 U.S.C. § 863(o).

In remanding the case to the judge in *Peabody I*, the Commission was unequivocal that, with regard to whether a plan provision urged by MSHA is suitable to conditions at a mine, "the Secretary bears the burden of proving that a plan provision is suitable to a mine." 15 FMSHRC at 388. It did so because in any enforcement action before the Commission (which is how ventilation plan disputes are resolved), the Secretary bears the burden of proof. *Id.* (citing *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987)).

Furthermore, in reviewing the judge's decision on remand in *Peabody I*, the Commission (with the Secretary's acquiescence) made the corollary holding the Secretary also bore the burden of proving to the judge that an operator's proposed plan or revision was unsuitable to the mine. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) ("*Peabody II*"). The Commission then reviewed the judge's findings that the previously approved plan was unsuitable and the new provision was suitable against the substantial evidence standard. *Id.* at 691.

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<sup>1</sup> There, in a case involving roof control plan provisions, the Commission stated that the two key elements of good-faith consultation are giving notice of a party's position and adequate discussion of disputed provisions. *C.W. Mining*, 18 FMSHRC at 1747. The Commission stated that "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *Id.* at 1746 (citing *UMWA v. Dole*, 870 F.2d at 669 n.10). The Commission, affirming as supported by substantial evidence the judge's findings that the parties had engaged in good faith consultations because there was adequate notice and discussion by MSHA, concluded that nothing in the record "suggests bad faith by MSHA," and that it perceived "no course of arbitrary conduct." *Id.* at 1749.

Unlike the judge and the majority, we do not read intervening decisions to have disturbed the *Peabody* case holdings with regard to the burden the Secretary bears in substantive ventilation plan disputes. The majority, like the judge and the Secretary, points to our decisions in *Emerald Coal Res., LP*, 29 FMSHRC 956, 966 (Dec. 2007), and *Twentymile.*, 30 FMSHRC at 748, as having established that the Commission applies an arbitrary and capricious standard of review to the MSHA district manager's decisions when resolving the substance of a plan dispute between MSHA and an operator. Slip op. at 7. We do not read those decisions, which were rendered with regard to a new and very distinctly different type of mine plan – emergency response plans, also known as “ERPs” – as having overturned the Commission's prior holdings in the *Peabody* cases.

Application of an arbitrary and capricious standard of review to the Secretary's actions in ERP approval cases is appropriate because the statutory language permits it. Unlike with mine ventilation plans, neither the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) amendments to the Mine Act that instituted the ERP requirements, nor any applicable regulations, require the Secretary to make determinations that various ERP provisions are suitable to the mine submitting the ERP for approval. *See* 30 U.S.C. § 876. Without that requirement, and the fact-finding it necessitates in a plan-approval dispute case, there is no need for the Secretary to bear the burden of proof the Commission imposed on her in the *Peabody* cases.

Instead, the inquiry in an ERP approval case extends no further than to an examination of whether MSHA properly interpreted the statutory criteria that govern emergency response plans and the circumstances of the approval process. *See Emerald*, 29 FMSHRC at 966-970; *Twentymile*, 30 FMSHRC at 749-53. The more deferential arbitrary and capricious standard is plainly appropriate to such a limited inquiry.

That the ERP approval process is substantively different from the ventilation plan approval process is further evidenced by the Commission's docket. Ventilation plan disputes have for years been the subject of Commission proceedings. After an initial flurry of ERP disputes following the institution of ERP requirements, the Commission cases on ERP disputes decreased dramatically. That is most likely because the ERPs are not a dynamic subject area, while ventilation plans, as this case shows, most clearly are so. *See* slip op. at 2 (“The method for ventilating this mine is new to the mining industry.”).

Not surprisingly given the subject matter of the cases, neither of the ERP approval cases addressed the issue that is before us, which is the standard of review to be applied to MSHA-operator disputes over the substance of proposed ventilation plans. That standard was

established in the *Peabody* cases, and the majority errs in being essentially silent on why it is reversing the governing Commission precedent. *See Pendley v. FMSHRC*, 601 F.3d 417, 426, 27 (6th Cir. 2010) (Commission cannot depart from its own applicable precedent without articulating a reasoned basis for doing so).<sup>2</sup>

Because the judge applied the wrong standard of review to the MSHA district manager's decisions on both the unsuitability of Mach's proposed ventilation plan and the suitability of the plan imposed by the district manager, we would vacate the judge's decision upholding the citations and remand the case to her to apply the proper standard of review. We would also specify in the remand that the judge is to review the district manager's decision on the unsuitability *not* of the plan as originally proposed by Mach, which was a continuation of the plan that governed the first two panels, but rather the plan as it was subsequently proposed to be revised by Mach in response to MSHA's rejection of the continuation of the existing plan. Tr. 47; Gov't Ex. 2.

While the judge's decision at its outset acknowledges the proposed revisions (32 FMSHRC at 153), it is clear that the judge's review of the district manager's decisions was limited to the unsuitability of the existing Mach plan, and not as it would be revised with respect to Panel 3. *See* 32 FMSHRC at 162-63. To the extent the judge ignored plan revisions proposed by Mach in upholding the district manager on the issue of unsuitability of Mach's plan, she plainly erred, regardless of the standard of review she applied, and her decision merits remand on that basis alone. Given that the judge ignored the standard of review established by the *Peabody* cases, we cannot agree with the majority that her error in failing to review the correct pieces of evidence that were before her was harmless under these circumstances. *See* slip op. at 10.

Because we believe that the judge failed to apply the proper standard of review to the decision of the MSHA district manager or even to examine Mach's proposed plan as the operator revised it during the required negotiations, we will not address in detail the separate matters of

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<sup>2</sup> As the majority cites (slip op. at 9), the appeals court that upheld the Commission in the *Peabody* cases issued a short unpublished memorandum decision in which it stated that, with respect to one of the ventilation plan issues in dispute in the cases, MSHA's conclusion "was not arbitrary and capricious." *Peabody Coal Co. v. FMSHRC*, 111 F.3d 963 (D.C. Cir. 1997) (Table), 1997 WL 159436. Before the court, the Secretary specifically challenged the Commission's assignment to the Secretary of the burden of proving suitability under a preponderance of the evidence standard. *See* Brief for Respondent-Secretary at 11-12, *Peabody*, 111 F.3d 936 (D.C. Cir. No. 96-1205). Without more, we do not read the court's limited use of the phrase "arbitrary and capricious" in an unpublished opinion upholding the Commission's decisions as overturning the Commission with regard to the standard of review to be applied in ventilation plan approval cases.

substance on which the judge and the Commission here upheld the MSHA district manager.<sup>3</sup> Indeed, a number of the issues may now be moot. *See slip op.* at 15. However, the issues merit some discussion to demonstrate the differences that can result from applying a higher or lower standard of review to the district manager's decision.

**A. Bleeder evaluation points**

With regard to Issue #1 in Citation No. 6680550 (Panel 3) and Issue #6 in Citation No. 6680551 (general plan), the majority affirms the judge's finding that the district manager did not abuse his discretion by requiring additional evaluation points in the bleeder system. *Slip op.* at 10-13; 32 FMSHRC at 155-59. As the majority explains, this dispute centers around whether the ventilation plan should include a requirement obligating a Mach miner to travel to a specific bleeder evaluation point ("EP") in its "wrap-around" bleeder system, in order to take weekly measurements at that EP, or, as Mach proposed, whether it is sufficient for the operator to measure the adequacy of the bleeder from outside and thus protect Mach personnel from the roof hazards within its bleeder system. *Slip op.* at 11-12.

Clearly, this issue requires a judge to review the district manager's decision to weigh the relative dangers of the two approaches. Because the judge did not apply a preponderance of the evidence standard with regard to the suitability of competing proposals to the mine in question, however, she largely avoided doing so.

Instead, by applying the lower abuse of discretion standard, the judge focused on whether MSHA acted rationally in its decision. Because there was evidence to support MSHA's conclusion that evaluating the bleeder at the point it specified would provide better information than the alternative proposed by Mach, that was enough for the judge, and is enough for the majority. *See slip op.* at 12-13; 32 FMSHRC at 158.

There is little in the judge's decision to indicate that she considered the issue of the dangers roof conditions in the bleeders would pose to miners traveling to the EPs. The Secretary concedes as much when she argues that the judge should be upheld because the operator, in proposing an alternative method of evaluation, bears the burden of proving that the alternate means was suitable. *S. Br.* at 11 (citing *Jim Walter Res., Inc.*, 12 FMSHRC 1354, 1357 (June 1990) (ALJ)). As discussed, the Commission decided in *Peabody* that the burden of proof instead remains with the Secretary throughout the ventilation plan approval process.

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<sup>3</sup> The majority is remanding to the judge the issue of whether Mach failed to include sufficient bleeder controls to control air movement in the bleeder system in both its proposed site-specific plan for Panel 3 and its general base plan, assuming that the issue is not now moot. *Slip op.* at 15. While we agree with remanding the issue, we would have the judge apply a preponderance of the evidence standard with regard to the issue, with the burden on the Secretary, instead of having the judge redetermine whether the district manager abused his discretion in requiring that ventilation controls be used by Mach at the back of Panel 3.

Moreover, given the standard of review the judge applied to the district manager's decision, she essentially left unaddressed whether the EP specified by MSHA would be suitable to the conditions at Mach's mine, given the adverse roof conditions in the bleeder entries. There is no dispute that the roof conditions in the bleeder entries were adverse. Tr. 233-34, 325, 382-83. Mach's experience in Panels 1 and 2 reveal considerable roof falls. Tr. 154, 156-57. The Secretary conceded in her post-hearing brief that "Mach's own geology reports reveal the likelihood of continued roof support issues for Panel # 3." S. Post-Hr'g Br. at 11 (citing Gov't Ex. 6). The district manager's letter of September 29, 2009, also acknowledged the severe roof conditions:

The continuing deterioration of the mine roof and the existing roof falls prevent proper bleeder and gob system evaluation. These worsening roof conditions threaten the viability of these entries to service projected panels #3, #4, #5, and #6 and are reasonably likely to threaten the internal flow paths of the worked-out panels of HG #1 and HG #2.

Gov't Ex. 12, at 3. Further, MSHA's expert witness Dennis Beiter testified that he believed that the EP in the stairstep at crosscut 161 would be appropriate *if* travel to the area could be made safely. Tr. 225.

While Mach has a duty to control its roof independent from its duty to determine the effectiveness of its bleeder system (*see* 30 C.F.R. § 75.220(a)(1)), that does not mean that Mach's concerns for the safety of its miners traveling to an EP should be ignored. Here the judge did just that.<sup>4</sup> While the majority concludes that MSHA examined the relevant data and articulated a satisfactory explanation for its requirement of additional EPs in the bleeder system, that does necessarily mean that the Secretary carried her burden of proof with respect to the issue.

#### **B. Stoppings in the active tailgate entry**

With regard to Issue #3 in Citation No. 6680550 (Panel 3) and Issue #14 in Citation No. 6680551 (general plan), the dispute is over whether ventilation controls in the tailgate entry, such as stoppings, are necessary to adequately ventilate the tailgate entry between it and adjacent worked-out areas in order to assure that air from the worked-out areas will not be directed to the longwall face. The majority upholds the judge's conclusion that the district manager did not abuse his discretion in requiring such controls. Slip op. at 15-17.

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<sup>4</sup> Although the Judge found that there were adverse roof conditions in the bleeders that might deteriorate further as mining progresses, she noted those conditions only in terms of negative effects on ventilation (that the roof falls could further obstruct the free flow of air), without reconciling how miners would reach the evaluation point without putting themselves in danger. *See* 32 FMSHRC at 158.

In our opinion, the record evidence the majority cites in support of its holding – particularly the results of the various ventilation surveys – is more than sufficient to show that not only did the district manager not act arbitrarily or capriciously, but that the Secretary established by a preponderance of the evidence that Mach’s proposed plan provision was unsuitable and the provision the Secretary was requiring was suitable for the mine. Consequently, it is likely that the judge would have reached the same conclusion on the issue even if she had reviewed the district manager’s decision under the higher standard we believe is required in plan approval cases such as this.

**C. Use of belt air**

As the majority explains, Issue #4 in Citation No. 6680550 (Panel 3) and Issue #9 in Citation No. 6680551 (general plan) turn on whether Mach offered the justification required by 30 C.F.R. § 75.350(b) for using belt air to ventilate the longwall working section. Slip op. at 17-18. The question of whether Mach offered that justification (as oppose to the strength of the justification offered) would be resolved the same way under an arbitrary and capricious standard as it would under a preponderance of the evidences standard. Consequently, the judge likely would have reached the same conclusion on the issue as she did even if she had applied the preponderance of the evidence standard.

**D. Requirement to specify means of compliance with 30 C.F.R. § 75.332**

Issue #1 in Citation No. 6680551 (general plan) concerns MSHA’s requirement that Mach’s plan specify the operator’s means of compliance with 30 C.F.R. § 75.332(a)(2), which governs the simultaneous use of mining equipment within the same working section. At the time of the judge’s decision there was a contest pending of an MSHA citation for the mine having recently operated two continuous miners on a single split of air. The Judge concluded that it was appropriate for MSHA to require Mach to include a provision requiring that it specify its means of complying with the standard. 32 FMSHRC at 161.

We are not at all certain that the provision at issue is a proper subject of a ventilation plan. While the majority approves it because it does more than incorporate section 75.332(a)(2) into the plan (*see* slip op. at 18-19), we do not necessarily agree that it is proper for MSHA to use the ventilation plan process to impose upon an operator a duty to provide information regarding its compliance with applicable law. That Mach may have violated the regulation once in the past is irrelevant, because regardless of previous violations, an operator is required to comply with section 75.332(a)(2) on an ongoing basis.

Moreover, it is not clear that the provision was suitable to conditions at Mach’s mine. The judge failed to make a finding regarding whether the plan provision was suitable to a mine that had just one unresolved allegation of violation of the regulation at issue. Again, this seems to be an instance where the standard of review applied to the district manager’s decision made quite a difference in the judge’s decision.

**E. Ventilation of idle places and places where roof bolter operates**

This dispute, Issue No. 3 of Citation No. 6680551 (general plan), concerns Mach's ventilation of idle places and places where the roof bolter operates. The judge concluded that the district manager did not abuse his discretion in determining that the plan change requested by MSHA – that the area where roofbolters are operating must be ventilated by a line curtain – was suitable to the mine, and the majority upholds the judge's conclusion. 32 FMSHRC at 160-61, 165-66; slip op. at 19-20.

In our opinion, the resolution of this issue clearly hinged on the degree of deference the judge showed towards the district manager in reviewing his decision. We do not disagree that the district manager had a legitimate concern regarding the potential for a methane buildup in idle areas in the time preceding roof bolting operations, and thus he was not acting arbitrarily or capriciously in requiring Mach to use line curtain. Unlike under the arbitrary and capricious standard, however, that is not the end of the inquiry. Here, Mach also had legitimate concerns, specifically regarding dust control, and submitted rebuttal evidence on the potential for methane buildup. A preponderance of the evidence standard would require the judge to balance's Mach's concerns with the evidence on the potential for methane buildup in the idle areas that could be ignited by sparks resulting from the roof bolting (including evidence Mach submitted on the lack of a history of methane in idle places in the mine, and the fact that its roof bolter is equipped with a methane monitor).

Moreover it appears to us that in this instance application of the more deferential standard of review permitted the district manager's decision to evade review of whether he was focused on suitability of the plan provision in question to *this* mine. It may be that the judge would have come out the same way on the preponderance of the evidence standard. That is impossible to know, however, absent remand to her to apply that standard of review.

**F. Inclusion of a depth-of-water action level**

Issue #4 in Citation No. 6680551 involves the dispute over MSHA's requirement for a depth-of-water action level be included in the ventilation plan, and Mach's proposed plan provision that would allow the accumulation of up to 12 inches of water on the mine floor before any action in response by it would be required. The judge concluded that the district manager was well within his discretion to deny the proposed provision as it would circumvent the requirement in 30 C.F.R. § 75.371(aa) that an operator include in its ventilation plan "[t]he means for adequately maintaining bleeder entries free of obstructions such as roof falls and standing water." 32 FMSHRC at 161.

The judge reviewed the contentions of both parties on whether it was safe to permit up to 12 inches of water on the mine floor before addressing the situation with pumps and other means of reducing the depth of the water. There is substantial record evidence that the Secretary demonstrated that it would not be safe to permit such accumulations before acting. Accordingly, in this instance it does not appear that the standard of review that was applied would have made a difference.

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

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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August 9, 2012

WILLIAM METZ

v.

CARMEUSE LIME, INC.

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Docket No. PENN 2009-541-DM

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

**DECISION**

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

In this discrimination proceeding arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c),<sup>1</sup> Administrative Law Judge Jerold Feldman determined that William Metz was not discriminated against by Carmeuse Lime, Inc. (“Carmeuse”). 32 FMSHRC 1710 (Nov. 2010) (ALJ). Metz filed a petition for discretionary review of the judge’s denial of his claim, which the Commission granted. For the reasons that follow, we affirm the judge’s decision.

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<sup>1</sup> Section 105(c)(1) provides in part:

No person shall discharge or in any manner discriminate against or cause to be discharged . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

## I.

### **Factual and Procedural Background**

Carmeuse, an affiliate of Carmeuse Lime and Stone, operates a plant at Annville, Pennsylvania, with approximately 50 employees. *Id.* at 1711; Tr. 16. The plant produces lime from stone extracted from an adjacent quarry. 32 FMSHRC at 1712. Willam Metz was employed by Carmeuse and its predecessor company at the Annville plant for approximately 22 years. *Id.* Metz worked in the maintenance department as a millwright; his responsibilities included working on general maintenance, inspecting equipment, welding, and fabricating. *Id.*; Tr. 226-27. Metz also served on the safety committee and periodically accompanied mine inspectors as a miners' representative. 32 FMSHRC at 1712. Metz has a long history of making safety-related complaints and acting as "an employee spokesman" for personnel grievances.<sup>2</sup> *Id.*

#### **A. Metz's Complaints About the Kilns**

At the Annville plant, four kilns weighing several tons were used to process lime from limestone rock. *Id.* at 1714. In 2009, independent contractors were dismantling the kilns. *Id.* Metz was concerned about asbestos dust possibly being released as a result of the dismantling because the lunch room was in the same vicinity. Tr. 44, 51. He was also concerned about being struck by falling material, as he believed that the area was not properly dangered-off. Tr. 47-48, 50-51, 54; 32 FMSHRC at 1714. Metz communicated these safety concerns two to three weeks before his termination to five Carmeuse managers. Tr. 60; 32 FMSHRC at 1714. He complained to Plant Manager Ken Kauffman the day before his suspension on March 11, 2009. Tr. 56, 70-71, 103-04. Metz testified that at this meeting, he threatened to call MSHA about the hazardous kiln conditions. Tr. 71. Carmeuse stipulated that Metz's complaints were made in good faith. 32 FMSHRC at 1714; Tr. 61.

#### **B. The Operator's On-Call Policy**

Carmeuse had an "on-call policy" that required certain maintenance and electrical employees to be available to work on their days off if needed. 32 FMSHRC at 714. On-call employees were paid for at least four hours if they were summoned to work. *Id.* at 1714. However, prior to 2009, Carmeuse did not pay on-call employees for their on-call status. *Id.* In January 2009, Carmeuse changed its policy so that employees were paid for four hours if they came to work and, in addition, employees were paid \$25 for each day that they were on-call, but not required to work. *Id.* at 1714-15. The new policy did not apply retroactively. *Id.*

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<sup>2</sup> Metz filed a discrimination complaint against Carmeuse's predecessor company at Annville, Wimpey Minerals, regarding a termination of employment in 1995. *Metz v. Wimpey Minerals*, 18 FMSHRC 1087 (June 1996) (ALJ). In that case, the judge determined that the operator had discriminated against Metz when it discharged him for making safety complaints. *Id.* at 1100-02.

The issue of retroactive backpay compensation was a source of contention in the early months of 2009. *Id.* at 1715. Metz, acting as a representative of the millwrights, approached several members of the Carmeuse Human Resources (“HR”) Department about this issue. *Id.*; C. Ex. 25; R. Ex. 15. Metz testified that he was promised that the on-call compensation would be paid retroactively. Tr. 72, 191, 599-600; C. Ex. 25, R. Ex. 15; 32 FMSHRC at 1715. He submitted a peer review request listing six employees requesting backpay compensation.<sup>3</sup> Tr. 165-66, 191-92; R. Ex. 15. Carmeuse denied the peer review request on the basis that it involved a company policy. R. Ex. 15. Metz then filed a response to the denial and a renewed request on January 5, 2009, and Carmeuse again denied Metz’s request. R. Ex. 15.

**C. Events of March 12 and 13, 2009**

Melissa Croll was a corporate HR manager based in Carmeuse’s corporate headquarters in Pittsburgh, Pennsylvania. 32 FMSHRC at 1715. Her supervisor was Kathy Wiley, Vice-President of HR, who also was based in Pittsburgh. *Id.* Croll was assigned to the Annville plant in January 2009. *Id.*; Tr. 370.

On March 12, 2009, Croll visited the plant to meet with the plant’s HR assistant, Ed Saterstad. 32 FMSHRC at 1715. At that time, Metz was called into a conference room to speak with Croll. *Id.* at 1716. Before the meeting, Saterstad informed Croll that Metz “complains a lot.” *Id.* at 1715-16; Tr. 468, 530. Croll was not aware of the ongoing history with respect to on-call backpay between Metz and Carmeuse. Tr. 528, 547-48; R. Ex. 18. Nor was she aware that another HR officer had made representations that the employees were going to get paid two years of backpay. Tr. 547-48; R. Ex. 18. Metz brought up the on-call issue and grew upset when Croll professed to know nothing about it. Tr. 730; R. Ex. 18. When Metz tried to invoke peer review for the denial of the backpay, Croll replied that peer review did not apply to company policy. 32 FMSHRC at 1716. According to Croll, Metz grew irate and said “that’s f\_\_\_\_\_g bullshit.” *Id.* Croll testified that Metz also used profanity when he requested a formal response on the issue from the company. *Id.* Croll testified that Metz got up suddenly but that he did not try to attack her. Tr. 471; R. Ex.18.

After the meeting ended, Croll met with Plant Manager Kauffman. 32 FMSHRC at 1719. Croll asked Kauffman to call Metz to the office so that she could express her concerns and explain that the behavior in the conference room was inappropriate. *Id.* Croll subsequently

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<sup>3</sup> Peer review is a method of addressing employee grievance and discipline issues at Carmeuse. 32 FMSHRC at 1715. It is a process where aggrieved employees may request review before a panel of three hourly and two salaried employees who have completed peer review training. *Id.*; C. Ex. 10; Tr. 315. The peer review policy provides that a peer review panel cannot set or change company policy or be used in cases of sexual harassment. C. Ex. 10, at 2. All persons on the panel must maintain the confidentiality of the proceedings. *Id.* at 1, 2.

suggested to Metz that he should look for another job if working at the plant was making him unhappy. *Id.* Croll, Saterstad, and Kauffman then went to lunch. *Id.*

When they returned from lunch, Croll, Kauffman and Saterstad met Ron Popp, Metz's supervisor, who had just spoken to Metz. *Id.* Popp explained that Metz was upset and reported that Metz said "she [Croll] is a waste of my f\_\_\_ time. She told me to go look for a job. I want to go home before I hurt myself or someone." *Id.*; R. Ex. 20. Popp had agreed that Metz should go home, and he observed Metz leave the plant. 32 FMSHRC at 1720.

Kauffman and Croll called Carmeuse's Vice President of Operations, Roger Downham, because Croll's supervisor was unavailable. *Id.* They explained the series of events that had occurred. *Id.* Downham decided that Metz should be suspended without pay pending further investigation. *Id.* Metz did not attempt to come to work on March 13, 2009. *Id.* Because Carmeuse was concerned with Metz's reaction, the notice of suspension was delivered by the state constable. *Id.*

#### **D. Croll's Investigation**

Croll then began an investigation to determine if Metz's conduct was an isolated event or a pattern of behavior. *Id.* She reviewed Metz's personnel file, in which there was one employee warning notice dated March 6, 2007, which briefly stated that "employee threatened management." *Id.*; R. Ex. 6. The warning notice said that termination would occur if behavior should occur again. R. Ex. 6. The notice contained a signature line for the employee but was not signed by Metz. *Id.* It also contained a section entitled "Employee Statement" (that provided for the employee to agree or disagree with the employer's action), which was also blank. *Id.* In addition to reviewing the file, Croll interviewed employees with regard to Metz's past behavior. R. Ex. 26. She also contacted some HR officials who previously had been assigned to the Annville plant. 32 FMSHRC at 1721.

#### **E. Termination of Metz's Employment**

Wiley reviewed the information submitted by Croll and discussed the March 12 incident with Downham and in-house counsel. *Id.* Their conclusion was that Metz should be terminated. *Id.*

Wiley telephoned Metz on March 18, 2009, and informed him of the decision to terminate his employment. *Id.* A letter of termination was also sent to Metz on that day. *Id.*; R. Ex. 1. The letter provided that the grounds for termination were violations of the Corporate Harassment Policy and the General Rules and Regulations as outlined in the Annville Handbook. *Id.* The letter stated in pertinent part:

Your repeated use of profane, vile, threatening and/or abusive language in the workplace used with your peers and members of management, in addition to a thorough review of your personnel

file, has demonstrated a clear pattern of harassing, abusive and offensive behavior in the workplace as well as a lack of respect for others. This behavior will not be tolerated.

*Id.*

Metz requested peer review of his termination. 32 FMSHRC at 1721. On March 23, 2009, Wiley sent a letter denying the request for peer review. R. Ex. 27A. The letter stated that “terminations are not subject to peer review when they involve any type of harassment as it involves very confidential information that cannot be shared in a peer review format.” *Id.*

#### **F. The Judge’s Decision**

Metz filed a discrimination complaint under section 105(c)(2) of the Act with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on March 28, 2009. 30 U.S.C. § 815(c)(2). 32 FMSHRC at 1710 n.1. On May 11, 2009, MSHA advised Metz that its investigation did not disclose a Mine Act section 105(c) violation. *Id.* On June 4, 2009, Metz filed a discrimination complaint with the Commission pursuant to section 105(c)(3). *Id.*

The judge determined that Metz had established a prima facie case of discrimination because Metz made a safety-related complaint, i.e, that the contract employees were dismantling a kiln in an unsafe manner, shortly before his termination of employment. *Id.* at 1711, 1722-23. However, the judge found that Carmeuse successfully rebutted the prima facie case by demonstrating that the termination was not motivated by protected activity, but rather by an incident that occurred on March 12, 2009, in which Metz used “profanity and expressed hostility towards a Carmeuse HR official.” *Id.* at 1711. The judge found that Metz’s hostility was related to a personnel matter rather than any activity protected by the Mine Act. *Id.* The judge also held that even if Carmeuse had been motivated in any part by Metz’s protected activity, his hostile and threatening conduct during and immediately following the March 12 meeting provided Carmeuse with a rational and independent basis for his termination regardless of his protected activity. *Id.* at 1728. Accordingly, the judge denied Metz’s discrimination claim. *Id.*

## **II.**

### **Disposition**

As noted above, the judge concluded that Metz had presented a prima facie case of discrimination but that the operator successfully rebutted it by demonstrating that the termination was not motivated by Metz’s safety complaints and activities. A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Sec’y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981);

*Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). As recently stated in *Turner v. Nat’l Cement Co. of CA.*, “to establish a prima facie case, it is sufficient that the alleged discriminatee present evidence from which the trier of fact could infer retaliation.” 33 FMSHRC 1059, 1065 (May 2011) (citing *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir. 1998)).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

#### **A. Metz’s Prima Facie Case**

The first element of a prima facie case is a showing that protected activity occurred. *Sec’y 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). Here, the judge found that Metz met the first element of a prima facie case of discrimination because Metz had made safety-related complaints involving the kilns shortly before his March 18, 2009, termination of employment. 32 FMSHRC at 1711, 1722-23.

Substantial evidence<sup>4</sup> supports the judge’s determination that Metz made numerous safety complaints with respect to the kilns in the weeks leading up to his termination. *See* Tr. 55-56, 59-60, 71. Moreover, Carmeuse stipulated that Metz’s complaints were made in good faith. Tr. 60-61; 32 FMSHRC at 1714.

The second element of a prima facie case is a showing that adverse action was motivated in any part by protected activity. *Chacon*, 3 FMSHRC at 2510. The judge found that Metz satisfied his burden of demonstrating the second element of a prima facie case because Metz’s safety-related complaints were made two to three weeks prior to his termination. 32 FMSHRC at 1723. In addition, the judge rejected Carmeuse’s contention that there was no motivation because the managers who terminated Metz had no knowledge of his protected activities. *Id.*

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<sup>4</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable 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 U.S. 197, 229 (1938)).

We agree that the judge properly imputed the knowledge of those protected activities to the Carmeuse corporate officials who decided to terminate Metz. *Id.* at 1723. The Annville plant is small-sized with approximately 50 employees. *Id.* The Commission has held that the small size of a mine supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (Dec. 1999). Moreover, "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb.1984). In addition, Kauffman, the plant manager, was consulted on the decision. Tr. 566-67, 597.

The supervisors' knowledge of the complaints and the timing of those complaints constitute evidence that would allow a factfinder to conclude that Metz's discharge was at least partially motivated by his protected safety complaints. See *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982); *Chacon*, 3 FMSHRC at 2510 (providing in part that discriminatory motivation may be shown by the operator's knowledge of protected activity and the coincidence in time between the protected activity and the adverse action). Accordingly, we conclude that the judge properly found that Metz had established both elements of a prima facie case of discrimination.

#### **B. Rebuttal of the Prima Facie Case**

We now turn to the question of whether the operator has successfully rebutted the prima facie case. *Robinette*, 3 FMSHRC at 818 n.20. The judge determined that Carmeuse rebutted Metz's prima facie case by demonstrating that the termination was not motivated in any part by his protected activity. 32 FMSHRC at 1728. We conclude that the judge's determination is supported by substantial evidence.

The judge found that Metz's conduct on March 12, 2009, "was insubordinate and intolerable." *Id.* at 1724. In reaching this finding, the judge made a credibility determination that Metz acted inappropriately and used profane language at his meetings with Croll. *Id.* The Commission has often recognized that as a general rule, absent exceptional circumstances, the Commission will not overturn findings based on credibility resolutions. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995) *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096,1107 (D.C. Cir. 1998); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Although Metz points out that the judge did discredit part of Croll's testimony (32 FMSHRC at 1723), the Commission has recognized that a judge may credit a witness' testimony despite minor inconsistencies in that testimony. *Austin Powder Co.*, 21 FMSHRC 18, 23 (Jan. 1999). In *Robinette*, 3 FMSHRC at 813, the Commission similarly reasoned that where it is apparent that a witness has testified untruthfully in part, the judge is not foreclosed from accepting the testimony, if the remainder of the questionable witness' testimony is corroborated by other credible evidence or is otherwise inherently believable. Here, the judge noted the inconsistency in Croll's testimony but gave her testimony, as a whole, greater weight because it was corroborated by other evidence. 32 FMSHRC at 1723-24. In particular, the judge relied on

Popp's corroborating account of meeting Metz shortly after the meeting with Croll, at which time Metz used profanity and suggested he might hurt himself or someone else if he didn't leave the plant. *Id.* at 1724; 644-48, 394-96. Popp testified that the March 12 incident was more serious and different from Metz's past behavior because he never knew Metz to say that "he was going to hurt somebody else." Tr. 648. Significantly, the judge discredited Metz's testimony as to the March 12 meeting as evasive and not believable. 32 FMSHRC at 1717, 1724.

In addition, the judge relied on Metz's history of angry and inappropriate behavior to support Carmeuse's claim that it discharged Metz for his intolerable behavior alone. *Id.* at 1724. Substantial evidence in the record supports the judge's determination. The record revealed that Carmeuse had previously warned Metz for threatening Kauffman and that his personnel file contained a warning notice dated March 6, 2007, which stated that "employee threatened management." *Id.* at 1720; R. Ex. 6.<sup>5</sup> Croll's interviews revealed that some employees were bothered by Metz's angry outbursts. R. Ex. 26. A number of the staff believed that Metz was "a time bomb waiting to go off." R. Exs. 23, 26. One of the staff interviewed relayed an account where Metz allegedly made lewd comments about another employee's mother. 32 FMSHRC at 1720; R. Ex. 26. The judge also credited Kauffman's testimony that he believed that Metz was volatile, that Kauffman considered Popp's report of what Metz said to be a threat, that Metz's "reactions in the past have been so over the top," and that he feared that Metz might go "postal." Tr. 591-93; 32 FMSHRC at 1727. Although there was some contrary evidence in the record, on balance, substantial evidence supports the judge's conclusion that Carmeuse's decision to terminate Metz was motivated by Metz's history of inappropriate behavior. *See Keystone Coal*, 151 F.3d at 1104 (holding that the Commission on appeal may not substitute a competing view of the judge's reasonable findings of facts and conclusions).

We are also not persuaded by Metz's assertion that the judge did not consider Metz's long history of making safety complaints. The record does not reflect that there was a proximity in time between any of Metz's past safety activities, other than the kiln complaints, and his termination. 32 FMSHRC at 1726. As the judge found, although Metz served as a miners' representative on occasion, Metz primarily relied upon his safety-related complaints concerning the dismantling of the kilns to establish discrimination. *Id.* at 1722. Most significantly, the record reveals that numerous other employees complained about the kiln issue and no other employee experienced any retaliation. *Id.* at 1726. This evidence provides further support for the judge's finding that the operator did not have animus against Metz for his safety-related complaints. *Id.*

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<sup>5</sup> Metz claims that this event involved a statement that he made to Kauffman and an MSHA Inspector that he was going to contact MSHA and let them decide over a backpay dispute. M. Br. at 6-8, Tr. 112-14. Carmeuse alleged that Metz stated that he was "going to kick Kauffman's and the MSHA Inspector's ass." Tr. 574. The judge implicitly credits Carmeuse's version of the event, by referring to Kauffman's account with approval and relying on the March 2007 warning notice. 32 FMSHRC at 1713, 1727. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (recognizing and giving great weight to judge's implicit credibility finding).

Similarly, we reject Metz's assertion that denial of peer review after his termination constituted disparate treatment. The Commission has held that disparate or inconsistent treatment is a factor often indicative of discrimination. *Chacon*, 3 FMSHRC at 2512. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Id.* The peer review policy for the Annville Plant states: "The Peer Review process will be available to all regular, full-time employees who have successfully completed their probationary period . . . ." C. Ex. 10. The policy goes on to state that peer review cannot "[r]eview cases involving sexual harassment" nor can it "[s]et or change policy" or "work rules." *Id.* at 2. Carmeuse conceded that Metz was not discharged for sexual harassment but only for harassment. Tr. 732. Accordingly, we acknowledge that the denial of Metz's peer review after his termination was inconsistent with company policy on its face. However, we can understand the need for sensitivity in Metz's case, in which peer review might have interjected the mother of another employee into a workplace issue, thus approximating the privacy considerations in sexual harassment cases, which are clearly barred from peer review according to Carmeuse's policy. In any event, we conclude that the failure to provide peer review was not linked in any way to Metz's protected activity. Thus, we agree with the judge that "there is no rational basis for concluding that the denial of peer review is an indicia of discriminatory motive." 32 FMSHRC at 1727.

Metz argues that the judge failed to take into account testimony that showed that Metz was not threatening to Croll or toward his other colleagues. M. Reply Br. at 6-7. However, even in the absence of a threat by Metz, we would conclude that substantial evidence supports the operator's assertion that it fired him for behavior not related to mine safety – that is for profane and abusive conduct. Moreover, we agree with the judge that Metz's hostility on March 12, 2009, was related solely to a personnel matter having to do with Carmeuse's on-call compensation policy, rather than any activity protected by the Mine Act. Accordingly, we conclude that the judge properly denied Metz's discrimination claim.<sup>6</sup>

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<sup>6</sup> Carmeuse has moved to strike portions of Metz's brief that were not part of the record before the judge. C. Mot. to Strike at 1-3. The Mine Act limits the information the Commission is permitted to consider when reviewing an administrative law judge's decision. 30 U.S.C. § 823(d)(2)(C). The sections of Metz's brief to which Carmeuse objects contain material that was not before the judge when he made his ruling. Because pursuant to the Mine Act, the Commission may only address matters contained in the record, we have not considered the portions of Metz's brief listed on pages 2 and 3 of the operator's motion to strike.

### III.

#### Conclusion

Metz bears the ultimate burden of proving that his termination was the result of his protected activity – his safety complaints. He has not produced evidence sufficient to prove that his complaints about the kilns (and his other safety activities) motivated his discharge. Accordingly, for the foregoing reasons, the Commission affirms the judge’s 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/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

This case turns upon whether the justifications that Carmeuse Lime, Inc., offered for terminating William Metz's employment were pretextual. Because I conclude that the judge did not adequately address the pretext question and, accordingly, the case should be remanded, I dissent.

Under the traditional Commission framework, a complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. This framework is commonly referred to as the *Pasula-Robinette* analysis.<sup>1</sup>

The Supreme Court, under similar federal anti-retaliation provisions including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), has established a more nuanced allocation of the burden of production and an order for the presentation of proof in discriminatory treatment cases.<sup>2</sup> First, the plaintiff must establish a prima facie case of discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The burden then shifts to the employer to "produc[e] evidence that the plaintiff was rejected . . . for a legitimate, nondiscriminatory reason." *Id.* at 254. Once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision, an opportunity "must be afforded" to the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253; *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S.133, 143 (2000). The Supreme Court has ruled that a "plaintiff's prima facie case, combined with

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<sup>1</sup> I omit the second part of the *Pasula-Robinette* analysis dealing with an operator's affirmative defense when the adverse action is motivated by discriminatory and non-discriminatory reasons (mixed motive) as this case does not involve that issue.

<sup>2</sup> The Commission often looks to case law under other Federal anti-retaliation provisions such as Title VII in resolving questions involving the anti-discrimination provisions of the Mine Act. *Turner v. Nat'l Cement Co. of CA*, 33 FMSHRC 1059, 1065-66 (May 2011); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1939 n.7 (Nov. 1982) (referring to Title VII cases). In analyzing claims of discriminatory retaliation under Title VII, federal courts apply the familiar standards derived from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). *See, e.g., Mitchell v. Baldridge*, 759 F.2d 80, 84-86 (D.C. Cir. 1985).

sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148.<sup>3</sup>

As the majority has acknowledged, Metz established a prima facie case of discrimination by showing that he engaged in safety-related complaints and that his termination was in some part motivated by those complaints. Slip op. at 6-7. The majority then focuses on whether Carmeuse successfully rebutted that prima facie case. Slip op. at 7-9. Absent from the majority's discussion is a consideration of pretext.

The Commission has explained that a defense should not be "examined superficially or approved automatically once offered." *Haro* at 1938. In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990) (citing *Haro*, 4 FMSHRC at 1937-38). As the Commission has set forth, "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Turner v. National Cement Co. of CA.*, 33 FMSHRC 1059, 1073 (May 2011) (emphasis in original) (citations omitted).

My colleagues in the majority focus on the relative credibility of Metz and Melissa Croll, a corporate human resources manager who was newly assigned to the Annville plant, with respect to the March 12, 2009 meeting. The majority is indeed correct that credibility determinations uniquely lie within the province of the judge. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). Thus, I do not question the finding that Metz acted in a

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<sup>3</sup> Although the Commission similarly requires that an operator's rebuttal or business justification should be examined for pretext (*Haro* at 1938; *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992-94 (June 1982)), it has not explicitly included this third step in the *Pasula-Robinette* analysis. This absence makes the Commission's discrimination analysis confusing to miners and operators. I suggest that the *Pasula-Robinette* formulation be revised to reflect that, consistent with *Burdine*, once a miner establishes a prima facie case of discrimination, the burden shifts to the operator to produce evidence that the adverse action was taken for a legitimate, non-discriminatory reason. If the operator produces such evidence, the miner then has the opportunity to prove, by a preponderance of evidence, that the reason(s) articulated by the operator are, in fact, a pretext for discrimination.

hostile and inappropriate manner in the meeting with Croll on March 12.<sup>4</sup> However, as discussed, *infra*, this case involves more than a determination of what happened at the March 12 meeting between Metz and Croll.

The majority also relies on “Metz’s history of angry and inappropriate behavior” to justify Metz’s termination. Slip op. at 8. However, in Metz’s personnel file, there was only one warning notice, dated March 6, 2007, during his entire 22-year work history. R. Ex. 6.<sup>5</sup>

Additionally, the judge relied on the claim that Metz reacted aggressively in one past incident with former HR representative Mei Lorick. 32 FMSHRC at 1724. It is questionable whether this is supported by substantial evidence. *See Id.* at 1720, 1724. Lorick did not testify and Metz’s counsel objected at the hearing to any reference to Lorick since counsel was unable to contact her. Tr. 30. Croll learned of this event through human resources assistant Ed Saterstad, who also did not testify. Tr. 392-93; R. Ex. 18. Thus, the judge was relying on hearsay on top of hearsay.<sup>6</sup> In addition, there is no notation in Metz’s personnel record as to any incident with Lorick. *See also* Tr. 426, 489 (Croll states that Metz’s statement to Lorick was not threatening).

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<sup>4</sup> I do disagree with the majority’s affirmation of the judge’s characterization of Popp’s testimony as corroborating Croll’s testimony. Slip op. at 7-8. Popp was not present at the meeting between Metz and Croll. What Popp describes is meeting Metz *after* his meeting with Croll, at which this new HR person told Metz, who had worked at the facility for 22 years, to look for another job. Tr. 389; R. Ex. 20. This infuriated Metz, who told Popp that he wanted to “go home before I hurt myself or someone.” R. Ex. 20. What Popp’s testimony reveals about Metz is that he was under tremendous stress but he had enough self-control to remove himself from a difficult situation. As discussed, *infra*, Metz’s statement to Popp should not be characterized as hostile or threatening.

<sup>5</sup> The warning notice itself raises some questions, which the judge did not address. The notice briefly stated that “employee threatened management” but did not go into any particulars of the incident. 32 FMSHRC at 1720; R. Ex. 6. The notice contained a signature line for the employee but was not signed by Metz. R. Ex. 6. The notice also contained a section entitled “Employee Statement” that provided for the employee to agree or disagree with the employer’s action, which was also blank. R. Ex. 6. I find it curious that Metz, whom the record revealed to be so attentive to standing up for his and his coworkers’ rights (Tr. 221-22), would have forfeited the opportunity to describe his version of the incident.

<sup>6</sup> Commission Rule 63(a), 29 C.F.R. § 2700.63(a), provides that relevant hearsay evidence is admissible. However, hearsay evidence which is this attenuated must be examined in terms of its reliability. *See Martin Marietta Aggregates*, 21 FMSHRC 76, 81 (Jan.1999) (ALJ) (Merlin) (hearsay evidence contained in inspectors’ notes and testimony held not entitled to probative weight where source of hearsay information was available as witness but did not testify).

Similarly, the judge's acceptance of the evidence that Metz had a history of harassing a former Carmeuse employee about that employee's mother, 32 FMSHRC at 1713, 1720, 1727, is based on so many levels of hearsay that it lacks any reliability. The supposed incident was never testified to by the former employee. Croll did not speak directly with the former employee. Rather, Croll relied on a statement about this incident by another employee, Jim Smith, who also never testified. Smith did not hear about the alleged incident from the former employee directly, but rather from the former employee's mother. Tr. 418-19. Thus, the evidence relied on by the judge was what Croll said that Smith said that the former employee's mother said that the former employee himself said. Moreover, Smith was the boyfriend of the former employee's mother. Tr. 313-14, 416, 418. Additionally, there had been a previous incident between Smith and Metz, in which Smith accused Metz of trying to burn him with hot metal. Tr. 415-16; R. Exs. 18A, 25. As the judge noted, Carmeuse investigated and found that Metz was not at fault. 32 FMSHRC at 1719. For Croll to rely so heavily on Smith's evidence against Metz reduces the substantiality of the evidence of Metz's alleged "harassment" of the other employee to the level of a television reality show. The judge never examined the extent to which Croll relied on Smith's information, and the potential unreliability and bias associated with that information.<sup>7</sup>

Moreover, as the majority acknowledges, slip op. at 8, there was contrary evidence in the record about Metz's history as a Carmeuse employee which the judge did not weigh or discuss in his decision. Popp stated in his interview on March 13, 2009, the day after the Croll meeting, that he did not feel threatened when Metz said that he was going to hurt himself or someone else because "Bill is good on safety, I don't think he would hurt anyone or himself." R. Ex. 26. When Croll investigated Metz's past history, many employees reported that they liked Metz, that he was a good worker (Larry Graby, Bruce Kercher), and that when the plant was unionized, people went to him because he knew the rules (Robert Boehler). R. Ex. 26. The other millwrights at Carmeuse – Jeffrey Englehart, Bruce Kercher and Robert Boehler – testified that Metz was a very good and safe millwright who had a good relationship with his co-workers. Tr. 203, 246-47, 297, 305. Many who knew him for some time testified that he had a temper but was not threatening, that "Bill was just Bill." R. Ex. 26 (Ron Popp, Ken Davis); Tr. 576. The judge's failure to address this contrary evidence undercuts his decision that Carmeuse sufficiently rebutted Metz's prima facie case.<sup>8</sup>

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<sup>7</sup> The judge also credited Metz's witness Robert Boehler, who stated that the former employee quit because Metz said that his mother was "hot". 32 FMSHRC at 1713; Tr. 312. But Boehler also testified that the employee quit for other reasons, including the fact that Jim Smith ended up in a relationship with his mother. Tr. 314.

<sup>8</sup> In reviewing the whole record to determine whether substantial evidence supports the judge's decision, the Commission must consider anything in the record which "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n. 5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Given this substantial body of contradicting evidence, it was incumbent upon the judge to adequately analyze and weigh all the testimony of record and then make appropriate findings and explain the reasons for his decision. *See Mid-Continent Res. Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (vacating and remanding for adequate analysis of the record). For this reason, I would remand for the judge to re-evaluate his reliance on Metz's past history to support Carmeuse's justification for the termination.

The Supreme Court in *Burdine* mandated that in discrimination cases there is a "requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." 450 U.S. at 258. Nonetheless, the judge here went to great lengths to explain that he did "not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies . . ." 32 FMSHRC at 1725 (citing *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990)). The judge stated "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." 32 FMSHRC at 1725 (quoting *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981)). The judge reasoned that "while a proffered business justification must be facially reasonable, it is not the role of the judge to substitute his or her judgement for that of the mine operator." *Id.* at 1725. Thus, the judge applied a "limited" and "restrained" examination of Carmeuse's business justification. *Id.* However, I would suggest that the judge's review of Carmeuse's "business justification" was so "limited" and "restrained" that it conflicted with the Supreme Court's mandate in *Burdine*. Using this highly deferential standard to evaluate the operator's justification, the judge failed to fairly and appropriately evaluate Metz's assertion that Carmeuse's explanations were pretextual.

A plaintiff may establish pretext if the proffered reasons did not actually motivate his discharge. *Turner*, 33 FMSHRC at 1073. Carmeuse claims to have fired Metz because of his abusive and threatening behavior. R. Ex. 1. Although Metz acted inappropriately in his meetings with Croll, it was not until Popp reported what Metz said after the meetings that Carmeuse managers began to consider disciplining him. Tr. 523, 532, 589-94.<sup>9</sup> Although

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<sup>9</sup> After Croll first met with Metz on March 12, Metz was again called to the office to meet with plant manager Ken Kauffman, Croll and other managers where he was told that he could not speak or treat people like he did in the meeting with Croll. Tr. 588. Metz left the meeting and the managers went to lunch. Tr. 589. Kauffman summarized to Croll Metz's actions at the meetings as "That's Bill. Bill is Bill. That's the way he is." Tr. 392. At the lunch gathering, the Carmeuse managers did not discuss disciplining Metz. Tr. 391-94, 589-90. Kauffman testified that when they returned, they met Popp, who reported Metz's statement that he might hurt himself or someone else, and only at that point did Croll recommend a suspension. Tr. 592. After receiving Popp's report, the managers called Carmeuse's Vice President of Operations about disciplining Metz. Tr. 398. Thus, I reject the majority's assertion that Carmeuse in fact would have terminated Metz solely for his "profane and abusive conduct" on March 12 towards Croll absent the so-called threat. Slip op. at 9. The record does not support (continued...)

Carmeuse suspended Metz for making this “threat,” Metz may actually have been acting with self-control in that he wished to leave before he might hurt himself or someone else. 32 FMSHRC at 1719. It is noteworthy that Popp gave this description of Metz’s appearance: “Like something was wrong with him. He had his head, hands up and was laying, like, over one of the cat-walks.” Tr. 644.

Metz’s conduct in this incident is similar to the classic case of *Tuberville v. Savage*, 1 Mod. Rep. 3, 86 Eng. Rep. 684 (1669), where the Kings Bench held that it was not a threat when Tuberville, after being insulted by Savage, put his hand upon his sword and said, “[i]f it were not assize-time, I would not take such language from you.”<sup>10</sup> In a legal action in which Savage claimed that Tuberville had committed an assault, the court held that the declaration of Tuberville was, in fact, that he would *not* assault Savage. *Id.* Similarly, Metz’s declaration that he needed to leave so that he would not hurt someone does not rise to the level of a threat.

In *Sec’y on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 924-26 (Sept. 2001), the Commission vacated and remanded a judge’s finding that, because of a miner’s outrageous use of profanity and repeatedly issuing a threat to his manager that “I’ll get the little f\_\_\_\_\_r,” the operator would have fired the miner in any event because of the cursing and threatening behavior. There, the Commission determined that a single, general statement that mentions no person by name, unaccompanied by coercive conduct or warning of specific harm, made in the context of a safety complaint does not constitute a threat. 23 FMSHRC at 934. Similarly, Metz’s words did not rise to the level of a threat and there was no accompanying coercive conduct. Hence, I would remand for the judge to evaluate Metz’s alleged threat to determine whether it qualified as a motivating factor for the termination.

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<sup>9</sup>(...continued)  
the majority’s proposition.

<sup>10</sup> In seventeenth-century England, judges of the King’s Bench division of the High Court of Justice traveled around the country to hold court. *Pernell v. Southall Realty*, 416 U.S. 363, 371 n.7 (1974) (noting that itinerant justices of the King’s court would travel around the countryside presiding over trials dating back to the 1225 Magna Carta); *Hardy v. United States*, 3 App. D.C. 35 (D.C. Cir. 1893) (providing that cases were generally tried by single judges in the “courts of assize”); *Webster’s Third New International Dictionary* 132 (1993) (Assize were the “periodical sessions of the judges . . . in every county of England for the purpose of administering justice in the trial and determination of civil and criminal cases” or “the court itself”). Assize-time was a period when the courts of assize were holding session in the locality. *See United States ex. rel Brodie v. Hilton*, 496 F. Supp. 619, 624 (D. N.J. 1980) (citing *Tuberville v. Savage*, noting that “assize time” was when the judges were in town, and further stating that the “common law of England was expressly continued” by the New Jersey Constitution).

Pretext also may be demonstrated by disparate treatment or inconsistent treatment. *Chacon*, 3 FMSHRC at 2512. As the majority recognizes, “[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Id.*; slip op. at 9. The plaintiff may show pretext for discrimination with evidence that “similarly situated employees outside of the plaintiff’s protected group received favorable treatment or did not receive the same adverse treatment.” 1 Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 73-74 (4th ed. 2007). Here, the record reveals that another miner, Jim Smith, stated in an e-mail to Croll that he “wanted to punch someone in the mouth.” Tr. 504; C. Ex. 21 at 9. Croll regarded this as a threat, but Smith was never punished, disciplined or even written up for the threat. Tr. 504.<sup>11</sup> Significantly, the judge never addressed this instance of potential disparate treatment.

Pretext is also an issue in the context of the denial of peer review to Metz after his firing. Metz raised his denial of peer review when other similarly-situated employees were granted peer review. The judge’s basic analysis of this contention was: “Carmeuse’s assertion that peer review did not apply because Metz’s termination involved comments that constituted sexual harassment is supported by the peer review guidelines. (Metz Ex. 10; Resp. Ex. 27A).” 32 FMSHRC at 1727. However, the judge’s analysis is incorrect. As the majority recognizes, “the denial of Metz’s peer review after his termination was inconsistent with company policy on its face.” Slip op. at 9. Carmeuse’s peer review policy states that it does not apply to cases involving “sexual harassment.” C. Ex. 10, at 2. Carmeuse conceded that Metz was not discharged for sexual harassment but only for harassment. Tr. 732. Hence, the judge’s finding is contrary to Carmeuse’s own evidence, as well as to its written policy.<sup>12</sup>

Federal courts hold in discrimination cases that an employer’s failure to follow its own internal employment procedures can constitute evidence of pretext. *Reeves*, 530 U.S. at 147 (the “fact-finder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative

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<sup>11</sup> Arguably, the context of Smith’s phrase “wanted to punch someone in the mouth” indicates that Smith was not making a threat. C. Ex. 21, at 9. However, Croll regarded the statement as a threat. Tr. 504.

<sup>12</sup> The judge also, on his own, determined that peer review was not appropriate because of the potential for Metz to become violent. 32 FMSHRC at 1727. However, nowhere in its arguments to the judge did Carmeuse assert that peer review was inappropriate because of the threat of violence. *See* C. Post Hearing Br. at 22-23; C. Post Hearing Reply Br. at 6. Carmeuse also did not include this basis in its letter to Metz denying his peer review. R. Ex. 27A & 27I. According to *Sec’y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sept. 2001), the judge’s inquiry is limited to an examination of the reasons given by the operator for the adverse action. *See also Pendley v. FMSHRC*, 601 F.3d 417, 426 (6th Cir. 2010) (holding that the inquiry turns on what the operator actually believed at the time). Hence, the judge erred by adding his own justification to that of the operator with respect to Metz’s peer review denial.

evidence of guilt” because that employer may be “dissembling to cover up a discriminatory purpose”); *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (holding that failure to follow company’s own procedures may be evidence of pretext); *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992) (determining that employer’s proffered justification was pretextual when company failed to follow its own procedures); *Mohammed v. Callaway*, 698 F.2d 395, 401 (10th Cir. 1983) (plaintiff demonstrated pretext by exposing “serious procedural irregularities” on the part of the company). See also *Turner*, 33 FMSHRC at 1075 (holding that failure to follow operator’s own policies is suggestive of pretext). The judge and the majority have overlooked the serious inconsistencies in Carmeuse’s procedures with respect to its treatment of Metz, and thus failed to adequately examine the question of pretext.

The majority overlooks the fact that Carmeuse did not apply its peer review policy consistently in cases of sexual harassment. In one instance, Jeff Englehart was granted peer review when he was suspended for having a photo of a naked woman on his phone and showing it to others. Tr. 215-16. Carmeuse’s Annville Employee Handbook defines “sexual harassment” as including the “display of sexually explicit material.” C. Ex. 8 at 35. Essentially, Carmeuse refused peer review to Metz on the basis of his alleged “harassment” (Ex. R. 27A) – contrary to its policy – while – also contrary to its policy – permitting peer review for Englehart, who was disciplined for conduct involving sexual harassment.

The majority states that it “can understand the need for sensitivity in Metz’s case, in which peer review might have interjected the mother of another employee into a workplace issue . . .” Slip op. at 9. However, what the majority characterizes as “sensitivity” amounts to a clear denial by Carmeuse of Metz’s right to peer review under company policy. It strikes me that Carmeuse’s “sensitivity” is much more likely a desire that its reasons for discharging Metz not undergo the scrutiny to which Metz was entitled under the peer review policy.<sup>13</sup> Thus, the denial of peer review to Metz is clear evidence of pretext.<sup>14</sup>

The majority also states that “[i]n any event, we conclude that the failure to provide peer review was not linked in any way to Metz’s protected activity.” *Id.* at 9. However, to show evidence of pretext, Metz need not connect Carmeuse’s failure to follow its own peer review policy in his case to the protected activity. It is sufficient to show that he engaged in protected activity, that Carmeuse took adverse action against him, and that Carmeuse then refused to permit him the right to appeal – in essence the right to be heard as to – the adverse action.

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<sup>13</sup> Carmeuse’s peer review policy is not a negligible right. Under the policy, the Peer Review Panel – composed of three non-salaried employees from the appealing employee’s peer group and two salaried employees – has the authority to review management’s action and, if the Panel so votes, to grant the appeal and modify the action or provide other remedies to the appealing employee. C. Ex. 8, at 33, C. Ex.10, at 1-2, 4.

<sup>14</sup> By using the phrase “evidence of pretext”, I am not suggesting that the denial of peer review to Metz, in and of itself, compels the conclusion that the reasons offered by Carmeuse for the termination of Metz were pretextual.

The majority agrees with the judge that “there is no rational basis for concluding that the denial of peer review is an indicia of discriminatory motive.” *Id.* (citing 32 FMSHRC at 1727). The problem with this conclusion is that the judge neither addressed Metz’s arguments on pretext nor weighed the evidence of disparate treatment or Carmeuse’s failure to follow its own procedures.

Finally, both the majority and the judge disregard the evidence of animus and hostility towards Metz’s mine safety complaint that he made the day before the encounter with Croll. Metz described his meeting with Kauffman on March 11, 2009, in the following testimony:

I walked in. [Kauffman] pretty much said – he started right off. I didn’t get a chance to say anything. How do you think them contractors are doing? They are pretty good, ain’t they? I said, yeah, if everybody gets out alive. That’s exactly why I am here.

I said, I told my boss, Keith Lambert, Greg Doll, Mark Miller, and now I am telling you. I said them guys are a hazard. I don’t want to work around them.

[Kauffman then said] Don’t worry about them, Bill. I said what do you mean don’t worry about them? He said, they are signed off. I said, [w]hat do you mean they are signed off?

He said, [t]hey are signed off with MSHA. If they get hurt, it’s not going to come back on Carmeuse. I said, well, that’s no consequence for us guys that have to work up around there. We don’t even want to work in there.

He spun around like I wasn’t even there. He was in his chair. Spun around like I wasn’t even there and was doing whatever he was doing before I walked in there.

I said, [w]e will see if MSHA agrees. And I walked out. And the next day they called me to [meet Croll].

Tr. 70-71. Kauffman did not deny this incident. Tr. 580-81, 631-32.

This conversation suggests not only that Kauffman did not want to hear Metz’s safety complaint, but also that Kauffman was far more concerned about Carmeuse’s potential monetary liability for injuries suffered by the contractors than he was about the potential for injuries to Carmeuse’s employees. Considering that this conversation occurred the day before the critical events that led to Metz’s termination, the judge should have considered it as evidence of

Kauffman's animus. *McGill*, 23 FMSHRC at 986-87 (concluding that the judge correctly inferred discriminatory motive from adverse action taken hours after miner's safety complaint). This testimony indicates that Kauffman may have harbored hostility for Metz's raising of mine safety complaints. The judge should have addressed whether this conversation revealed animus or hostility on the part of Carmeuse toward Metz's protected activities under the Mine Act.

This case presents many instances where Carmeuse's treatment of Metz is inconsistent with its own internal procedures and practices. Under Commission case law, as well as the law developed by federal courts in Title VII cases, the judge was required to carefully examine the evidence which tended to show that Carmeuse's reasons for discharging Metz were pretextual. Instead, the judge only gave a superficial look at Carmeuse's justifications. He also failed to consider Carmeuse's evidence of animus toward Metz's safety complaint. For all of these reasons, I conclude that this case should be remanded for a thorough analysis of the record with respect to whether the reason presented by Carmeuse for Metz's discharge was pretextual, and whether Metz was discriminated against because of his safety complaints.

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

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The record indicates that the proposed assessment was delivered on October 18, 2011, and became a final order of the Commission on November 17, 2011. M-Class asserts that it changed its mailing address from a P.O. Box to its mine location, and that this proposed assessment was delivered to its warehouse location. The Secretary does not oppose the request to reopen, and states that MSHA received a payment for the uncontested penalties, by check dated January 25, 2012.<sup>1</sup> However, the Secretary notes that all proposed assessments are mailed to the operator's address of record, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed M-Class' 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.  
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/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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<sup>1</sup> In response to the Secretary, M-Class indicated which penalties it seeks to contest.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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WASHINGTON, DC 20001

August 15, 2012

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

v.

NATIONAL LIME AND STONE COMPANY :

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Docket No. LAKE 2012-260-M  
A.C. No. 33-00123-267910

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 4, 2012, the Commission received from National Lime and Stone Company (“National”) 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).

National asserts that it may have sent its October 4, 2011 contest to the wrong address. National encloses a copy of the delinquency notice it received on December 22, 2011. The Secretary does not oppose the request to reopen, but notes that there is no record that the penalty contest form was received by MSHA. The Secretary also notes that MSHA received a payment for the uncontested penalties, by check dated October 7, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed National'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.  
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/s/ Patrick K. Nakamura  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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August 15, 2012

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

v.

REX COAL COMPANY, INC.

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Docket No. KENT 2012-412  
A.C. No. 15-19114-272200

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 11, 2012, the Commission received from Rex Coal Company, Inc. (“Rex”) 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).

Rex asserts that it was one day late in filing the contest form, due to a clerical error during a holiday break. Rex encloses a copy of the delinquency notice it received on January 3, 2012. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated December 22, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Rex'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

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Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N. W., Suite 9500  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 15, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-356-M
v.	:	A.C. No. 02-03021-267632
	:	
WESTERN TECHNOLOGIES, 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 28, 2011, the Commission received from Western Technologies, Inc. (“WTI”) 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 September 28, 2011, and became a final order of the Commission on October 28, 2011. WTI asserts that it received a delinquency notice, dated December 13, 2011, which prompted an investigation by its general counsel's office. WTI states that although this proposed assessment apparently "fell through the cracks," WTI is not responsible for the operator or the equipment in the citation. The Secretary does not oppose the request to reopen based solely on the fact that WTI asserts that it is not responsible for the equipment cited. However, the Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed WTI'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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The record indicates that the proposed assessment was delivered on November 9, 2011, and became a final order of the Commission on December 9, 2011. NESG asserts that it attempted to send its counsel all the proposed assessment forms, but counsel only received and timely contested the 110(c) penalties in proposed assessment No. 000271074A. Counsel never received the 104(d) orders in proposed assessment No. 000271336. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed NESG'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.  
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/s/ Patrick K. Nakamura  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. LAKE 2008-327
v.	:	LAKE 2008-590
	:	LAKE 2009-224
BLACK BEAUTY COAL COMPANY	:	

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

DECISION

BY: Jordan, Chairman, Cohen and Nakamura, Commissioners

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Administrative Law Judge Margaret A. Miller denied motions to approve settlement on the grounds that the Secretary of Labor had failed to provide sufficient factual support for the proposed settlement terms agreed to by Black Beauty Coal Company (“Black Beauty”). Pursuant to 29 C.F.R. § 2700.76, the Secretary subsequently sought interlocutory review of the Judge’s determination that she must provide factual support for the proffered settlements. The Judge certified the matter for interlocutory review, and the Commission granted interlocutory review. For the reasons that follow, we remand this matter to the Judge for further proceedings.<sup>1</sup>

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<sup>1</sup> Black Beauty filed a motion requesting oral argument. The Commission hereby denies that motion.

## I.

### **Factual and Procedural Background**

#### **A. Motions to Approve Settlement and Orders Disposing of the Motions**

##### **1. LAKE 2008-327**

On March 12, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000143641 to Black Beauty, setting forth proposed civil penalties for various citations and orders. Black Beauty contested 10 of the citations, for which a sum of \$232,216 in civil penalties had been proposed. On February 1, 2010, the Secretary filed a motion to approve settlement. The motion requested approval of the settlement amount of \$46,025.

On March 16, 2010, the Judge denied the settlement motion. Unpublished Order (No. LAKE 2008-327) at 1, 3 (Mar. 16, 2010). She concluded that the reduced penalties "would not adequately effectuate 'the deterrent' purpose underlying the Act's penalty assessment scheme." *Id.* at 1. The Judge concluded that the settlement amount of the penalties, which was greater than an 80% reduction of the original penalty amount, would encourage operators to contest the penalties "in the hope of receiving such a reduction." *Id.* She reasoned that a Judge's assessment of penalties is bounded by a proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and the deterrent purposes of the Act. *Id.* at 2. The Judge further stated that Judges are required by Commission precedent to provide a sufficient explanation when a penalty assessment diverges substantially from a proposed penalty. *Id.* She concluded that the information provided by the Secretary did not allow her to provide a sufficient explanation for the penalty reduction. *Id.*

On April 15 and 21, 2010, the Secretary filed a Motion for Reconsideration and an Amended Motion for Reconsideration, respectively. The Secretary argued that a proffered settled penalty is a revised proposed penalty and a modified enforcement action by the Secretary. Amended Mot. at 2. She maintained that she has unreviewable prosecutorial discretion to make such revisions, and that the Commission cannot require the Secretary to make findings of fact to support a proposed settlement. *Id.* at 2, 5-7. The Secretary further contended that the plain language of sections 110(i) and 110(k) of the Mine Act, 30 U.S.C. §§ 820(i) and 820(k), does not require her to make factual findings. *Id.* at 2-3, 8. She further asserted that if the Commission finds the statutory language to be ambiguous, the Secretary's interpretation is entitled to deference. *Id.* at 8-9. The Secretary also argued that the Judge erred in considering deterrence as a separate component in the Judge's consideration of the appropriateness of the penalties. *Id.* at 4, 8.

## 2. LAKE 2008-590

On January 26, 2009, MSHA issued Proposed Assessment No. 000157123 to Black Beauty, proposing penalties for 20 citations in the sum of \$493,348. On October 8, 2009, the Secretary filed a motion to approve settlement for 16 of the citations. The motion requested approval of the settlement amount of \$150,502 and stated that the original proposed assessment for the 16 violations was \$386,994. On October 19, 2009, the Judge issued an order approving the settlement of the 16 citations for \$150,502. On February 1, 2010, the Secretary filed a motion to approve settlement of the remaining four citations. The motion requested approval of the settlement amount of \$20,000 and stated that the original assessment for those four citations was \$106,354.

On March 16, 2010, the Judge issued an order denying the motion to approve settlement as to the four citations. Similar to the denial she issued in Docket No. LAKE 2008-327, the Judge concluded that the proposed settlement would not adequately effectuate the deterrent purpose underlying the penalty scheme, and that the information provided by the Secretary did not allow the Judge to provide a sufficient explanation for the penalty reduction. Unpublished Order (No. LAKE 2008-590) at 1, 2 (Mar. 16, 2010).

On April 15 and 21, 2010, the Secretary filed a Motion for Reconsideration and an Amended Motion for Reconsideration. The Secretary made the same arguments in her motions filed in Docket No. LAKE 2008-590 as she did in Docket No. LAKE 2008-327.

On May 7, 2010, the Judge denied the amended motions for reconsideration in Docket Nos. LAKE 2008-327 and 2008-590. The Judge stated that given the extreme reductions in the amount of penalties, there was insufficient information to determine what penalty would be appropriate in each case. *Id.* at 2. The Judge stated that there was no difference in determining a penalty after hearing or in reviewing the facts to support a penalty as proposed in a settlement agreement because both require findings as to the six statutory criteria set forth in section 110(i) of the Mine Act. *Id.* The Judge concluded that the facts provided in the settlement motions did not allow her to adequately address the six criteria and explain the reduction in penalty. *Id.* Accordingly, the Judge set the matter for hearing. *Id.* at 2-3.

### **3. LAKE 2009-224**

On December 17, 2008, MSHA issued Proposed Assessment No. 000171751 to Black Beauty, proposing penalties for various citations. Black Beauty contested 12 citations and one order for which a sum of \$146,075 was proposed. BB Br. at 2. On April 19, 2010, the Secretary filed a motion to approve settlement and dismiss the proceedings. The motion requested approval of the settled penalty amount of \$26,205.<sup>2</sup>

On May 18, 2010, the Judge issued an order denying the settlement motion, concluding that the settlement was not appropriate under section 110(i) of the Mine Act. Unpublished Order (No. LAKE 2009-224) at 1 (May 18, 2010). She noted that the penalties sought to be settled were more than 80% less than the originally proposed penalties. *Id.* The Judge found that there was not enough information provided in the motion to justify the penalties proposed for settlement. *Id.* Accordingly, the Judge set the matter for hearing.

#### **B. Interlocutory Review Motions and Orders**

On May 26, 2010, the Secretary filed unopposed motions for certification for interlocutory review and for continuances of hearing in all three dockets. The Judge subsequently granted the Secretary's motions and certified the matter for interlocutory review.<sup>3</sup>

On June 22, 2010, the Commission granted interlocutory review in the three dockets, concluding that the Judge's interlocutory ruling involved a controlling question of law and that immediate review would materially advance the final disposition of the proceedings. The Commission granted review on: (1) what requirements, if any, an Administrative Law Judge may impose upon the Secretary to demonstrate the six penalty criteria as they relate to a modified penalty in a settlement context; and (2) whether an Administrative Law Judge may consider the "deterrent purposes" of the penalty scheme in reviewing a settlement proposal. The Commission directed the parties to file simultaneous briefs.

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<sup>2</sup> The motion stated that the original proposed assessment amount for the citations at issue was \$146,205 rather than \$146,075.

<sup>3</sup> The Judge also granted the Secretary's motions for continuance of hearing and stayed the matters pending further notice.

## II.

### Disposition

**A. What requirements, if any, may a Judge impose on the Secretary to address the statutory penalty criteria as they relate to a modified penalty in a settlement context?**

In lieu of filing a brief, the Secretary filed a motion requesting that the Commission remand this case to the Judge with instructions that the Judge permit the submission of amended motions to approve the three proposed settlements at issue. Mot. to Remand at 1. The Secretary further requests that the Commission also instruct the Judge that she may not consider the deterrent effect of the penalty amounts agreed to by the parties as a factor independent of the statutory criteria set forth in section 110(i) of the Mine Act. *Id.* at 1-2.

Black Beauty filed an opposition to the Secretary's motion. In its brief responding to the Commission's order, the operator argues that the Judge's orders denying the settlement motions should be reversed because the Judge erroneously usurped the Secretary's prosecutorial role. BB Br. at 11-15. It asserts that although the Commission must approve a penalty modified during settlement, it has no authority to review the underlying modification of the citation. *Id.* Black Beauty maintains that the Secretary modified the citations and then applied MSHA's penalty formula at 30 C.F.R. Part 100 to the modified citations. *Id.* at 14-15. Finally, the operator submits that the Secretary made an adequate showing as to the basis of the penalty reductions in the motions to approve settlement. *Id.* at 15-20.

We conclude that the Commission is clearly authorized by the Mine Act to review a proposed settlement of a contested penalty and to require parties to submit the factual support necessary for that review. Although the Commission's review authority may not extend to certain areas of the Secretary's enforcement authority, Congress emphatically authorized the Commission to review proposed settlements of contested penalties and to assess all penalties provided under the Act.

The Commission has recognized that, as an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988); *see, e.g., Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961). For example, the Commission has recognized that it does not have the authority to overturn the Secretary's decision to vacate a citation, which is a function of her unreviewable prosecutorial discretion. *RBK Constr., Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993).

The plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty. Section 110(k) provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission."

30 U.S.C. § 820(k). Thus, section 110(k) unambiguously sets forth the Commission's exclusive authority to approve the compromise, mitigation or settlement of a penalty after it has been contested.

The legislative history of section 110(k) explains that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement. The Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. . . . Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978) (“*Legis. Hist.*”).

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

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

*Id.* at 633.

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

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

*Id.* (emphasis added). To carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest.

As the Commission has long recognized, after “an operator contests the Secretary’s proposed assessment of penalty, . . . *Commission* jurisdiction over the matter attaches.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) (emphasis in original). It is clear that the Commission’s jurisdiction attaches to a proposed penalty after it has been contested due to the language of section 110(k), which specifies that “[n]o proposed penalty which has been *contested* before the Commission under section 105(a)” shall be settled without the approval of the Commission. 30 U.S.C. § 820(k) (emphasis added). In addition, section 110(i) designates the Commission as the agency authorized to “assess *all* civil penalties provided in this Act.” 30 U.S.C. § 820(i) (emphasis added). The assessment of such penalties clearly includes contested penalties that are the subject of a settlement agreement.<sup>4</sup>

Given this statutory mandate to approve or disapprove proposed penalty reductions, the Commission has promulgated procedural rules which require parties to submit factual support

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<sup>4</sup> We reject the Secretary’s argument that a settlement offer is a revised proposed penalty and that the Secretary cannot be required to submit additional information to a Judge because the last sentence of section 110(i) provides, “In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the [statutory penalty] factors.” 30 U.S.C. § 820(i). Amended Mot. for Reconsideration before ALJ at 2-3; Mot. for Cert. at 2. Such language unambiguously applies only to the *proposal* of penalties, i.e., the Secretary’s duty under section 105(a) to propose penalties. The penalty proposal process ends when the proposed penalty assessment is sent to the operator. Once such a proposed penalty is contested, Commission jurisdiction attaches, the Secretary is no longer proposing a penalty, and the last sentence of section 110(i) does not apply.

for a proffered settlement agreement. Commission Procedural Rule 31 provides that a “proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion,” and expressly requires a party seeking the approval of a settlement to submit “[f]acts in support of the penalty agreed to by the parties.” 29 C.F.R. § 2700.31(b)(3). Rule 31 further provides that any “order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(c).<sup>5</sup> Rule 65 provides in part that a “Judge may require the submission of proposed findings of fact.” 29 C.F.R. § 2700.65. Thus, a Judge’s authority to reasonably request additional information to justify a proposed settlement is fully supported by both the Act and the Commission’s procedural rules.

We further conclude that the Judge did not abuse her discretion by requesting further factual support in these cases. There is ample evidence in the record, which the Judge articulated, that supports her conclusion that more information was required.<sup>6</sup> *See Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) (citations omitted) (providing in part that an abuse of discretion may be found if there is no evidence to support the decision or if the decision is based on an improper understanding of the law).

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<sup>5</sup> Subsequent to the Judge’s decisions denying settlement, the Commission published changes to Rule 31, which do not affect these requirements. More specifically, on November 30, 2010, the Commission published a final Rule 31, which became effective on December 30, 2010. The final rule continues to provide in section 2700.31(a) that a “proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion.” 29 C.F.R. § 2700.31(a). The final rule also requires the movant to provide in a proposed order and/or motion “facts in support of the penalty agreed to by the parties.” 29 C.F.R. §§ 2700.31(b)(1), (c)(1). If a movant fails to include such information, the Commission may not accept the motion and proposed order for filing in accordance with the provisions of Rule 31(f). 29 C.F.R. § 2700.31(f). In addition, the final rule continues to provide that “[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(g).

<sup>6</sup> For example, in Docket No. LAKE 2008-590, the Judge noted that the explanation provided by the Secretary for a reduction in penalty related to a preshift violation was inconsistent with the inspector’s description of the violation described in the order, but the inconsistency was not explained in the motion. In Docket No. LAKE 2008-327, the Judge concluded that the motion to approve settlement lists the same facts for the reduction in penalty for each roof control and accumulation violation, but the motion does not include facts necessary to evaluate whether a reduction in negligence was appropriate, or an explanation for why the number of persons affected by the violation should be modified.

In both dockets, the Judge also found insufficient the information provided by the parties because the parties failed to submit the history of violations for review.

In sum, Commission Administrative Law Judges are authorized by the Mine Act to review offers of settlement of contested penalties and to require parties to submit the factual support necessary for that review. The Judge did not abuse her discretion in requiring the Secretary to provide further factual support to demonstrate the penalty criteria as they relate to the subject penalties. Accordingly, we grant the Secretary's motion to remand these matters to the Judge. On remand, the Judge shall take such further evidence as she reasonably requires to review the motions for settlement.

**B. Whether a Judge may consider the deterrent purposes of the statutory penalty scheme in reviewing a settlement proposal**

As the Commission has previously observed, “[t]he judges’ front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.” *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). A Judge’s approval or rejection of a proposed settlement must be based on principled reasons. *Id.* Thus, the Commission has held that if a Judge’s approval or rejection of a settlement is “fully supported” by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but that abuses of discretion or plain errors are subject to reversal. *Id.* at 2480.

The remaining issue raised by the parties regarding the Judge’s rejection of the settlement is that, in her June 7, 2010 Order granting the Secretary’s motion for certification for interlocutory review, the Judge declared that “discretion in assessing penalties is bounded by not only the factors set forth in section 110(i), but also by the ‘deterrent purposes underlying the Act’s penalty assessment scheme.’” Unpublished Order (Docket Nos. LAKE 2008-327, 2008-590, and 2009-224) at 3 (June 7, 2010) (citations omitted).<sup>7</sup> The Judge noted in all three dockets that the penalties proffered in the settlement motion constituted a greater than 80% reduction of the original penalties. Unpublished Order (Docket No. LAKE 2009-224) at 1 (May 18, 2010); Unpublished Order (Docket No. LAKE 2008-327) at 1 (Mar. 16, 2010); Unpublished Order (Docket No. LAKE 2008-590) at 1 (Mar. 16, 2010). We granted interlocutory review to determine whether a Judge is permitted to consider the deterrent purposes of the penalty provisions of the Mine Act when deciding whether or not to approve a settlement.

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<sup>7</sup> The issue is before the Commission because the Secretary filed an unopposed motion for interlocutory review which, *inter alia*, raised the issue of whether the Judge improperly considered deterrence in rejecting the proposed settlements. Our colleagues assert that we are addressing this issue without the benefit of full briefing by the parties. However, we note that Black Beauty fully briefed this issue in the section of its brief to the Commission entitled, “The ALJ Improperly Evaluated the Potential Deterrent Effect.” BB Br. at 6-11. We have carefully considered Black Beauty’s arguments. The Secretary filed a Motion to Remand in which she urged the Commission to instruct the ALJ on remand that she may not consider the deterrent effect of the penalty amounts. The Secretary then chose not to file a response brief following the submission of Black Beauty’s brief, although provision for a response brief was made in the Commission’s June 22, 2010 Direction for Review and Order.

We begin our analysis with the relevant statutory provision, which, as we noted earlier, is section 110(k) of the Mine Act, 30 U.S.C. § 820(k). That section states:

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

This statutory language contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal. Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be considered in this review.

Also relevant is the language of section 110(i) of the Mine Act, 30 U.S.C. § 820(i):

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The legislative history of the Mine Act makes exceedingly clear that Congress intended civil penalties assessed pursuant to the Mine Act to induce compliance with health and safety laws and regulations. Put another way, Congress undoubtedly recognized that such penalties should be used to deter operators from violating such mandates.

The Senate Report, for example, acknowledged that civil penalties are “an enforcement tool,” and recognized that the “settlement of penalties often serves a valid enforcement purpose.” *Legis. Hist.* at 632-33. It emphasized that:

[T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards. . . .

. . . .  
[t]o be effective and *to induce compliance*, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.

While the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed *for the purpose of encouraging operator compliance with the Act's requirements*, the need to save litigation and collection expenses should play no role in determining settlement amounts.

*Id.* at 629-33 (emphasis added).

Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, and it explicitly called for consideration of the protection of the “public interest” – which includes such compliance – before a settlement is approved. Consequently, it is eminently appropriate for a Judge to acknowledge the need for deterrence in deciding whether or not to approve a settlement, with the understanding that the result of the settlement must, consistent with fundamental principles underlying the penalty provisions of the Mine Act, discourage operators from violating health and safety regulations and laws in the future.

The procedural rule promulgated by the Commission to implement section 110(k) is also devoid of any limitations regarding what a Judge may or may not consider in approving a settlement. As mentioned earlier, Commission Procedural Rule 31(g), simply states that “[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(g). Notably, the Commission amended this rule in 1980, as a prior version had required Judges to include in decisions approving penalty settlements a discussion of the six statutory criteria for penalty assessments set forth in section 110(i) of the Act. In deleting this requirement, the Commission stated the amendment was “intended to enhance the flexibility of the Judges to approve settlements.” 45 Fed. Reg. 44301, 44302 (1980).<sup>8</sup> We believe such flexibility should also include the option of explicitly taking into account the deterrent effect of the penalty when reviewing a settlement proposal.<sup>9</sup>

The Judge in her June 7, 2010 order, properly relied on our seminal decision in *Sellersburg Stone*, 5 FMSHRC at 294, in which we stated that a Judge’s discretion in assessing a penalty “is bounded by proper consideration of the statutory criteria *and* the deterrent purpose

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<sup>8</sup> In *Knox County*, 3 FMSHRC at 2480 n. 3, we took this commentary into account, noting that “[t]he amended rule permits Judges to issue simpler and briefer settlement decisions, free from the burden of separately discussing each of the penalty criteria.”

<sup>9</sup> We believe our colleagues’ concern, that this flexibility may lead to judges “impermissibly insinuat[ing] themselves into the Secretary’s enforcement bailiwick,” to be unfounded. *See slip op.* at 17 n.2.

underlying the Act's penalty assessment scheme" (emphasis added). In other cases we have noted the role of penalty assessments in deterring health and safety violations of the Mine Act and regulations promulgated pursuant to it. For instance, in *Unique Electric*, 20 FMSHRC 1119, 1123 (Oct. 1998), we stated:

We agree with the Secretary that a penalty assessed against an operator who is no longer in business nevertheless provides a deterrent against future violations of health and safety standards. Admittedly, there may be no need to deter this particular operator. However, as one Court of Appeals has noted in an analogous case under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., the failure to assess a penalty could cause other employers to "become complacent in the knowledge that future civil penalties could be avoided by ceasing operations on the eve of the Commission hearing." *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1203 (11th Cir. 1997). . . . Moreover, even "employers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether." *Id.*

In addition, in a case in which we vacated a Judge's decision which made a 95% reduction in a daily penalty for failure to abate, we explicitly acknowledged the role of deterrence, "For a company with the size and resources of Thunder Basin, a daily penalty of \$100, even multiplied over 13 days to yield a total penalty of \$1300, is likely to have little financial impact, and therefore minimal deterrent effect." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997). Given these types of pronouncements by the Commission, we fail to see how the Judge's similar statement in the case before us – that discretion in assessing penalties is bounded in part by "the deterrent purposes underlying the Act's penalty assessment scheme," Unpublished Order at 3 (June 7, 2010) (citations omitted) – is in error. *See also Topper Coal Co.*, 20 FMSHRC 344, 360 (Apr. 1998) (quoting the Commission's holding in *Consolidation Coal Co.*, 14 FMSHRC 956, 965 (Jun. 1995), that the assessment of civil penalties for Part 50 regulations "advances the goals of the Act and maintains the importance of civil penalties as a deterrence."); *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (Dec. 1980) (quoting the Mine Act legislative history that the purpose of a penalty is to induce compliance, and stating that to "assure this purpose is served section 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements"). We thus reject the operator's contention that the Judge improperly considered a potential deterrent effect beyond the six statutory criteria in section 110(i). BB Br. at 6-8.

The federal courts have clearly acknowledged the deterrent effect of penalties. In a case involving the penalty provision of section 109 of the Federal Coal Mine Health and Safety Act, of 1969, 30 U.S.C. § 801 et seq. (“the Coal Act”),<sup>10</sup> the Supreme Court declared:

The importance of § 109 in the enforcement of the Act cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. . . . A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

*Nat’l Independent Coal Operators’ Ass’n.*, 423 U.S. 388, 401 (1976). And the D.C. Circuit, after reviewing the legislative history of the Mine Act, determined that “[f]rom this history, we conclude that Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989).

Hence, the Act’s legislative history, and numerous Commission and federal cases identify deterrence as a central tenet of the Mine Act and its penalty provisions. This leads to the inexorable conclusion that, in approving or rejecting a proposed settlement, a Commission Judge may take into account the deterrent effect of the penalty.

Our decision in *Ambrosia* acknowledged the importance of the deterrent effect of penalties, citing to the pertinent legislative history and to the statement in *Consolidation Coal* recognizing the importance of civil penalties as deterrence. 18 FMSHRC 1552, 1565 n.17 (Sept. 1996). While acknowledging that “detering future violations is an important purpose of civil penalties,” we held in that case that deterrence could not be used as a separate component to adjust a penalty amount after the statutory criteria have been considered. *Id.* To the extent that the case suggests that a Judge may not explicitly consider deterrence in the analysis of the six statutory factors and the overall penalty, we overrule it, as it is not consistent with the principles set forth above.<sup>11</sup> Moreover, it forces our Judges to perform the unenviable – and perhaps impossible – task of attempting to distinguish between the supposedly permissible goal of achieving deterrence via a penalty based on the six statutory penalty criteria, and the supposedly impermissible utilization of the concept as a factor separate from the six criteria set forth in section 110(i). Our Judges should not be asked to perform such analytical hair-splitting.

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<sup>10</sup> Section 109 of the Coal Act was the basis of section 110 of the Mine Act. Specifically, the provisions of section 110(i) of the Mine Act were taken directly from section 109(a)(1) of the Coal Act.

<sup>11</sup> We also overrule *Jim Walter Res., Inc.*, 19 FMSHRC 498, 501 (Mar. 1997), insofar as it relies on *Ambrosia* to vacate the Judge’s penalty assessment because he may have considered deterrence as a separate factor in his analysis.

Simply put, we refuse to require our Judges to apply blinders when reviewing settlement proposals, and to ignore the central and most obvious purpose of civil penalties - to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties. Thus, deterrence can and should infuse the Judge's consideration of whether or not to approve a settlement. Accordingly, we hold that the Judge did not abuse her discretion by considering the deterrent effects of the penalty amounts in the manner stated in her order.

### III.

#### Conclusion

For the reasons set forth above, we hereby grant the Secretary's motion to remand. On remand, the Judge shall take such further evidence as she reasonably requires to consider the six statutory criteria in reviewing the motions for settlement and consider deterrence in a manner consistent with this decision.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

Commissioners Duffy and Young, concurring in part and dissenting in part:

We fully concur with our colleagues that Commission judges are authorized to require parties to submit factual support necessary for the proper review of proposed settlements of contested civil penalties and that the judge here did not abuse her discretion by requiring the Secretary to provide such factual support to demonstrate the applicability of the penalty criteria as they relate to the penalties contained in the settlement proposal presented to her for review. We respectfully part company with the majority with regard to whether a judge may consider separately the deterrent purposes of the penalty assessment scheme in reviewing a settlement proposal.

Today a majority of this Commission momentarily overturns at least 16 years of Commission precedent concerning the appropriate and statutorily authorized criteria for assessing penalties under the Mine Act. Of equal importance is the fact that the majority has seen fit to do so without benefit of full briefing on that particular issue by the parties,<sup>1</sup> without benefit of oral argument, even though oral argument was requested, and without benefit of the normal Commission procedure of holding a decisional meeting whereby each Commissioner is given the opportunity to address the issues on review in a forum open to the public and recorded for posterity. As a consequence of this unprecedented, truncated, and opaque procedure, a major policy shift has been effected without an opportunity for the mine safety and health constituencies – labor, management, and government – to weigh in meaningfully on the matter. Neither the Commission nor the community it serves are edified by this process, and that is regrettable.

Moreover, contrary to the majority's assertion that its departure from longstanding Commission policy rescues Commission judges from having to engage in "analytical hair-

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<sup>1</sup> The Secretary did not file a brief on review, opting instead to file a motion to remand the case to the judge for the taking of additional evidence justifying the settlement proposal. Black Beauty filed a brief arguing that the record below was sufficient to justify the proposed settlement since the Secretary had modified key special findings that had once supported the initial proposed penalties. Both parties took the position that the judge could not consider deterrence as a separate factor for assessing an appropriate civil penalty. However, their arguments were not fully developed, presumably because they agreed on the issue and because they anticipated a relatively straightforward disposition by this Commission that would simply have remanded the matter for reconsideration by the judge, with or without the taking of additional evidence, as a condition precedent to addressing whether deterrence needed to be considered as a separate factor for evaluating the (presumably) revised proposed settlement agreement. There is no comparable need for fuller briefing on the issue on which we agree with our colleagues, i.e., the judge's demand for additional information to justify the settlement. The need to provide additional information justifying reduced penalties is clearly contemplated in the statute; moreover, our unanimous endorsement of that principle does not depart from Commission precedent.

splitting,” slip op. [13], today’s decision invites a plethora of subjective criteria for determining appropriate levels of civil penalties, limited only by the number of judges employed by the Commission – each with a perspective on what constitutes “deterrence” in the abstract as opposed to deterrence as embodied in the concrete and quantifiable criteria set forth in section 110(i) of the Act.

As the Commission stated in *Sellersburg*, the discretion exercised in assessing a penalty “is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act’s penalty assessment scheme.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). In denying the motions to approve settlement, the judge treated the holding in *Sellersburg* as a departure point from which to restate the principle in significantly altered and, in our view, erroneous terms by asserting that “discretion in assessing penalties is bounded by not only the factors set forth in section 110(i), but also by the ‘deterrent purposes underlying the Act’s penalty assessment scheme.’” Unpublished Order at 3 (June 7, 2010) (citations omitted).

To the extent that the judge considered deterrence as a factor separate from the statutory criteria, she erred. The Commission has made it crystal clear that deterrence is not a separate component used to adjust a penalty amount but, rather, deterrence is achieved through the assessment of a penalty based on the statutory criteria. In *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996), the Commission stated:

[A]lthough deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria . . . . Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

*See also Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (judge’s consideration is limited to the statutory penalty criteria); *Jim Walter Res., Inc.*, 19 FMSHRC 498, 501 (Mar. 1997) (vacating judge’s penalty assessment because it was based on the need for an effective deterrent in addition to the six penalty criteria).

The Supreme Court has also noted: “[T]he Commission reviews all proposed civil penalties *de novo* according to six criteria.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994).

Our dissension does not rest on disagreement with the concept of deterrence as an appropriate guiding principle. Rather, it arises from our view that the important goal of deterring violations of the Act is a vital, motivating concern that is served by the proper application of the clearly articulated statutory criteria set forth in section 110(i). Thus, while deterrence is not a separate factor in the evaluation and assessment of an appropriate civil penalty, deterrence is a principle basic to, and underlying, the civil penalty scheme. Indeed, “the purpose of civil penalties is to ‘convinc[e] operators to comply with the Act’s requirements.’” *Ambrosia Coal*, 18

FMSHRC at 1565 n.17. It must be remembered that the current Act was intended in part to reconcile two very different regulatory schemes applicable, respectively, to coal and noncoal mines in 1977: the Federal Coal Mine Health and Safety Act of 1969, and the 1966 Federal Metallic and Nonmetallic Mine Safety Act. The Coal Act mandated civil penalties for all violations regardless of seriousness. The Metal Act had no provision for civil penalties – only closure order authority in limited circumstances.

Accordingly, the mandatory, universal civil penalty system established under the 1977 Act became the means of deterrence and the six statutory criteria allowed for the *level* of deterrence to escalate depending upon the circumstances surrounding a given violation. Thus, although a judge may not consider deterrence as an additional penalty criterion or a subsequent multiplier, the goal of deterrence is implicit in the judge’s evaluation and application of the six statutory criteria.

The judge further erred in considering the deterrent effect of the overall cumulative amount of the penalties rather than focusing on each penalty amount on an individual basis. Each penalty offered for settlement must be reviewed individually against the statutory criteria. *See* 29 C.F.R. § 2700.30(a) (“In assessing a penalty, the Judge shall determine the amount of penalty in accordance with the six statutory criteria.”). As Black Beauty notes (BB Br. at 7), in Docket No. LAKE 2008-590, the Secretary vacated Order No. 6670663, which had a proposed penalty of \$20,302. Elimination of that penalty alone reduced the total of the proposed penalties in that docket by approximately 20 percent.<sup>2</sup> When deterrence is allowed to be factored in as a discrete basis for arriving at an assessment beyond and in addition to the statutory criteria, the occasion for error like that committed here becomes more likely since the judge has a tendency to lose focus regarding the individual citations and the conditions surrounding them.<sup>3</sup>

We therefore concur in granting the Secretary’s motion to remand for the taking of additional evidence, but we would direct the judge on remand not to consider deterrence as a

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<sup>2</sup> Our colleagues broadly insist that section 110(k) “places no explicit restrictions” on what a judge may consider when reviewing a settlement proposal. Slip op. at [9]. Thus, it would seem that in a case involving multiple citations where the Secretary vacates one of the citations, the judge could nevertheless consider that citation as a basis for enhancing the civil penalty or rejecting a proposed settlement agreement, as the judge did here in Docket No. LAKE 2008-590, simply by invoking the amorphous rationale of “deterrence.” To avoid such an absurd result, section 110(k) must be read in conjunction with the restrictive scope of the assessment criteria contained in section 110(i). Otherwise, the Commission’s judges could impermissibly insinuate themselves into the Secretary’s enforcement bailiwick. “The judge, who is not an authorized representative of the Secretary, cannot make findings that create new liability.” *Ambrosia Coal*, 18 FMSHRC at 1565 (citations omitted).

<sup>3</sup> In fact, the majority’s decision is only necessary if one believes that the judge’s erroneous aggregation of penalties in this case must be accommodated.

separate component in her assessment of penalties, or to consider the deterrent effect of the cumulative amount of the penalties. The Act simply does not authorize that approach to evaluating the merits of the proposed settlement agreement.

On a final note, as stated above, the direction the Commission takes today is regrettable – particularly when much more open, orderly, and systematic paths are available. In addition to uprooting long-established precedent, the majority decision provides no guidance for Commission judges on whether it is error to fail to consider deterrence, or on what is required and forbidden in their consideration of deterrence as a separate factor. While we would insist that the Commission’s policy as expressed in *Ambrosia Coal* is eminently sound, in consonance with the Mine Act and its enforcement scheme, and worthy of affirmance, we believe that any departure from that policy should more appropriately be taken only after the issues underlying the matter on review can be fully vetted by the immediate parties and others who, once put on notice, would have an interest in having their views known. Indeed, so fundamental are the stakes in these matters that we would prefer that any departure from precedent be considered in the context of an amendment to the Commission’s current rules of procedure.

/s/ Michael F. Duffy

Michael F. Duffy, Commissioner

/s/ Michael G. Young

Michael G. Young, Commissioner

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Mr. Ward worked as a third shift chief electrician at Argus Energy's Deep Mine No. 8 from October 2011 until his termination on June 1, 2012. 34 FMSHRC \_\_\_, slip op. at 5, No. WEVA 2012-1448-D (Aug. 1, 2012) (ALJ) ("slip op."). Ward alleged that he became aware that water was impounded behind the seal outby the No. 3 section and water was present in the return entry adjacent to the affected seals and in active workings of the mine. *Id.* at 5-6. Ward maintained that, beginning in January 2012, he complained about the water accumulations to the third shift mine foreman, Elza Maynard, who, in turn, communicated the safety complaint to Mine Superintendent Grover Meade. *Id.* at 6; Tr. 28-29.

On April 24, 2012, the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection at the mine, which resulted in the issuance of approximately 96 citations. Slip op. at 6. MSHA Inspector Dave Thomson issued Citation No. 8143298, alleging a violation of 30 C.F.R. § 75.364(f)(2)<sup>2</sup> because there was an excessive amount of water in the return entry which prevented it from being traveled as part of a weekly examination. *Id.* The mine was shut down for 25 days while the water was pumped out of the cited area, and Citation No. 8143298 was terminated on May 19, 2012. *Id.* at 4, 6. After the mine resumed production, Ward and Foreman Maynard were called to Mine Superintendent Meade's office, where they both received demotions. *Id.* at 14. Subsequently, in a meeting with the third shift, Meade allegedly stared at Ward when Meade responded to a question about who called MSHA, and stated that he knew who had called. *Id.* On June 1, 2012, Argus Energy terminated Ward. *Id.* at 4.

On June 5, 2012, Ward filed a discrimination complaint with MSHA against Argus Energy alleging that his termination was motivated by his protected activity. *Id.* at 1. MSHA conducted a preliminary investigation of Ward's discrimination complaint and found that it was not frivolously brought. *Id.* at 7. The Secretary filed an Application for Temporary Reinstatement, requesting an order requiring Argus Energy to temporarily reinstate Ward to his former position as the third shift chief electrician. *Id.* at 1-2. On July 16, 2012, the operator filed a request for hearing, and a hearing was held on July 27, 2012. *Id.* at 2.

On August 1, 2012, the Judge issued a decision, concluding that Ward's discrimination complaint was not frivolously brought and directing Argus Energy to reinstate Ward to his former position as the third shift chief electrician at the same rate of pay and with the same benefits that he received prior to his discharge. *Id.* at 16. The Judge concluded that Ward had engaged in protected activity based on evidence that Ward had raised the issue of water accumulations near the seals several times with Third Shift Foreman Maynard. *Id.* at 13-14. The Judge further concluded that there was a nexus between that protected activity and the alleged discrimination. *Id.* at 15. In reaching this conclusion, the Judge found Ward's testimony that Meade had stared at him when he responded that he knew who had called MSHA to be sufficient

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<sup>2</sup> 30 C.F.R. § 75.364(f)(2) provides that: "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."

evidence of hostility toward the protected activity. *Id.* at 14. Reasoning that credibility determinations were not appropriate at this stage of the proceedings, the Judge also found that Argus Energy had knowledge of Ward's protected activity despite the operator's witnesses' testimony that they had no knowledge of Ward's complaints. *Id.* at 15. Finally, the Judge concluded that there was a coincidence in time between the protected activity and the adverse action because Ward expressed concerns until April 2012, the mine was shut down between April 24 and May 19, and Ward was terminated on June 1. *Id.* Accordingly, the Judge held that Ward's application for temporary reinstatement was not frivolously brought. *Id.* at 16.

Argus Energy filed a petition for review of the Judge's temporary reinstatement order. Pet. at 1-16. It argues that Ward was terminated due to repeated performance problems, and that substantial evidence does not support the Judge's determination that Ward's complaint was non-frivolous. *Id.* at 2. The operator contends that the Judge's finding that Ward had complained about water behind the seals to the third shift foreman from January through April 2012 is not supported by substantial evidence. *Id.* at 12-13. Argus Energy points to evidence that water had not existed in the seals area during January to March 2012. *Id.* It also asserts that the Judge's finding that there was a non-frivolous issue as to a nexus between the alleged protected activity and discharge was not supported by substantial evidence. *Id.* at 13-14. The operator explains that nobody involved in the decision to terminate Ward was aware that Ward had engaged in protected activity at the time it took the adverse action. *Id.* at 14. The operator argues that Judges must be permitted to make some credibility determinations after a temporary reinstatement hearing in order to afford parties due process. *Id.* at 15-17. The Secretary opposed the petition. S. Opp. at 1-21.

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 immediate 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). The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The "not frivolously brought" standard reflects a Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) ("*JWR*").

Courts and the Commission have likened the "not frivolously brought" standard set forth in section 105(c)(2) with the "reasonable cause to believe" standard applied in other statutes. *Id.* at 747 ("there is virtually no rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350, 1352 (Aug. 1996). In the

context of a petition for interim injunctive relief under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 160(j), courts have recognized that establishing “reasonable cause to believe” that a violation of the statute has occurred is a “relatively insubstantial” burden. *See Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001) (citations omitted). In *Schaub*, the Court explained that the proponent “need not prove a violation of the NLRA nor even convince the district court of the validity of the Board’s theory of liability; instead he need only show that the Board’s legal ‘theory is substantial and not frivolous.’” *Id.* (citations omitted). It cautioned that:

An important point to remember in reviewing a district court’s determination of reasonable cause is that the district judge need not resolve conflicting evidence between the parties. *See Fleischut [v. Nixon Detroit Diesel, Inc.]*, 859 F.2d 26, 29 (6th Cir. 1988)] (stating that the appellant’s appeal did not seriously challenge whether reasonable cause exists; instead it simply showed that a conflict in the evidence exists); *Gottfried [v. Frankel]*, 818 F.2d 485, 494 (6th Cir. 1987)] (same). Rather, so long as facts exist which could support the Board’s theory of liability, the district court’s findings cannot be clearly erroneous. *Fleischut*, 859 F.2d at 29; *Gottfried*, 818 F.2d at 494.

*Schaub*, 250 F.3d at 969 (emphasis added).

Similarly, at a temporary reinstatement hearing, the Judge must determine “whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *JWR*, 920 F.2d 744. As the Commission has recognized, “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 Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 164 (Feb. 2000) (Marks and Beatty, dissenting). The Commission applies the substantial evidence standard in reviewing the Judge’s determination.<sup>3</sup> *Id.* at 157.

We conclude that substantial evidence supports the Judge’s determination that Ward’s application for temporary reinstatement was not frivolously brought. More specifically, although there is conflicting evidence in the record, there are facts which support the Secretary’s theory that Ward engaged in protected activity by complaining about the water accumulations

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<sup>3</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

and that a nexus exists between the protected activity and the alleged discrimination. As the Judge found, there is evidence that Ward expressed concerns about water accumulations to Third Shift Foreman Maynard prior to the MSHA inspection. Tr. 28-29, 31. In addition, although the operator presented evidence that none of the decision-makers had knowledge of Ward's safety complaints prior to the termination,<sup>4</sup> Ward testified that he informed Maynard about the water accumulations, who in turn informed Mine Superintendent Meade. Tr. 28-29, 37. Ward testified that he also informed Jake Bowen, his direct supervisor, that there were water accumulations in front of the seals that needed to be addressed. Tr. 57-58. The operator acknowledges that Bowen was one of the decision-makers who made the decision to terminate Ward. Pet. at 2; Tr. 145-46.

Thus, facts in the record exist which support the Secretary's theory of liability. The Judge implicitly credited Ward's testimony.<sup>5</sup> Requiring the Judge to resolve conflicts in testimony between Ward and the operator's witnesses, when the parties have not yet completed discovery, would improperly transform the temporary reinstatement hearing into a hearing on the merits. *See Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999); *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009).

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<sup>4</sup> The operator has not challenged the Judge's findings that there is sufficient evidence under the "not frivolously brought" standard to establish hostility toward the protected activity and a coincidence in time between the protected activity and adverse action. *See* Pet. at 13-14.

<sup>5</sup> We reject the operator's argument that the Judge issued his Decision and Order reinstating Ward because "due to Commission precedent, the Judge was forced to credit all of the testimony of Ward, taking it at face value, despite the overwhelming evidence to the contrary." Pet. at 17. Contrary to the operator's assertion, the Judge did not accept all of Ward's testimony at face value. For example, the Judge rejected Ward's contention that the configuration of the pump and float box constituted a safety hazard. Slip op. at 14.

Accordingly, we affirm the Judge's August 1 decision temporarily reinstating Ward. We intimate no view as to the ultimate merits of this case.

/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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August 22, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-335
v.	:	A.C. No. 15-19068-265638
	:	
FRASURE CREEK MINING, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 13, 2011, the Commission received from Frasure Creek Mining, LLC (“Frasure”) 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 September 9, 2011, and became a final order of the Commission on October 10, 2011. Frasure asserts that its security guard failed to forward the proposed assessment to appropriate personnel, despite having been instructed to do so. Frasure states that it was not aware of the assessment until it received a delinquency notice, dated November 28, 2011. Frasure maintains that it contested the underlying citation on March 11, 2011, and upon receiving the delinquency notice regarding the proposed assessment, promptly filed this motion to reopen. Moreover, Frasure asserts that it has modified its procedures to ensure that security guards alert management as soon as they receive a proposed assessment. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated December 7, 2011. However, the Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Frasure'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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Chief Administrative Law Judge Robert J. Lesnick  
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MSHA's record indicates that the proposed assessment became a final order of the Commission on October 21, 2011. H&K asserts that it promptly sent the proposed assessment to its counsel for contest on September 26, 2011. H&K's counsel states that it failed to file a timely contest because, although the law firm has an adequate docketing system in place, the paralegal responsible for filing had been suffering from a serious personal problem which prevented the paralegal from timely submitting the contest. Upon discovering this failure to contest, counsel states that it contacted the Solicitor's Office, and also contacted an employment counsel to address privacy concerns and legal limitations before filing this motion to reopen. The Secretary does not oppose the request to reopen, and urges counsel to take all steps necessary to ensure that future penalty contests are processed in a timely manner.

Having reviewed H&K'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. H&K's motion to file under seal to protect personal employee information is also hereby granted.

/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.  
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/s/ Patrick K. Nakamura  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 22, 2012

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

v.

SCABTRON

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Docket No. WEST 2012-302-M  
A.C. No. 50-01614-224689

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 13, 2011, the Commission received from Scabtron a motion seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Scabtron asserts that it did not receive the proposed assessment in this case. Scabtron states that upon receiving a delinquency letter from the Department of Treasury, it paid the penalties in full. The Secretary does not oppose the request to reopen. The Secretary confirms that the proposed assessment was returned undelivered, and that the penalties were paid in full through Treasury collection.

Having reviewed Scabtron's request and the Secretary's response, we conclude that the above-captioned assessment has not become a final order of the Commission because it was never received by Scabtron. Accordingly, we deny the request to reopen as moot<sup>1</sup> and remand this matter 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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<sup>1</sup> We deny the operator's request as moot because it no longer needs the Commission to grant the relief it had initially requested – the reopening of this matter. The order never became final, because Scabtron never received the proposed assessment.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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August 22, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-328-M
v.	:	A.C. No. 10-01658-271670
	:	
DEATLEY CRUSHING 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 December 21, 2011, the Commission received from Deatley Crushing Company (“Deatley”) 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). The Secretary does not oppose the request 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. *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 Deatley’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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WASHINGTON, DC 20001

August 22, 2012

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

v.

NORTH STAR MINERALS, INC.

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Docket No. WEST 2012-420-M  
A.C. No. 04-05169-269301

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 25, 2012, the Commission received from North Star Minerals, Inc. (“North Star”) 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 18, 2011, and became a final order of the Commission on November 17, 2011. North Star asserts that it had previously requested and set a conference date with the MSHA office in Elko, NV regarding the citation. MSHA then cancelled the conference and informed North Star that a representative from an MSHA office in California would contact it. However, North Star was never contacted to re-schedule the conference. The Secretary does not oppose the request to reopen, but notes that a request for a conference does not in any way alter the deadline or the procedure for contesting a proposed penalty. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed North Star'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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August 28, 2012

SECRETARY OF LABOR,	:	Docket Nos.	PENN 2009-775
MINE SAFETY AND HEALTH	:		PENN 2009-825
ADMINISTRATION (MSHA)	:		PENN 2010-63
	:		PENN 2010-191
	:		PENN 2010-275
	:		PENN 2010-291
	:		PENN 2010-381
v.	:		PENN 2010-465
	:		PENN 2010-515
	:		PENN 2010-745
	:		PENN 2011-16
	:		PENN 2011-104
	:		PENN 2011-129
SHAMOKIN FILLER COMPANY, INC.	:		PENN 2011-189

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

DECISION

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

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Administrative Law Judge John Kent Lewis concluded that a facility operated by Shamokin Filler Co., Inc. (“Shamokin”) is a “mine” subject to the jurisdiction of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under the Mine Act. 33 FMSHRC 725, 748-49 (Mar. 2011) (ALJ). On April 6, 2011, Shamokin filed a petition for discretionary review of the judge’s decision, which the Commission denied. On April 25, 2011, it filed a petition for interlocutory review of the judge’s decision, which the Commission also denied. On June 9, 2011, Shamokin filed a motion for reconsideration of the Commission’s June 2 order denying its petition for interlocutory review, which the Commission granted.

Additionally, on July 29, 2011, the Secretary filed an unopposed petition for interlocutory review of the judge’s prehearing order mandating that the parties submit all direct examination of each witness in written form and limiting trial testimony to cross-examination and re-direct examination. The Secretary also requested that the Commission stay the

proceedings pending a final decision by the Commission. The Commission granted the Secretary's petition and also granted her request to stay the proceedings below.

For the reasons that follow, we affirm the judge's decision concluding that Shamokin's Carbon Plant is subject to jurisdiction under the Mine Act. We also vacate the judge's order directing the parties to submit advanced written direct testimony, lift the stay, and remand the case for a hearing consistent with our decision.

## I.

### **Factual and Procedural Background**

Shamokin operates a carbon products manufacturing plant ("Carbon Plant") in Shamokin, Pennsylvania, that sells products consisting solely of anthracite coal, as well as anthracite coal that is blended with other carbon materials. 33 FMSHRC at 731. The Carbon Plant also manufactures a variety of carbon-based products for the steel, glass, rubber and plastics industries. *Id.*; Tr. 402. The parties stipulated that Shamokin does not extract, wash, clean or crush coal in its Carbon Plant. 33 FMSHRC at 731; Op. Post Hearing Br. at 2, Jt. Stip. 10-14.

For the purely anthracite products, Shamokin begins with prepared anthracite coal purchased from local mines and further prepares it by putting it in a feed hopper and then drying it in an outdoor rotary dryer. 33 FMSHRC at 745; Tr. 49-51, 164, 185; G. Ex. 2; Jt. Ex. 4. After the drying, the coal is screened to remove oversized pieces. 33 FMSHRC at 745; Tr. 51. After the screening, the coal is stored and then bagged, loaded, and shipped for bulk sale. 33 FMSHRC at 745. Shamokin performs this extra processing to meet customer specifications. *Id.* at 748; Tr. 402, 406-07.

Shamokin's production chart for 2009 and 2010 shows that the company sold thousands of tons of purely anthracite coal. 33 FMSHRC at 747; Jt. Ex. 2. The chart also includes items listed as blends of coal and non-coal materials. However, as described below, statements by Shamokin officials and a major customer suggest that some of these items were 100% coal. 33 FMSHRC at 747; Jt. Ex. 2; G. Exs. 1, 3; Tr. 110-11, 127, 129, 454-55.

Since 1977, MSHA has treated Shamokin's Carbon Plant as a mine and has inspected it for compliance with the Mine Act. G. Ex. 7 at 3. In January 2009, Shamokin changed ownership<sup>1</sup> and shortly thereafter challenged MSHA's jurisdiction over its facility, asserting that the facility should be subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration ("OSHA"). 33 FMSHRC at 731; Tr. 381.

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<sup>1</sup> Shamokin's prior owners are brothers and are also the fathers of the current owners. The prior owners are still on Shamokin's payroll as Shamokin's consultants. 33 FMSHRC at 731 n.7; Tr. 383, 385.

During MSHA's inspections of the facility, its inspectors observed no mixing of coal with non-coal materials at Shamokin's plant. 33 FMSHRC at 748; Tr. 50, 164, 322-23, 359. The only bid sheets that Shamokin provided for its sales were for anthracite coal. 33 FMSHRC at 748; G. Ex. 5. Shamokin also admitted that in 2009 and 2010, the vast majority of its purchases were of anthracite coal. G. Ex. 6. Based on such considerations, MSHA rejected Shamokin's assertions that its operations and business had changed to manufacturing since new owners took over in 2009. G. Ex. 7 at 3. Instead, MSHA determined that Shamokin's facility continued to be subject to MSHA's jurisdiction as a coal preparation plant. G. Ex. 7 at 4.

Shamokin timely contested all of the citations at issue in these proceedings,<sup>2</sup> specifically disputing that MSHA had jurisdiction over the facility. A trial solely on the issue of jurisdiction was conducted on October 27 and 28, 2010.

Below, Shamokin sought to compel the Secretary to produce internal memoranda prepared by the Department of Labor's Office of the Solicitor and MSHA's District Manager. These memoranda addressed other bagging facilities that Shamokin claimed were identical to its Carbon Plant and which it asserted MSHA and the Solicitor's Office had determined were not mines subject to regulation under the Mine Act, but were rather under OSHA's jurisdiction. The Secretary withheld these documents during discovery, claiming they were privileged. Shamokin also sought to submit at the hearing evidence related to MSHA's inspection activity, or lack thereof, at facilities other than the Carbon Plant. Shamokin argued that such evidence was relevant to establish that MSHA had previously determined in 2004 that its Carbon Plant, along with other similar bagging facilities, was not a mine subject to MSHA jurisdiction.

The Secretary filed a motion *in limine* seeking to exclude the foregoing evidence. The judge granted the Secretary's motion *in limine* and denied Shamokin's motion to compel. Unpublished Order Granting Secretary's Motion *in Limine* dated Oct. 27, 2010 ("*Limine Order*"); Unpublished Order Denying Respondent's Motion to Compel dated Oct. 27, 2010 ("*Mot. to Compel Order*"); 33 FMSHRC at 728-31. The judge reviewed the documents *in camera*. He determined that they were not relevant to the question of MSHA's jurisdiction over Shamokin, as they did not reference Shamokin specifically or the alleged "bagging facilities" in general, and noted that such inquiries were fact-specific. 33 FMSHRC at 729-31, 743 n.13; *Limine Order*. The judge also concluded that the Department of Labor's memoranda were privileged and not subject to disclosure. *Mot. to Compel Order*. The judge concluded that

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<sup>2</sup> In Shamokin's Motion for Reconsideration, it indicated that at that time, approximately 14 civil penalty dockets were pending, resulting from inspections conducted in 2009, 2010 and 2011, in which Shamokin has challenged MSHA's jurisdiction as well as the factual basis for the citations. *Mot. for Reconsideration* at 3.

Shamokin failed to prove that MSHA had previously made a specific determination that its Carbon Plant was not subject to MSHA jurisdiction.<sup>3</sup> 33 FMSHRC at 742-43.

In his decision on jurisdiction, the judge concluded that Shamokin's Carbon Plant meets the definition of a "mine" under section 3(h) of the Mine Act. 33 FMSHRC at 727-28, 744, 748. Recognizing the Congressional intent of giving the broadest possible interpretation to what is to be considered a mine and regulated under the Mine Act, the judge held that "the Carbon Plant falls within the 'sweeping' definition of a mine engaged in the work of preparing coal, and thus, should remain subject to MSHA jurisdiction." *Id.* at 745 (citation omitted). Based on the plant's activities of storing, loading, sizing and drying coal for the purpose of sale for further industrial use, the judge concluded that Shamokin's operation was a "custom coal preparation facility." *Id.* at 746. The judge was cognizant of the operator's arguments that not every facility that handles minerals is a mine and specifically considered the nature of Shamokin's operations. *Id.* at 745. He concluded that the nature and function of Shamokin's operations constituted the "work of preparing coal" as defined in the Mine Act. *Id.* at 746.

The judge rejected Shamokin's argument that the majority of its products sold were non-coal or primarily coal/non-coal mixtures. Specifically, the judge found that the owners attempted "to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations." *Id.* at 747. The judge found that the evidence "*in toto* clearly establishes that a substantial portion of the material used by [Shamokin] was anthracite coal." *Id.* at 746. Further, the judge considered the Commission's functional analysis in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 7-8 (Jan. 1982), and specifically noted that the Carbon Plant's operation performed the work usually done by coal preparation facilities to make coal suitable for a particular use or to meet market specifications. 33 FMSHRC at 748.

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<sup>3</sup> Shamokin moved to certify the judge's decision granting the Secretary's motion *in limine*, which the judge denied. Unpublished Order Denying Respondent's Motion to Stay, Order Denying Respondent's Motion to Certify Decision for Interlocutory Review dated Oct. 27, 2010. Shamokin then filed with the Commission a petition for interlocutory review on the matter, which the Commission also denied. Unpublished Order dated Dec. 10, 2010.

On May 20, 2011, the judge issued a notice of hearing scheduling a hearing on September 6, 2011, on the merits of the violations in these consolidated proceedings.<sup>4</sup> In the order, the judge directed the parties to

submit all direct examination of each witness in written form at least 48 hours prior to the hearing. The direct examination shall be in the form of an affidavit, signed under oath and shall include only items that are appropriate for direct examination of the witness. All exhibits used by the witness must be numbered (or lettered) and attached to the direct testimony. The witness must appear at hearing and will be subject to cross-examination and redirect examination only. The parties may present, at hearing, any objection to the written direct examination or attached exhibits. Failure to include a witness, to provide the written direct examination or failure to include an exhibit or to specify in detail the items that remain in dispute, will result in their exclusion at hearing.

Unpublished Order dated May 20, 2011.

On June 16, 2011, the Secretary filed a Joint Motion for Reconsideration of the judge's order pertaining to his instruction on testimony, which the judge denied. Unpublished Order dated June 23, 2011. The judge found that "the legal issues . . . identified in the motion *sub judice* will be adequately and efficiently addressed by this Court's prehearing report requirements." *Id.* at 4-5. On July 15, 2011, the Secretary filed a motion to certify the June 23, 2011 order for interlocutory review and a motion to stay proceedings pending a final decision by the Commission. The judge denied both motions without explanation. Unpublished Order dated July 18, 2011. The Commission granted the Secretary's petition for interlocutory review of the judge's June 23 order on the issue of the judge's requirement of advanced written direct evidence and also granted her request to stay the proceedings below. Unpublished Order dated Aug. 10, 2011.<sup>5</sup>

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<sup>4</sup> The merits proceeding involves 11 civil penalty cases, which include 58 citations alleging violations of MSHA standards, including six section 104(d) orders, and one section 110(c) case concerning four section 110(c) penalty assessments against one of Shamokin's owners, William Rosini. Unpublished Order Denying Mot. for Reconsideration dated June 23, 2011 at 4-5.

<sup>5</sup> Shamokin's petition for interlocutory review, addressing both the judge's conclusion on jurisdiction and his exclusion of the evidence of MSHA's enforcement actions at other facilities, was also granted in this order.

## II.

### Disposition

#### A. Jurisdiction

Section 4 of the Mine Act provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this [Act].” 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, “coal or other mine” is defined as including “lands, . . . facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of preparing coal . . . and includes custom coal preparation facilities.” 30 U.S.C. § 802(h)(1). Section 3(i) of the Mine Act defines “work of preparing the coal” as “the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.” 30 U.S.C. § 802(i).

The legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a “coal or other mine” under the Act. The Senate Committee stated that “what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). *See Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (“[T]he statute makes clear that the concept that was to be conveyed by the word [mine] is much more encompassing than the usual meaning attributed to it [–] the word means what the statute says it means.”).

In considering the phrase the “work of preparing the coal,” the Commission has inquired not only into whether the entity performs one or more activities listed in section 3(i), but also into the nature of the operation performing such activities. *Elam*, 4 FMSHRC at 7-8. In *Elam*, the Commission explained that “‘work of preparing [the] coal’ connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.” *Id.* at 8. The Commission noted that the purpose of coal preparation has been described as increasing the value of fuel by making it more suitable for uses by the consumer in part by “mixing or blending.” *Id.* at 8 n.5. The Commission concluded that although *Elam* performed several of the functions included in coal preparation at its commercial loading dock, it did so solely to facilitate its loading business rather than to meet customers’ specifications or to render the coal fit for any particular use, and that, accordingly, its facility was not a mine. *Id.* at 8.

In contrast, in *Mineral Coal Sales, Inc.*, 7 FMSHRC 615, 620 (May 1985), the Commission determined that the handling of coal at a loading facility constituted the “work of preparing the coal” because the work was performed to make the coal suitable for a particular

use or to meet market specifications. Such handling included custom blending or mixing the coal to meet the specifications and needs of a broker's customers, in addition to storing, crushing, sizing, and loading the coal on to railroad cars. *Id.* at 616-18, 620.

The Commission and courts have consistently applied a version of the two-part analysis set forth by the Commission in *Elam* to determine whether a facility is engaged in the “work of preparing the coal” by considering: (1) whether the facility performs any of the enumerated activities listed in section 3(i); and (2) the overall nature of the operation to determine whether it engages in the work of preparing coal “as is usually done by the operator of the coal mine” or whether it functions to make the coal suitable for a particular use or to meet market specifications. *See, e.g., RNS Servs., Inc.*, 18 FMSHRC 523, 528-30 (Apr. 1996) (concluding that the loading of coal refuse into trucks was one of the activities listed in section 3(i) and that the transportation of coal refuse to a co-generation facility constituted “work of preparing the coal”), *aff'd*, 115 F.3d 182, 185 (3d Cir. 1997) (noting that the storage and loading of coal was “a critical step in the processing of minerals . . . in preparation for their receipt by an end-user, and [that] the Mine Act was intended to reach all such activities”); *Air Prods. & Chems., Inc.*, 15 FMSHRC 2428, 2431 (Dec. 1993) (holding that the handling of coal refuse at a co-generation facility involved some of the coal preparation activities listed in section 3(i) and constituted the “work of preparing the coal” that is usually done by a mine operator), *review denied*, 37 F.3d 1485 (3d Cir. 1994) (table, No. 93-3646).

The judge correctly utilized this analytical framework when considering whether Shamokin's Carbon Plant performed the “work of preparing the coal.” The judge found that Shamokin engaged in a number of the activities listed in section 3(i) – specifically that it “is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce.” 33 FMSHRC at 749. He noted that, “[i]n examining the ‘nature of the operation’ performing work activities listed in section 3(i), the operations taking place at a single site must be viewed as a collective whole.” *Id.* (citing *Mineral Coal Sales*, 7 FMSHRC at 620-21). The judge also stated that “in applying a functional analysis to the subject facility, this Court finds that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use.” 33 FMSHRC at 746.

There is no dispute that Shamokin engages in certain activities listed in section 3(i) as comprising the “work of preparing the coal.” The judge found that Shamokin stores, loads, sizes and dries coal at its Carbon Plant. *Id.* Substantial evidence supports the judge’s finding.<sup>6</sup> Moreover, Shamokin does not dispute these findings on appeal.

The heart of Shamokin’s argument before the Commission is that the judge erred by ignoring language that assertedly limits the phrase “work of preparing the coal” – the last clause of section 3(i), which states “as is usually done by the operator of the coal mine.”<sup>7</sup> The language of section 3(i) which Shamokin highlights has been considered by the Commission and courts in past cases under the second prong of the *Elam* test or the “functional” analysis. *Elam*, 4 FMSHRC at 7-8; *Pennsylvania Electric Co.*, 11 FMSHRC 1875, 1880-81 (Oct. 1989), *aff’d*, 969 F.2d 1501 (3d Cir. 1992); *United Energy Servs. Inc. v. MSHA*, 35 F.3d 971, 975 (4th Cir. 1994). The judge did consider the statutory language regarding whether the activities involved were usually done by the mine operator. 33 FMSHRC at 745-46. He specifically cited and applied the *Elam* test and acknowledged that an operation’s performance of any of the enumerated activities under section 3(i) does not *per se* subject it to jurisdiction, but rather that a “functional” analysis is necessary. *Id.* at 746-48. The judge considered the Carbon Plant’s handling of coal as compared to its non-coal products and, contrary to Shamokin’s assertions, determined *in toto* that the majority of the plant’s products consisted primarily of coal. *Id.* Applying the *Elam* test, the judge concluded that Shamokin processes coal “to customer’s specifications and for particular uses” and thus operated as a “custom coal preparation facility.” *Id.* at 748-49.

Substantial evidence supports the judge’s findings. In Shamokin’s product table, the judge found that one of its highest volume products (585 Injection Carbon), although listed as a mixed-product, was marketed as primarily coal. *Id.* at 747; Jt. Ex. 2. John Petrulich, Shamokin’s former production manager, testified that the carbon was added merely as a filler and did not alter the properties of the coal. 33 FMSHRC at 732. Moreover, the judge noted that a sworn declaration from a customer of Shamokin indicated that the product was marketed to him as 100% coal. *Id.* at 747; G. Ex. 1. Additionally, in an email from William Rosini to a customer, Rosini indicated that Shamokin B-593 was “100 percent anthracite coal and barley

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<sup>6</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>7</sup> Contrary to the Secretary’s contention, S. Response Br. at 12, Shamokin did raise this issue before the judge below. Op. Reply Br. at 9, n.1.; Op. Post-Hearing Br. at 13; Op. Br. at 8-11. Although the Secretary is correct in noting that Shamokin failed to present evidence to support its argument and failed to develop its argument below, it is proper for the Commission to consider and address Shamokin’s argument on appeal.

size.” 33 FMSHRC at 733, 748; Tr. 110. The judge did not find Shamokin’s witnesses to be credible regarding the scope and nature of the facility’s handling of coal and concluded that “there has been an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations.”<sup>8</sup> 33 FMSHRC at 747. MSHA inspectors Matthew Bierman and Ronald Farrell testified that they did not observe any mixing of coal with non-coal materials at the plant, which the judge found was supported by the plant production reports. *Id.* at 748. The judge also found that the only bid sheets Shamokin provided for its sales were for anthracite coal. *Id.*; G. Ex. 5. William Rosini even admitted that the facility processed coal according to customer specifications. 33 FMSHRC at 740; Tr. 524. In short, Shamokin fails to point to any persuasive evidence to support its contention that it is primarily a manufacturing facility and not a coal processing facility.

Clearly, Shamokin’s facility – its activities, function and purpose – are akin to the activities and purpose of the operator in *Mineral Coal Sales*, rather than the operator in *Elam*. It dries and sizes processed coal to meet customer specifications. It stores and loads the coal into bags for resale and subsequent use. Significantly, Shamokin is not handling the coal for its own consumption and thus is unlike the facilities in cases involving utilities or co-generation facilities where some courts have found Mine Act jurisdiction did not extend. *See, e.g., Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1083 (8th Cir. 1999) (applying *Elam* and stating that Associated “did not participate in transporting the coal from the mine, nor were its processing activities necessary to make the coal marketable”; thus it was not a “mine” by further processing the coal for combustion). In fact, Shamokin engages in more coal preparation activities than the facilities in *Mineral Coal Sales*, 7 FMSHRC at 620; *Air Products*, 15 FMSHRC at 2431; and *RNS*, 18 FMSHRC at 528-30, all found to be subject to MSHA jurisdiction. As the judge found, Shamokin’s Carbon Plant functions as a custom coal preparation facility. While the Carbon Plant handles non-coal materials and makes non-coal products, such as graphite pellets, MSHA is not interested in Shamokin’s graphite process. 33 FMSHRC at 732; Tr. 55-56. The evidence indicates that a substantial portion of Shamokin’s business, contrary to its assertion, involves the handling and processing of anthracite coal.

Shamokin argues that, according to precedent, a facility that handles only processed, market-ready coal is not engaged in the “work of preparing the coal.” Shamokin contends that its further refinement of this type of coal falls outside of the jurisdiction of the Mine Act. We disagree. The Commission and courts have never held a bright-line distinction between facilities that handle raw coal as compared to facilities that handle processed, marketable coal. In fact, the Commission and courts have evaluated a particular facility’s operations *in toto* and considered

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<sup>8</sup> To the extent that Shamokin attempts to challenge the judge’s credibility determinations as to the characterization of its facility, Shamokin fails to point to any evidence sufficient to overturn those determinations. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that a judge’s credibility determinations are entitled to great weight and may not be overturned lightly).

the nature of the coal in conjunction with the types of coal preparation activities performed by the facility in question, and evaluated the end product rather than the initial state of the coal. In *Kinder Morgan* and *Mineral Coal Sales*, the Commission and court of appeals found jurisdiction over facilities that handled already processed, market-ready coal because the coal was subsequently prepared by those facilities to make it “suitable for a particular use or to meet market specifications.” *Kinder Morgan Operating, L.P.*, 23 FMSHRC 1288, 1294 (Dec. 2001) (Commissioners Jordan and Beatty), *aff’d*, 78 Fed. Appx. 462, 465 (6th Cir. 2003); *Mineral Coal Sales*, 7 FMSHRC at 616-18, 620. Here, Shamokin clearly engaged in further handling or processing of the coal in order to meet its customers’ specifications.

Accordingly, the judge was correct in concluding that the Carbon Plant performs the “work of preparing the coal,” and thus is a “mine” under section 3(h) and subject to jurisdiction under the Mine Act.<sup>9</sup>

## **B. Exclusion of Evidence**

Shamokin contends that the judge abused his discretion by excluding evidence of MSHA’s non-jurisdiction determinations regarding other bagging facilities similar to its Carbon Plant. The operator argues that this evidence is relevant to whether the judge should defer to the Secretary’s interpretation that sections 3(h) and (i) of the Mine Act afford her jurisdiction. It claims that the evidence “revealed inconsistent treatment of direct competitors who manufacture the same products, in the same way, using the same ingredients – and also demonstrat[ed] that carbon plants MSHA released from its jurisdiction actually had more indicia of ‘mining’ than did Shamokin.” Op. Br. at 24.

The judge considered the evidence *in camera* and excluded it because he determined it to be “irrelevant and/or, if relevant, unduly confusing and misleading.” 33 FMSHRC at 729. He concluded that it was not relevant because it did not specifically pertain to Shamokin or generally to the group of bagging facilities of which Shamokin contends it was a part. The judge also determined that the evidence was of little probative value.<sup>10</sup> *Id.* at 730 n.6.

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<sup>9</sup> Shamokin also argues that the judge erred in finding that the Carbon Plant was engaged in “milling.” Because this issue is not essential to the resolution of the issue of jurisdiction in this case, we do not need to address it.

<sup>10</sup> The judge cited Federal Rule of Evidence 403, which states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” 33 FMSHRC at 729. A judge’s reference to excluded evidence as not being “probative” is essentially the same standard as the relevance standard in Commission Procedural Rule 63(a). *See, e.g., Twentymile Coal Co.*, 30 FMSHRC 736, 764 n.8 (Aug. 2008) (Commissioners Jordan and Cohen).

When reviewing a judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). "Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial." *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007) (citation omitted). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero*, 22 FMSHRC at 1366 (citations omitted).

Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Commission Procedural Rule 55(i) states that "a Judge is empowered to . . . (i) [t]ake other action authorized by these rules, by 5 U.S.C. 556, or by the Act." 29 C.F.R. § 2700.55(i). Section 556(d) of the Administrative Procedure Act, in turn, states that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

The memoranda Shamokin sought to obtain and submit into evidence were written in 2004 and earlier by attorneys in the Office of the Solicitor and by MSHA's District Manager when MSHA formed a fact-finding committee to investigate several coal bagging facilities and address the issue of jurisdiction. *See, e.g.*, Op. Ex. 2. The memoranda indicate that MSHA engaged in fact-specific inquiries of each facility to determine whether it functioned as a "mine" under the Mine Act. In one instance, MSHA determined that the facility was not engaged in mining-related activities as defined under the Mine Act and thus was not properly subject to Mine Act jurisdiction. The other facility was determined to be subject to MSHA jurisdiction. Contrary to Shamokin's assertion, no general determination was made as to the bagging facilities as a whole and as the judge found, MSHA never made an offer to Shamokin to "opt out" of MSHA jurisdiction. 33 FMSHRC at 742-44.

We agree that the memoranda are not relevant to the judge's consideration of whether Shamokin's Carbon Plant is subject to Mine Act jurisdiction. It is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction. *See Mach Mining, LLC*, 34 FMSHRC \_\_\_, slip op. at 24, 26, No. LAKE 2010-1-R et al. (Aug. 9, 2012) (affirming judge's exclusion of ventilation plans at other mines because only conditions at operator's mine are relevant to district manager's determination of which plan provisions should be approved or denied); *Twentymile Coal Co.*, 30 FMSHRC at 765 (Commissioners Jordan and Cohen) (upholding the judge's denial of the admission of other plans into evidence in an emergency response plan case because it was unlikely that two underground coal mines would present exactly the same factual situation). In any event, the Commission has previously stated that the question of jurisdiction is "governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct." *Alexander Bros., Inc.*, 4 FMSHRC 541, 543 (Apr. 1982).

Moreover, allowing Shamokin to present evidence that may be of limited probative value would have unduly delayed the trial. Shamokin would have been required to present evidence on each of the other facilities in order to demonstrate the similarities between those facilities and its Carbon Plant and thereby the relevance of MSHA's evaluation of those other facilities. This would have necessitated a significant number of additional witnesses, consuming an inordinate amount of trial time.

It is significant that MSHA has asserted jurisdiction over Shamokin's Carbon Plant for decades and Shamokin admits that the nature of its business has not changed. 33 FMSHRC at 742; Op. Ex. 5 at 2; G. Ex. 7, at 3. Thus, there appears to be no change in the underlying facts or law supporting Mine Act jurisdiction. Accordingly, we conclude that the judge did not abuse his discretion in excluding the evidence.

### **C. Limitations on the Presentation of Trial Testimony**

The Secretary argues, and Shamokin agrees, that the judge erred in requiring the parties to submit all direct testimony in the form of affidavits prior to the beginning of the hearing.<sup>11</sup> This is an issue of first impression for the Commission.

Commission Rule 63(b) provides:

The proponent of an order has the burden of proof. A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

29 C.F.R. § 2700.63(b).

The Commission's Procedural Rules and the language of Rule 63 do not explicitly address whether a Commission judge may order the parties to submit written direct testimony in advance of the hearing. Where a regulation is determined to be ambiguous, courts have deferred to the administering agency's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'"), *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted). Moreover, the interpretation of Rule 63 involves a substantial question of

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<sup>11</sup> These consolidated proceedings involve 62 violations. Unpublished Order dated June 23, 2011 at 4-5. The Secretary anticipates presenting the testimony of at least nine witnesses. *Id.* Shamokin is expected to call seven witnesses. *Id.*

policy as to the Commission's administration of its own proceedings. Accordingly, the Commission is entitled to deference regarding a reasonable interpretation of its own rule.

The language of Rule 63(b) can be interpreted either one of two ways. First, the provision can be read as giving a party the right to determine without limitation whether it will present "oral or documentary evidence" at an adjudicatory hearing. Alternatively, the clause "as may be required for a full and true disclosure of the facts" could be read to limit a party's entitlement to "present his case or defense by oral or documentary evidence."

Interpreting Rule 63(b) as giving parties the right to present oral direct testimony avoids potential prejudice to the parties and practical problems. A requirement to submit written direct testimony may substantially limit the parties' ability to fully and fairly present their case. For example, it may be difficult for parties to secure the written testimony of adverse witnesses or witnesses not under the parties' control or direction. A party is able to subpoena such a witness to appear at a hearing under Rule 60, but there is no provision to subpoena a witness to obtain his or her written testimony.

Second, the ability of the respondent to present its defense could be compromised. The respondent would have to prepare its written direct testimony anticipating every possible line of proof that the Secretary could conceivably rely on in her case-in-chief.

Third, it may undermine the judge's ability to assess the credibility of witnesses. The parties are deprived of the opportunity to establish the credibility of their witnesses before adversarial cross-examination.

Fourth, it makes it problematic to adequately present documentary evidence. Frequently, Mine Act cases involve technical maps, diagrams and pictures which require explanation by the witness who is presenting the exhibit.

Interpreting Rule 63(b) as permitting parties the right to choose the form in which evidence is presented is also consistent with the Administrative Procedure Act ("APA"). The language of Rule 63(b) mirrors the language of section 556(d) of the APA, which provides in pertinent part:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . *A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* In rule making or determining claims for money or benefits or

applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 556(d) (emphasis provided).<sup>12</sup>

Thus, section 556(d) specifically permits an agency to adopt procedures for the submission of all or part of the evidence in written form if a party is not prejudiced in doing so, in three limited situations: (1) rulemaking; (2) determining claims for money or benefits; or (3) applications for initial licenses. Clearly, none of these three exceptions applies to Commission adjudicatory hearings. If the preceding sentence of section 556(d) were to be read as permitting the adjudicatory agency the right to dictate the form of evidence, then it would be unnecessary for Congress to have explicitly provided that right in the following sentence where the three specified situations are set forth. Interpreting the pertinent language of section 556(d) as the parties suggest gives full effect to the language of the entire provision. It is an elementary rule of statutory construction that effect must be given to every word, clause and sentence in a statute, and that it should be construed so that effect is given to all its provisions so that no part will be superfluous. Norman J. Singer, 2A Sutherland Statutory Construction, § 46:6 (7th ed. 2011); *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (“However inclusive may be the general language of a statute, it ‘will not be held to apply to a matter specifically dealt with in another part of the same enactment.’”) (citation omitted).

Based on the foregoing, we interpret Rule 63 as giving the parties the right to present oral direct testimony at a hearing and conclude that the judge erred in ruling otherwise. While the Commission’s administrative law judges are accorded broad discretion in their conduct of proceedings before them, such conduct must comply with the Commission’s procedural rules and applicable provisions of the APA.

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<sup>12</sup> The Mine Act makes clear that the APA does not generally apply to Mine Act proceedings, except to the extent provided explicitly under the Act. 30 U.S.C. § 956. Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in pertinent part: “the Commission shall afford an opportunity for a hearing . . . in accordance with section 554 of Title 5.” Section 554(c)(2) of the APA, in turn, makes section 556 applicable to adjudicatory proceedings. 5 U.S.C. § 554(c)(2).

### III.

#### Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Shamokin's Carbon Plant is a "mine" subject to jurisdiction under the Mine Act. We also vacate the judge's order requiring the parties to submit written testimony and remand the case for a hearing in accordance with this decision.

/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

Commissioner Duffy, concurring:

I join my colleagues in affirming the decision below.

First, the judge did not err in concluding that the Shamokin Carbon Plant could be deemed subject to Mine Act jurisdiction. Nor did he err in excluding evidence relating to MSHA's decision not to assert jurisdiction over other facilities that arguably conducted activities similar to those conducted at the Shamokin Plant.

In determining whether or not to subject a particular facility to MSHA rather than OSHA jurisdiction, the Mine Act gives the Secretary broad discretionary power to allocate her personnel and resources as she sees fit so long as the activity conducted at the facility in question falls within the rather extensive scope of mining and mineral processing as defined in sections 3(h) and (i) of the Act.

Moreover, notwithstanding Shamokin's efforts to align itself with facilities deemed by MSHA not to fall within that agency's purview, section 3(h) contemplates that matters of jurisdiction are to be decided on a case-by-case basis. Therefore, the judge's conclusions here are supported by substantial evidence, and I do not find that he abused his discretion in excluding evidence regarding other facilities.

Having said all that, however, just because the Secretary *may* elect to assert Mine Act jurisdiction over a given facility doesn't necessarily mean that she *should* do so, and while the Act gives the Secretary ultimate authority in that regard, I have serious concerns, as a matter of policy, with her decision to do so under current circumstances.

According to MSHA's website, in 1969, the year the original Coal Mine Health and Safety Act was passed, there were 419 anthracite mines that produced 10.25 million tons, and 111 anthracite preparation plants.<sup>1</sup> In 1978, when the current Mine Act took effect, there were 216 anthracite coal mines that produced about 4 million tons, and 62 preparation plants. MSHA's statistics for 2008 list 116 anthracite mines that produced 1.7 million tons, and 41 preparation plants.<sup>2</sup>

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<sup>1</sup> *Table 12A – Count of Operations at Pennsylvania Anthracite Mines in the U.S., 1931-77*, MSHA.GOV, <http://www.msha.gov/STATS/PART50/WQ/1931/wq31an12.asp> (last visited Aug. 24, 2012); *Table 11A – Production in Short Tons*, MSHA.GOV, <http://www.msha.gov/STATS/PART50/WQ/1931/wq31an11.asp> (last visited Aug. 24, 2012).

<sup>2</sup> *Table 01. Number of Anthracite Operations in the U.S., 1978-2008*, MSHA.GOV, <http://www.msha.gov/STATS/PART50/WQ/1978/wq78an01.asp> (last visited Aug. 24, 2012); *Table 02. Anthracite Production in Short Tons*, MSHA.GOV, <http://www.msha.gov/STATS/PART50/WQ/1978/wq78an02.asp> (last visited Aug. 24, 2012).

While the number of actual mines and the actual tonnage produced at those mines has decreased by one-half since 1978, the number of preparation plants has decreased by only one-third during that same period. So it would seem to me that in order to maintain some presence in MSHA District 1, where the anthracite industry is in its last throes, MSHA may be motivated to categorize an enterprise that handles coal in some fashion as a coal preparation facility subject to Mine Act jurisdiction.

That may have all been to the good in 1978, but due to recent legislation and enhanced Congressional oversight, MSHA as an agency has much more on its enforcement plate than it did thirty-five years ago. Moreover, MSHA's website indicates that coal fatalities are currently running 30% higher than they were during the same period last year.<sup>3</sup>

Consequently, it would seem counterintuitive that MSHA would choose to deploy its scarce resources to inspecting what is essentially a bagging operation that could just as easily be processing pet food or fertilizer as barley-sized coal, rather than allocating its inspection force to those facilities where actual and traditional coal extraction and processing are taking place.

As for the second issue on review, I believe the judge erred in requiring the parties to submit written testimony in advance of trial rather than allowing them to proceed to trial for the taking of oral testimony. My colleagues thoroughly explore the practical problems associated with proceeding according to the judge's order. Moreover, I agree with my colleagues that Commission Rule 63(b) affords the parties the right to make their case through oral testimony, and our judges cannot abridge that right without the agreement of the parties.

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

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<sup>3</sup> *2012 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal*, MSHA.GOV, <http://www.msha.gov/stats/daily/d2012bar.pdf> (last updated Aug. 1, 2012).

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 29, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of JUSTIN SLATON	:	
	:	
	:	
v.	:	Docket No. KENT 2012-1298-D
	:	
	:	
STAR MINE SERVICES, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners<sup>1</sup>

DECISION

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

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2006) (“Mine Act”).<sup>2</sup> On August 20, 2012, the Commission received from Star Mine Services, Inc. (“Star”) a petition for review of Administrative Law Judge William Steele’s August 16, 2012 decision and order temporarily reinstating Justin Slaton. On August 23, 2012, the Commission received the Secretary of Labor’s opposition to the petition. For the reasons that follow, we accept the petition for review and affirm the Judge’s order requiring the temporary reinstatement of Mr. Slaton.

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<sup>1</sup> Commissioner Duffy did not participate in this matter.

<sup>2</sup> 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 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.

Slaton was employed by Star, an independent contractor, as an outby support worker at the Cardinal Mine, which was operated by Warrior Coal, LLC (“Warrior”). 34 FMSHRC \_\_\_, slip op. at 3-4, No. KENT 2012-1298-D (Aug. 16, 2012) (ALJ) (“slip op.”). On May 29, 2012, Slaton filed a complaint of discrimination with the Department of Labor’s Mine Safety and Health Administration, alleging in effect that he had been terminated due to his exercise of activity protected by section 105(c) of the Mine Act, 30 U.S.C. § 815(c). *Id.* at 4. On July 6, 2012, the Secretary filed an Application for Temporary Reinstatement in which she requested that Slaton be reinstated to “the position he held immediately prior to his termination or to a similar position at the same rate of pay, same shift assignment, and with the same or equivalent duties.” Application at 2-3. Star requested a hearing, and a hearing was held before the Judge on August 8, 2012.

On August 16, the Judge issued a decision concluding that the application for temporary reinstatement was not frivolously brought. Slip op. at 12. The Judge ordered Star to reinstate Slaton “to his former position as Outby Support Worker at Warrior Coal, LLC’s Cardinal Mine at the same rate of pay and with the insurance benefits that he would have received but-for his discharge.” *Id.*

Star seeks review of the Judge’s order requiring it to reinstate Slaton to his position at Warrior’s Cardinal Mine. Star contends that it does not have the authority to compel Warrior to use specific miners. The operator requests that the Commission dissolve the temporary reinstatement order or modify the language of the order directing reinstatement at Warrior’s Cardinal Mine.

The Secretary opposes the petition and notes that the issue raised by Star on appeal was not raised before the Judge and hence is not properly before the Commission. *See* 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary also argues that Star currently employs miners at the Cardinal Mine, and that Star should be able to accomplish Slaton’s reinstatement. She states that if events occur that establish that Star cannot accomplish Slaton’s reinstatement, Star could pursue the matter with the Judge.

Having reviewed the parties' submissions, we deny the relief sought by Star. Accordingly, we affirm the Judge's August 16 decision temporarily reinstating Slaton. We intimate no view as to the ultimate merits of this case.

/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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW  
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August 30, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of LAWRENCE L. PENDLEY	:	Docket No. KENT 2007-383-D
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding on remand involves a discrimination complaint filed against Highland Mining Company (“Highland”) by the Secretary of Labor on behalf of miner Lawrence L. Pendley under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”).<sup>1</sup> Administrative Law Judge David Barbour concluded that Highland and its agents did not discriminate against Pendley when he was suspended and subsequently discharged in March 2007. 30 FMSHRC 459, 494-96, 498-99 (May 2008) (ALJ). The judge also found no merit to the Secretary’s allegation that Highland retaliated against Pendley by making adverse changes in his working conditions following his return to work under an order of temporary reinstatement in June 2007. *Id.* at 496-98, 499.

The Secretary sought and obtained Commission review of the judge’s determination regarding that suspension and discharge, while Pendley, through private counsel, did likewise

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<sup>1</sup> Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

with respect to the judge's finding that Highland did not discriminate against Pendley following his temporary reinstatement. A Commission majority affirmed the judge's decision on both issues. 31 FMSHRC 61, 83 (Jan. 2009).

Pendley (but not the Secretary) then petitioned the United States Court of Appeals for the Sixth Circuit to review the Commission's decision. In *Pendley v. FMSHRC*, 601 F.3d 417, 429 (6th Cir. 2010), the court granted Pendley's petition for review in part and denied it in part. The court reversed the Commission's order affirming the judge's decision and remanded the matter to the Commission for further proceedings consistent with the opinion issued by the court with regard to both the termination issue and the issue of post-reinstatement working conditions. *Id.* The Commission subsequently sought briefing from the parties on the issues the court raised in its remand order. Unpublished Order at 1-2 (July 2, 2010).

For the reasons that follow, we remand this case to the judge to clarify his findings and analysis with respect to one of the reasons Highland gave for Pendley's termination. Once he has done so, the judge should examine all the record evidence pursuant to established Commission section 105(c) precedent as discussed herein. We also remand the case so that Pendley's allegation of post-reinstatement discrimination can be reexamined by the judge in light of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006).

## I.

### **The Termination Issue**

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

## **A. Factual and Procedural Background**

Pendley's discrimination complaint regarding his termination from Highland was preceded by his earlier discrimination complaint against the operator over its first suspension of him in 2005. In his May 2008 decision, but in a separate docket (KENT 2006-506-D), the judge concluded that Highland, and its mine operations manager at its No. 9 mine at the time, David Webb, discriminated against Pendley when they suspended him from work there on December 21, 2005. 30 FMSHRC at 489-94, 498. With regard to that first suspension, the judge concluded that it was due to Pendley's having made safety complaints, both to Highland management and to the Department of Labor's Mine Safety and Health Administration ("MSHA"). 30 FMSHRC at 491-93. The Secretary offered evidence regarding a number of such incidents involving Pendley. *Id.* at 462-76. While the judge did not agree that every incident rose to the level of protected activity, he concluded that a number of them were safety-related and were thus protected activity under the Mine Act. *Id.* at 491-93.

Moreover, while the company, through Webb, claimed that Pendley's suspension was due to his having entered false information in a sign-in book, the judge found this reason to be pretextual, and that the record instead supported the inference that the incidences of protected activity motivated Highland and Webb to suspend Pendley. *Id.* at 490-91. Consequently, the judge held that both Highland and Webb had discriminated against Pendley. *Id.* at 493-94. The judge subsequently issued a final decision in which he set the back pay due Pendley and imposed a civil penalty against Highland. 30 FMSHRC 500, 502 (June 2008) (ALJ). Highland did not appeal the judge's determinations.

On March 19, 2007, while this first discrimination complaint was still pending before the judge, Pendley was involved in a verbal dispute with the mine office staff over the issue of his overtime pay. 30 FMSHRC at 476. Two days later an even more heated discussion between Pendley and the staff took place. *Id.* at 476-77. Pendley was told by the staff that only Mine Superintendent Lawrence Millburg could resolve the issue, but when Pendley could not locate Millburg and could not immediately board a man trip to descend into the mine, he again returned to resume his verbal confrontation with the staff. *Id.* at 477-78. To prevent Pendley from threatening the staff members further, the employees subsequently locked the office. *Id.* at 478. The judge subsequently found that Pendley was "disruptive, irrational, and orally aggressive." *Id.* at 494.

After leaving the office for the second time, Pendley returned to the mantrip load area, where Jack Creighton was near the controls for the man trip cars. *Id.* at 479. Mine personnel were conducting a hoist safety test at that time, and Creighton had been assigned to monitor the control panel. *Id.* at 479-80. As the judge detailed in his decision, Creighton and Pendley had an extensive history of antagonism (*id.* at 462-71), and as Pendley went to activate the controls to call for the man trip himself, an altercation between the two ensued. *Id.* at 479-80.

Based on the foregoing, Millburg gave Pendley a letter later that day, indicating that Pendley was being suspended with intent to terminate his employment. The termination occurred three days later. *Id.* at 481-82.

The Secretary subsequently alleged in a second, separate complaint in this docket that Pendley's termination constituted unlawful discrimination under section 105(c) of the Mine Act because it was motivated by Pendley's protected activities.<sup>2</sup> In his order temporarily reinstating Pendley, the judge agreed that there were instances in which Pendley had engaged in protected activities of which Highland was aware. 29 FMSHRC 424, 426 (May 2007) (ALJ).

The judge, however, in his May 2008 decision held that Highland had successfully rebutted any prima facie case of discrimination the Secretary had established with regard to whether the operator's decision to discharge the miner was motivated by his protected activity. The judge found that Highland was instead motivated by Pendley's confrontations with office staff and his latest dispute with Creighton, in the two days immediately preceding the operator's decision to suspend and ultimately terminate Pendley from employment at the mine. 30 FMSHRC at 494-95.

At issue in this aspect of the Sixth Circuit's remand are the reasons that Highland gave Pendley for his discharge, which the court summarized as follows:

Millburg's letter gave three reasons for the discipline: "[1] Harassment of office staff; [2] Inteference [sic] with safety check of hoist potentially endangering the safety of those conducting the test; [3] Assaulting another employee [i.e., Creighton]."

601 F.3d at 421 (quoting Gov't Ex. 4).

In his discussion of Highland's rationale for the discharge, the judge stated that the office incidents played "critical roles" in Superintendent Millburg's decision. 30 FMSHRC at 494. He concluded that Pendley's "office confrontations" were a proper basis for Millburg's suspension and discharge of Pendley. *Id.* at 495.

The latter two reasons Millburg cited in the letter involved Pendley's final run-in with Creighton. The judge found that Pendley had charged the slope shack where Creighton was monitoring the control panel during a hoist safety test. *Id.* at 479-81, 495. The judge, while acknowledging that there was a conflict in testimony regarding which miner struck the first blow, concluded that, at a minimum, there was at least an "altercation" between the two men, and that it is one that Pendley could and should have avoided. *Id.* at 495.

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<sup>2</sup> The two cases (involving the 2005 suspension and the 2007 termination) were subsequently consolidated.

Significantly, as to Highland's allegation that Pendley had interfered with the hoist test, the judge opined in a footnote that "I do not find this reason crucial to the validity of the disciplinary action. It was enough, in my view, that Pendley was involved in the oral altercation with the office employees and the physical altercation with Creighton." *Id.* at 495 n.43.

The Commission majority upheld the judge's decision dismissing Pendley's discrimination complaint on both evidentiary (31 FMSHRC at 76-77) and legal grounds. *Id.* at 79-80. In so doing, the Commission stated that "the judge's role in examining the reasons for Pendley's discharge under the Mine Act does not require that he adopt every reason given by the operator in order to sustain the discipline under the collective bargaining agreement." *Id.* at 79.

The court, while otherwise affirming the Commission majority's analysis on Pendley's claim of discriminatory termination, concluded that the Commission's affirmance of the judge on that specific ground departed from Commission precedent without explanation. 601 F.3d at 426. As a result, it remanded the issue to the Commission "to reexamine its decision in light of its own precedent." *Id.* The court identified *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), and *Secretary on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981 (Sept. 2001), as the applicable precedents. 601 F.3d at 426.

## **B. Disposition**

Both the Secretary and Pendley take the position that, because Highland offered three reasons why it discharged Pendley, and the judge only found evidence to support two of those reasons, the Commission's decisions in *Chacon* and *McGill* require that the Commission reverse the judge. Both argue that *McGill* requires that the employer's stated justification needs to be upheld in its entirety before a judge can find that it has established its affirmative defense; otherwise, the Commission would run afoul of its admonition in *Chacon* that a judge is not to substitute his or her own "business judgment" for that of the operator.

Highland submits that, because the court's remand on the termination issue involved only the issue of whether Highland established an affirmative defense, it cannot provide grounds for the Commission to overturn the judge's decision, in that the judge found that the Secretary's case failed at the prima facie case stage. According to Highland, *Chacon* and *McGill* are only relevant to mixed motive cases,<sup>3</sup> and that the part of the judge's decision holding that this is not such a case was affirmed by the Commission and not challenged before the court. Highland further argues that *Chacon* and *McGill* do not establish that every reason given by an operator must be established before discipline can be sustained.

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<sup>3</sup> In a mixed motive case, where it is found that both the miner's protected activity and his unprotected activity motivated the adverse action, an operator may defend by proving that it would have taken the action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982).

Pursuant to the Sixth Circuit’s ruling, we reject Highland’s suggestion that in this case the Commission may view any one of the three reasons that Millburg gave for terminating Pendley’s employment as sufficient by itself to justify Millburg’s actions. The court read the letter setting forth the three reasons, as well as Millburg’s testimony on which Highland now relies, to “suggest that the three reasons were not independently sufficient to motivate the termination.” 601 F.3d at 425.<sup>4</sup> The court later expressly rejected the argument Highland makes here, and concluded that the reasons Millburg gave “have not been shown to be alternative and independent reasons, but are, according to the decision-maker’s testimony, cumulative reasons for termination.” *Id.* at 426 n.4. The court’s factual conclusion on the issue is “the law of the case,” and thus must be accepted by the judge when the case is remanded. *See Eastern Ridge Lime Co.*, 21 FMSHRC 416, 421-22 (Apr. 1999) (holding in remanded case that decision of court of appeals precluded Commission consideration of issue raised by operator).<sup>5</sup>

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<sup>4</sup> At Pendley’s temporary reinstatement hearing (“TRH”), the record of which was incorporated into the later discrimination proceeding (30 FMSHRC at 461), Millburg testified as follows with regard to the letter setting forth the three reasons for Pendley’s discharge:

Q (By Mr. Hammer:) So in your direct testimony, it was my understanding that you were – that you were testifying that your decision was based on cumulative disciplinary actions and this was the final straw. Is that correct?

A Yes. Whenever I issued – whenever I made my decision to issue this – this letter to suspend with intent to discharge, yes, that was – that was my decision on – based on these three – three things right here.

Q Okay. So your cumulative – so your []cumulative things you’re referring to is all events that happened that day, not previous to that; is that correct?

A Right.

Q Okay.

A All three things that – that I laid out here in this letter.

TRH Tr. 212-13.

<sup>5</sup> “Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478, at 874 (2d ed. Supp. 1999).

(continued...)

In light of this holding and the Sixth Circuit’s discussion of our precedents in the discrimination area, we remand this case to the judge so that he can clarify his discussion of Pendley’s interference with the hoist test – the second of three reasons given by Highland for disciplining Pendley.<sup>6</sup> 30 FMSHRC at 495 n.43. Additional analysis of the hoist test justification is critical in reconsidering the case consistent with *Chacon* and *McGill*.

In *Chacon*, the Commission concluded that the judge had improperly rejected an operator’s affirmative defense, in that the judge had applied a subjective standard of fairness and notion of what constituted an appropriate business practice. 3 FMSHRC at 2516. The Commission held that it was enough for the operator to show that it had and was motivated by legitimate business reasons for taking the action that it did. *Id.* at 2516-17.

In *McGill*, the Commission rejected the judge’s reliance on an affirmative defense that had not been relied upon by the operator. 23 FMSHRC at 989. Although the operator had argued that it would have fired the miner for certain unprotected conduct – insubordination, use of profanity, and an unfavorable work record – the judge instead found that the evidence supported an affirmative defense based solely on other unprotected conduct – the exercise of certain collective bargaining agreement rights. *Id.* at 987-88. The Commission rejected the judge’s rationale as having strayed beyond the proper bounds of inquiry into the operator’s affirmative defense. *Id.* at 988-89. Thus, *McGill* stands for the proposition that a judge may not substitute a different affirmative defense for the one relied upon by the operator.

The Court of Appeals’ succinct summary of these holdings is particularly instructive in this case:

Under *McGill* and *Chacon*, the Commission may not disbelieve part of an operator’s justification but nonetheless hold that in the Commission’s own view *part* of the asserted justification was “enough” to support the adverse action. The inquiry turns on what the operator actually believed at the time, not what the

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<sup>5</sup>(...continued)

“The ‘law of the case’ doctrine mandates . . . that where issues have been . . . decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court.” *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993).

<sup>6</sup> It is clear from the Commission’s earlier decision and the court’s decision that there is no outstanding issue regarding the judge’s treatment of the other two reasons given by Highland for Pendley’s termination – his verbal disputes with the office staff during the two incidents and his altercation with Creighton at the man trip control panel soon thereafter. Both the Commission and the court upheld those reasons as well supported by the record evidence.

Commission later reasons the operator *could* have relied upon in making is disciplinary decision.

601 F.3d at 426 (citation and footnote omitted; emphasis in original).<sup>7</sup> Thus, in light of the judge's opaque statement that one of the three reasons provided by Millburg for Pendley's termination (his interference with the hoist test) was *not* crucial to the validity of the termination, the Court of Appeals finding that in fact the three reasons given *were* cumulative rather than independent, 601 F.3d at 426 n.4, and the principles central to our holdings in *McGill* and *Chacon* – that a judge must examine what an operator actually articulated as its reasons for adverse action – we remand for the judge to determine the role that the hoist test did or did not play in motivating the operator to discharge Pendley.

On remand, the judge must explain his reasoning in more detail. He made it clear that he believed that Highland's reliance on Pendley's confrontations with the office staff and his altercation with Creighton was credible and unquestionably sufficient to justify terminating Pendley. However, the judge did not explain why he did not more fully analyze the remaining justification – Pendley's interference with the hoist test – and also make a determination as to whether it was credible. One possibility is that he may have simply concluded that Highland did not need to rely on the hoist test incident. Another possibility is that the judge may have thought that the evidence regarding the hoist test justification was equivocal or that it did not appear to support Highland's reliance on that justification. However, we cannot discern the judge's rationale in this regard.

The critical question for the judge is what Superintendent Millburg believed when he issued the termination letter. With regard to Millburg's state of mind when he issued the termination letter, the judge needs to reconcile his statements regarding the hoist test, 30 FMSHRC at 495 n.43, with other findings in his opinion and with other relevant parts of the record. For example, the judge's finding that "there was no alarm indicator or tag to indicate a hoist test was underway" implies that Pendley might not have been aware of the test. *See id.* However, elsewhere in his decision the judge noted that Millburg, when deciding to discipline Pendley, knew that Pendley may not have been fully aware of the hoist test until Creighton acted to prevent him from reaching the control panel. *See id.* at 481 ("[t]o Millburg, the important

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<sup>7</sup> Unlike our dissenting colleagues, slip op. at 16-21, we see no reason why the principle cited by the Sixth Circuit from *McGill* and *Chacon* should be limited to the context of affirmative defenses. Simply stated, the principle is that the judge must consider and analyze the operator's justifications as the operator sets them forth, and not interpose or substitute justifications which in the judge's view the operator could have relied on. If the operator relies on multiple justifications which are cumulative, i.e., they are not independently sufficient to motivate the adverse action – as the Sixth Circuit determined in this case, 601 F.3d at 425 – then the judge must consider and analyze all of them. This principle is not only consistent with *McGill* and *Chacon*. It is self-evident. Hence, the Sixth Circuit did not "confuse[]" the analysis, as our colleagues assert. Slip op. at 16.

thing was Pendley shoved Creighton and interfered with the test”) (citing Tr. 1007). In addition, Millburg testified that Creighton told him immediately after the incident that Creighton had not told Pendley that the hoist test was occurring until Pendley began shoving him. TRH Tr. 228. Accordingly, Millburg may have disciplined Pendley for interfering with the hoist test regardless of whether Pendley’s interference with the test was intentional or was done inadvertently.

In short, the judge needs to reconsider his findings regarding the hoist test justification in light of all the relevant record evidence, determine whether or not the hoist test justification was credible, and explain in sufficient detail how he reached his conclusions. The judge then needs to consider and explain how his determination on the credibility of the hoist test justification affects his assessment of the operator’s business justification and his overall determination of whether Pendley was discharged in any part for his protected activities.<sup>8</sup> The judge should weigh all the evidence of protected activity, any evidence that Highland was motivated by that protected activity when it terminated Pendley, and any evidence that the employer was solely motivated by Pendley’s unprotected activity to reach a conclusion regarding whether Highland has successfully rebutted the Secretary’s prima facie case by establishing that Pendley’s termination was in no part motivated by protected activity.<sup>9</sup>

## II.

### **Issues Involving the Post-Reinstatement Working Conditions**

#### **A. Factual and Procedural Background**

Following Pendley’s discharge, the Secretary sought and obtained the miner’s temporary reinstatement pursuant to section 105(c)(2) of the Mine Act. *See* 29 FMSHRC at 424, 428. Pendley returned to work at the Highland mine, and he remained working there until after the

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<sup>8</sup> As we noted above, the Sixth Circuit’s ruling that the three reasons listed in the termination letter as the justification for firing Pendley “were not independently sufficient to motivate the termination,” is the law of the case. Slip op. at 6 (quoting 601 F.3d at 425). Given this holding by the court (which our dissenting colleagues do not acknowledge), we cannot agree that the judge’s questioning one of the three reasons (interference with the hoist test) should be regarded as harmless error. Moreover, the dissent’s insistence that Millburg knew that Pendley interfered with the test begs the question (which we remand to the judge) of whether such interference motivated the operator to discharge Pendley.

<sup>9</sup> We reiterate that the 2005 warning letter to Pendley cannot be considered as evidence that Highland was motivated by Pendley’s unprotected activity, because Millburg was not aware of the letter at the time he made his decision to suspend and terminate Pendley. The court upheld the Commission majority’s original conclusion that the judge did not consider it as evidence of Highland’s motivation, but rather merely discussed it to highlight Pendley’s culpability. 601 F.3d at 424.

judge issued his decisions on the merits of the discrimination case the Secretary brought on Pendley's behalf. While review of those decisions was pending the first time before the Commission, the judge, at the request of the parties, modified the order of reinstatement to reflect that Pendley was to be economically reinstated going forward. Unpublished Order (Aug. 14, 2008).

Prior to the merits hearing, the Secretary filed an amended complaint alleging that Highland had further discriminated against Pendley with respect to the work Pendley was assigned and other conditions of his employment when he returned to the mine under the temporary reinstatement order. 30 FMSHRC at 461. The judge concluded that while it had been demonstrated that "[s]ome of [Pendley's] tasks may have been different from those he had before his suspension and termination," the Secretary had failed to establish that the changes rose to the level of adverse action against Pendley. *Id.* at 496-98. Consequently, the judge held that "[t]he Secretary's allegations of post-reinstatement discrimination . . . are found to be totally lacking in merit." *Id.* at 499 (emphasis omitted).

Before the Commission on appeal, Pendley took issue with the judge's conclusion as to whether three of the aspects of the post-reinstatement working conditions constituted adverse action. With regard to two of those – the allegation that Highland had "bird dogged" Pendley upon his reinstatement and had publicly posted a letter identifying Pendley's specific job duties during his reinstatement – the Commission unanimously upheld the judge. 31 FMSHRC at 81, 82. Pendley did not appeal those rulings to the Sixth Circuit; therefore, those issues cannot be raised on remand.

The third issue involved the scope of the work Pendley was assigned during his temporary reinstatement, which the Secretary had argued differed from the work Pendley was doing prior to his discharge. A majority of the Commission upheld the judge's ruling that Pendley's new job duties were not adverse action and thus could not provide the basis for a discrimination claim under the Mine Act. *Id.* at 81; 30 FMSHRC at 497. The majority affirmed the judge's findings that the new duties were within Pendley's job classification and did not entail more responsibility than he could handle within an eight-hour shift. 31 FMSHRC at 81; 30 FMSHRC at 497. The majority also affirmed the judge's conclusion that there was no evidence to support a finding that the miner's new assignments were motivated by his protected activity. 31 FMSHRC at 81; 30 FMSHRC at 497. Then-Commissioner Jordan dissented from the majority's upholding of the judge on these issues. 31 FMSHRC at 86-88.

In its decision, the Sixth Circuit panel majority agreed in large part with Commissioner Jordan's dissent on this aspect of the case. 601 F.3d at 426-27. The court held that the Commission majority, in concluding that post-reinstatement discrimination was not established because Pendley's work assignments were not outside his job classification and could be completed within an eight-hour shift, had failed to reconcile that decision with applicable Mine Act precedent. *Id.* The court majority specifically cited *Secretary on behalf of Glover v. Consolidated Coal Co.*, 19 FMSHRC 1529, 1531-37 (Sept. 1997), and stated that on remand the Commission should reexamine its reliance on Pendley's job classification in light of the case,

and consider its reliance on Pendley's ability to complete the work within his shift in light of Commission precedent and the purposes of the Mine Act. 601 F.3d at 427.

The court further agreed with Commissioner Jordan that the holdings of the Commission majority with regard to the job description and work-shift questions called into question the majority's conclusion that there was no evidence to support a finding that the miner's new assignments were motivated by his protected activity. *Id.* at 427. Citing the Commission's decision in *Secretary on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002), that the coincidence in time between protected activity and adverse action may show discriminatory intent, the court instructed the Commission that, if it does find that the changes in Pendley's working conditions established that adverse action had been taken against him, on remand it also would need to reconsider whether discriminatory intent had been established. 601 F.3d at 427-28.

Consequently, the Commission's briefing order on remand requested that the parties discuss the cited holding in *Glover* and apply it to the facts of this case. July 2, 2010 Unpublished Order at 2. The Commission also directed the parties to discuss whether Highland's post-reinstatement treatment of Pendley constituted adverse action under the Mine Act and whether, if so, the proximity in time between Pendley's protected activity and the adverse action establishes discriminatory intent under *Colorado Lava*, 24 FMSHRC at 354.

## **B. Disposition**

With regard to the question of whether the post-reinstatement working conditions to which Pendley was subjected constituted adverse action by Highland against the miner, the Secretary takes the position that the Commission's decision in *Glover* mandates reversal of the judge's conclusion that adverse action against Pendley had not been established. Similarly, Pendley argues that, even prior to *Glover*, the Fourth Circuit had upheld a Commission judge's ruling that less desirable work assignments can constitute adverse action for purposes of a retaliation claim under the Mine Act. Both the Secretary and Pendley also argue that the record contains evidence relevant under *Chacon* that tends to establish that Highland, in assigning the new tasks to Pendley, was motivated by the miner's protected activity, including the most recent instance of such activity, i.e., exercising his rights under section 105(c)(2) and returning to work under an order of temporary reinstatement.

Highland takes the position that the tasks it assigned to Pendley after his reinstatement were much like the tasks he had been previously responsible for, and that, unlike in *Glover*, any new tasks Pendley was assigned were not dangerous. The operator further contends that even if Pendley's new assignments could be considered adverse action against him, the record supports the conclusion that Highland was not motivated by Pendley's protected activity in any part in assigning the new tasks to the miner.

In enacting the Mine Act, Congress made clear its intent that section 105(c) “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (“*Leg. Hist.*”). Moreover, in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), the Commission held that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against “not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference . . . .” *Id.* at 1478 (quoting S. Rep. No. 95-191, at 36, *Leg. Hist.* at 624).

As noted by the court in its decision, under the Mine Act the Commission has defined “adverse action” to constitute “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 428 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). At the same time, the Commission has recognized that, while “discrimination may manifest itself in subtle or indirect forms of adverse action,” at the same time “an adverse action ‘does not mean any action which an employee does not like.’” *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so – such as a discharge or suspension would be – the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. “Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Id.* at 1848 n.2.

It is within this context that the Commission decided *Glover*. The judge in *Glover* had held that the transfer of two miners from their work as “scooter barn” mechanics to positions as mine section mechanics constituted adverse action against the miners because the new positions required the miners to do “less desirable and more hazardous work.” 17 FMSHRC 957, 961-64 (June 1995) (ALJ). With regard to whether adverse action for purposes of the Mine Act had been established, it was enough for the Commission that there was substantial record evidence that the transfer to section mechanic duties meant that the miners’ job assignments had become more dangerous. 19 FMSHRC at 1534-35. Transfer to a working section meant the miners would be working on high-voltage electrical equipment and would be exposed to hazards such as dust, methane, and roof falls. *Id.* at 1531, 1534-35.

Importantly, in *Glover* the Commission noted that the transfer of the two miners to a different section of the mine “did not result in a change in job classification or salary rate.” *Id.* at 1531. Consequently, *Glover* demonstrates that the assignment of new job duties within a job classification can nevertheless still constitute adverse action under the anti-discrimination provisions of the Mine Act. It therefore was inconsistent with *Glover* for the Commission to narrowly focus on the job classification factor in determining whether Highland had taken adverse action against Pendley during the time he was reinstated.

The previous Commission majority also upheld the judge because there was no evidence that Pendley was unable to complete his new duties during his shift. 31 FMSHRC at 81; 30 FMSHRC at 497. The court held that this was reversible error and directed that on remand the Commission examine its reliance on such a consideration in light of Commission precedent and the purposes of the Mine Act. 601 F.3d at 427. The court noted that “[i]t is easy to imagine dangerous or arduous but quick-to-complete tasks that would constitute adverse action.” *Id.* In addition, in *Hecla-Day* the Commission was clear that, in determining whether adverse action has been taken against a miner, it will closely examine the surrounding circumstances to determine the nature of the action. 6 FMSHRC at 1848. Focusing simply on whether Pendley could perform all of the assigned tasks within his work shift would thus also run counter to the Commission’s directive in *Hecla-Day*. In light of the foregoing, the Commission, by relying heavily on the fact that Pendley could complete his new assignments during his shift, erred in its previous decision in this matter. A broader analysis is necessary to determine in discrimination cases whether an operator has taken an adverse action against a complaining miner. As the Sixth Circuit noted, the Commission has defined “adverse action” as “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 438 (quoting *Hecla Day*, 6 FMSHRC at 1847-48).

The test articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. at 57, should be applied in Mine Act cases to ascertain whether adverse action occurred.<sup>10</sup> In *Burlington Northern*, a Title VII retaliation case,<sup>11</sup> the Supreme Court held

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<sup>10</sup> Indeed, this standard was suggested to the Sixth Circuit by both Pendley and amicus curiae United Mine Workers of America (“UMWA”), but was rejected by the court because its applicability had not been previously considered by the Commission. 601 F.3d at 428. Our consideration here now cures that deficiency.

<sup>11</sup> We look, as we have in the past in resolving questions involving the anti-discrimination provisions of the Mine Act, to case law under similar federal anti-retaliation provisions, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”). *See, e.g., Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 n.7 (May 2011); *Magma Copper*, 4 FMSHRC at 1939 n.7.

Looking to case law under Title VII is particularly appropriate because of the context in which Pendley’s specific claim here arises: his claim that the operator is retaliating for his having brought a discrimination case against it. Title VII contains a provision which prohibits an employer from “discriminating against” an employee because that individual “opposed any practice” made unlawful by Title VII or “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a). Pendley’s further complaint that he was subjected to retaliation by Highland during his reinstatement is similar to a complaint that an employee would bring for being “discriminat[ed] against” for having made “a charge,

(continued...)

that the term “discriminate against” included those employer actions taken against an employee that would have been “materially adverse to a reasonable employee.” *Id.* By this, the Court meant “that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.*

The Court explained that it referred to reactions of a *reasonable* employee because it believed that the provision’s standard for judging harm must be objective, and emphasized that the significance of any given act of retaliation will often depend upon the particular circumstances, acknowledging that “an act that would be immaterial in some situations is material in others.” *Id.* at 68-69 (citations omitted).

This standard is eminently workable in section 105(c) cases. It acknowledges that a variety of actions may be taken by an operator that to a reasonable miner seeking to engage in protected activity under section 105(c)(1) would be retaliatory. It also recognizes that retaliatory action does not only affect the targeted miner, but other miners on whom it could have a chilling effect regarding the reporting of safety hazards. Alternative approaches setting a standard defining adverse action, such as requiring that new duties be more difficult or onerous, neglect to take into account the myriad of ways in which a supervisor can show displeasure by changing a miner’s tasks. Such a test would, for instance, preclude a finding of adverse action if a foreman ordered a miner to perform tasks that were clearly punitive and useless, but not particularly dangerous.

The judge should look anew at the evidence and arguments properly before him<sup>12</sup> and apply the *Burlington Northern* standard to reach a conclusion regarding whether those conditions were materially adverse to Pendley.<sup>13</sup> If the judge finds that Pendley’s post-reinstatement working conditions constituted adverse action, he should then address the issue of the operator’s motivation under *Chacon* and, as noted by the Sixth Circuit, *Colorado Lava*. See 601 F.3d at 428. In this regard, we note that Pendley’s bringing a discrimination complaint to MSHA and consequently returning to work by way of temporary reinstatement was unquestionably “the exercise . . . of [a] statutory right afforded by [the Mine] Act” within the meaning of section 105(c)(1).

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<sup>11</sup> (...continued) testified, assisted, or participated in” a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a).

<sup>12</sup> The judge should consider the Secretary’s argument below that Highland’s treatment of Pendley during his reinstatement would have a chilling effect on those miners who witnessed the treatment and who in the future may be in a position to exercise rights under the Mine Act or bring safety or other issues to attention of mine management. S. Post-Hr’g Br. at 52-54.

<sup>13</sup> We note that in *Burlington Northern*, the Court stated that a transfer to job duties which were “more arduous and dirtier” supported a jury finding that the transfer “would have been materially adverse to a reasonable employee.” 548 U.S. at 71.

### III.

#### Conclusion

For the foregoing reasons, we remand this case to the judge for him to determine, consistent with this opinion, whether Highland discriminated against Pendley in violation of the Mine Act when it terminated Pendley from employment in March 2007 and whether it further discriminated against Pendley when he returned to work upon an order of temporary reinstatement.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

Commissioners Duffy and Young, dissenting:

We respectfully disagree with our colleagues' decision to remand this case to the judge for further consideration in light of the Sixth Circuit's opinion. Despite the court's instructions to consider applicable Commission precedent, we believe that the record compels only one conclusion and thus we see no need to remand this case. Accordingly, we would affirm the judge's holding that the operator did not discriminate against Pendley. We first address the issue of Pendley's termination which the court remanded to the Commission to address in light of applicable Commission precedent.

**A. Issue on Remand Concerning Pendley's Termination**

Although the Sixth Circuit ruled that the Commission impermissibly ignored its own precedents in analyzing Pendley's claim of discriminatory termination, we disagree. The court criticized the Commission for its failure to explain its perceived departure from its own precedent. *Pendley v. FMSHRC*, 601 F.3d 417, 426 (6th Cir. 2010). Thus, we will now provide the explanation the court deemed missing from the Commission's initial decision.<sup>1</sup>

We believe the specific cases cited by the court are inapplicable to the circumstances of this case. First, we believe that the court confused the prima facie case analysis, which is used in all discrimination cases, with the affirmative defense analysis, which is used in mixed motive cases, under Commission case law. In particular, it applied the affirmative defense analysis in a case where the judge did not find that the operator's action was motivated in any part by protected activity. Second, we believe that even if the language in *Chacon* cited by the court applied here, there is no basis for overturning the Commission's conclusion that no discrimination occurred. Indeed, to the extent that the judge ran afoul of the cited language in commenting on the operator's justification for disciplining Pendley, any error is harmless.

Although the court believed that the Commission appeared to depart from precedent in upholding the judge, the court is mistaken in remanding the case on this point. That is because the portions of the precedents the court cites are only relevant to the affirmative defense stage of a discrimination proceeding, and the judge's decision did not reach the issue of whether Highland had established an affirmative defense. Instead, the judge decided either that the Secretary had failed to establish a prima facie case that Pendley's termination was motivated in any part by his protected activity, or that Highland rebutted the Secretary's case by showing that the termination was in no part motivated by Pendley's protected activity. *See* 30 FMSHRC 459, 494 (May 2008) (ALJ) (judge stated that he disagreed with the Secretary's contention that Highland's knowledge of Pendley's protected activities motivated the adverse action), 494-95 (detailing Pendley's

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<sup>1</sup> We note that the majority fails to do as the court instructed – “to reexamine its decision in light of its own precedent” (601 F.3d at 426) – and simply remands the case to the judge to consider the law without providing any guidance. Slip op. at 5-9.

actions over the two days previous to the decision to suspend and terminate him that the judge found persuasive as to the reasons that Highland decided Pendley's employment should be terminated).

The Secretary had argued before the Commission that the judge had erred in his analysis of Highland's motivation, in that he had engaged in an inadequate examination of the factors that had been found in *Chacon* and other cases to be relevant regarding motivation. S. Br. at 19-26, 32-33. The Commission, however, rejected those arguments, holding that the judge had properly found that the direct evidence of non-discriminatory reasons for Pendley's discharge outweighed the circumstantial evidence of discriminatory intent on which the Secretary based her case of motivation. 31 FMSHRC 61, 79-80 (Jan. 2009) (citing *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 329-31 (Apr. 1998)).

We see nothing in the court's decision that disturbs this portion of the Commission's decision. The Sixth Circuit panel began its analysis by affirming the Commission's *Pasula-Robinette* framework as the proper one for deciding discrimination cases. 601 F.3d at 423 (citing *Collins v. FMSHRC*, 42 F.3d 1388, 1994 WL 683938 (6th Cir. 1994) (unpublished per curiam table decision)). However, unlike the Commission, which addressed the affirmative defense issue on an alternative basis in addition to upholding the judge on the Secretary's failure to establish motivation,<sup>2</sup> the court did not distinguish between the different elements of the *Pasula-Robinette* framework. Rather, the court addressed the issues raised on appeal by Pendley with little regard to whether the issue was relevant solely to whether motivation had been established, solely to the issue of whether an affirmative defense had been established, or to both issues.

Two issues raised by Pendley before the court went solely to whether the Secretary had established a prima facie case of discrimination under the Mine Act. First, Pendley argued that the Commission erred in permitting the judge to consider a 2005 warning letter to Pendley of which Millburg was not aware of at the time he made his decision. The court disagreed, and upheld the Commission's conclusion that the judge did not consider it as evidence of Highland's motivation, but rather merely discussed it to highlight Pendley's culpability. 601 F.3d at 424.

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<sup>2</sup> See 31 FMSHRC at 80 (“[m]oreover, even if the judge had found that Millburg was motivated in any part by Pendley's protected activities, the record amply supports the conclusion that Highland would have taken the adverse employment action in any event because of unprotected activity alone.”).

The court also rejected Pendley's suggestion that the judge erred, once he found that Pendley and Creighton had engaged in an altercation, in not considering the disparity in Highland's treatment of Pendley and Creighton (who was not discharged for his role in the altercation) as evidence of improper motivation on the part of Highland. *Id.* at 425. The court concluded that the judge handled the issue correctly, given that Pendley and Creighton could not be considered to be similarly situated with respect to their behavior immediately preceding the incident. *Id.*

At that point, the court turned to the Commission's review of the judge's decision. The passage in the Commission's decision that the court took issue with – “the judge's role in examining the reasons for Pendley's discharge under the Mine Act does not require that he adopt every reason given by the operator in order to sustain the discipline under the collective bargaining agreement” – was clearly part of the Commission's prima facie case analysis. *See* 31 FMSHRC at 79. The court, however, reviewed that statement not in light of Commission prima facie case precedent, but under the affirmative defense case law of *McGill* and *Chacon*. 601 F.3d at 425-26.

In *McGill*, the judge found that the Secretary had established a prima facie case of discrimination, and the Commission upheld the judge's conclusion. 23 FMSHRC at 986-87. However, the judge did not address the affirmative defense relied upon by the operator — that it would have fired the miner in any event for unprotected conduct (his insubordination and use of profanity in a confrontation with a supervisor, along with his past work record). *Id.* at 988 & n.5. Instead, he found that the evidence established that the operator fired the miner for other unprotected conduct, primarily having to do with his exercise of collective bargaining agreement rights. *Id.* at 988. The Commission rejected the judge's finding of an affirmative defense on such grounds as having strayed beyond the proper bounds of inquiry into whether such a defense had been established. *Id.* at 988-89. Thus, *McGill* stands for the proposition that, in determining whether an operator has established an affirmative defense, a judge may not substitute a different affirmative defense for the one relied upon by the operator.

In *Chacon*, the Commission upheld the judge's conclusion that the Secretary had established a prima facie case of discrimination. 3 FMSHRC at 2510-14. With regard to the judge's rejection of the operator's affirmative defense, the Commission concluded that the judge's analysis was improper, in that he applied a subjective standard of fairness and notion of what constituted an appropriate business practice under the circumstances. *Id.* at 2516-17. The Commission held that it was enough for the operator to show that it had legitimate business reasons for taking the action that it did. *Id.* Accordingly, *Chacon* stands for the proposition that, in analyzing an operator's affirmative defense, a judge may not second-guess the operator's business judgment as to whether an employee's action warranted a disciplinary measure.

From the court's decision in this case, it is clear that the court was focusing on the affirmative defense portion of both *McGill* and *Chacon*. The court stated that:

[i]n analyzing an operator's asserted justification for taking adverse action under *Pasula-Robinette*, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. [*Chacon*]. The Commission may not impose its own business judgment as to an operator's actions. *Id.* Further, under [*McGill*], the Commission may not substitute its own justification for disciplining the miner over that offered by the operator.

601 F.3d at 425. In remanding the case to the Commission, the court stated:

The Commission's decision is inconsistent with its own case law. Under *McGill* and *Chacon*, the Commission may not disbelieve part of an operator's justification but nonetheless hold that in the Commission's own view *part* of the asserted justification was "enough" to support the adverse action. The inquiry turns on what the operator actually believed at the time, not what the Commission later reasons the operator *could* have relied upon in making its disciplinary decision.

*Id.* at 426 (footnote and citation omitted) (emphases in original).

It is significant that the court's citations to the Commission cases are from the affirmative defense stages of those cases, not the prima facie case stages. Moreover, in their briefs on remand both the Secretary and Pendley describe, from the outset, the issue remanded by the court as going to the validity of Highland's affirmative defense. S. Remand Br. at 1-2; P. Remand Br. at 1. The Secretary in her response brief also does not directly address Highland's point (H. Remand Br. at 1-3) that the court's remand involves an issue that does not provide a basis to overturn the judge's ruling that the Secretary failed to establish a prima facie case of discrimination.<sup>3</sup>

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<sup>3</sup> The Secretary appears to suggest in her response brief that, given the decisions of the Commission and the court, her failure to establish a prima facie case is not relevant on remand. S. Resp. Remand Br. at 3-4 & n.3. We do not agree. Not only the Commission, but also the court set forth the *Pasula-Robinette* framework as that which would govern the disposition of the case. The Secretary provides no convincing basis for ignoring her failure in this regard.

The reasons an operator gives for taking an adverse action against a miner are generally relevant to both the prima facie case analysis and, if it is reached, the operator's affirmative defense. *See, e.g., Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1071-72 (prima facie case analysis), 1073-77 (affirmative defense analysis) (May 2011). However, that does not mean that Commission precedent with respect to one analysis is equally relevant to the other analysis. The Commission has been clear that the validity of an operator's affirmative defense is reached only if a prima facie case has been established. *See Sec'y on behalf of Glover v. Consolidated Coal Co.*, 19 FMSHRC 1529, 1537 (Sept. 1997); *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 526 (Apr. 1991). It should be noted, however, that the Commission and its judges have often addressed affirmative defense issues even after finding that the operator's motivation was not established to be discriminatory, in the event that the finding of a lack of motivation is overturned on review.

The distinction between the precedents applicable to the different stages arises because of the fundamental differences in the two stages of analysis. At the prima facie case stage, the operator's reasons for disciplining the miner are examined, as part of the overall analysis of its motivation, for evidence of disparate treatment of the miner by the operator relative to other similarly situated miners, or other evidence that the action the operator took was pretextual in nature. *See generally Chacon*, 3 FMSHRC at 2510, 2512-13. The operator's reason or reasons for the action are not subject to rigorous scrutiny, because at the prima facie case stage the burden of persuasion remains with the Secretary (or, in the absence of the Secretary, the miner).<sup>4</sup> In contrast, at the affirmative defense stage, the operator's reasons are subject to greater scrutiny because the judge must have necessarily already concluded that the adverse action was motivated, at least in part, by the miner's protected activity.

In the instant case, the judge examined the operator's reasons for discharging Pendley, and found that they constituted sufficient evidence of a lack of discriminatory motivation for purposes of the prima facie case stage of the proceeding. He found evidence supporting all three reasons Millburg gave: (1) the miner's confrontations with office staff (30 FMSHRC at 494-95); (2) the physical incident between Pendley and Creighton immediately following the second of those confrontations (*id.* at 495); and (3) and that the incident occurred at a mine hoist during a safety check of the equipment there (*id.* at 495 n.43).

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<sup>4</sup> For instance, in *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984), as part of the prima facie case analysis, the court did not look to whether the operator demonstrated that the employee was actually incompetent; that analysis was left for the later affirmative defense stage of the case, where the operator had the burden of proof. Instead, for the court it was enough at the prima facie case stage that the employee's discharge for incompetence contradicted previous assurances from the company president that the employee had job security, and thus was a part of the evidence on unlawful motivation on the operator's part.

The judge also reached conclusions regarding the extent to which Highland could rely on the reasons as a basis for disciplining Pendley. The judge found: (1) that the confrontations with the office staff actually occurred, were quite serious in that Pendley put the office employees in fear for their safety, and thus were critical to Millburg's decision to terminate Pendley's employment (*id.* at 494-95); and (2) that the incident with Creighton, while it may not have risen to the level of the term "assault" used by Millburg was at least an altercation for which Pendley should bear the brunt of responsibility. *Id.* at 495. However, the judge concluded that Pendley's interference with the hoist test was not "crucial to the validity of the disciplinary action." *Id.* at 495 n.43. He also credited Pendley's testimony that there was no alarm indicator or tag to indicate that a hoist test was underway. *Id.*

Relying on the Commission's rulings in *McGill* and *Chacon* on the limits of an examination of an affirmative defense, the court took issue with the judge's statement that the first two reasons were enough, in his view, to justify Highland's discharge of Pendley. 601 F.3d at 425-26. However, the judge did not make that statement as part of an affirmative defense analysis; he made it during his *prima facie* case analysis in examining Highland's motivation. The judge never reached the issue of the operator's affirmative defense and, accordingly, he never conducted an affirmative defense analysis.

The judge may have been ill-advised to speculate on whether Highland would have discharged Pendley regardless of the hoist test interference accusations, because it was unnecessary to his conclusion on motivation. However, nothing in either *McGill* or *Chacon* suggests that the judge's findings that may have been improper in an affirmative defense analysis would have been likewise improper in a *prima facie* case analysis. Moreover, and importantly, the court did not hold, and the Secretary does not argue, that such a conclusion is mandated by the terms of the Mine Act's anti-discrimination provisions.

When this case was previously before the Commission, the Secretary argued that Pendley did not knowingly interfere with the hoist test and that Millburg's inclusion of this reason in his letter demonstrated that Highland's discharge of Pendley was a pretextual explanation. *See* S. Br. at 25-26. According to the Secretary, it was thus error for the judge to nevertheless conclude that Pendley's unprotected conduct was the sole reason for his discharge by Highland. *Id.* at 30.

In upholding the judge's *prima facie* case analysis, the Commission rejected the notion that there was sufficient evidence of pretext to disturb the judge's conclusion regarding motivation. It was at that point that the Commission went on to make the statement that the court found to be possibly contrary to Commission precedent. *See* 31 FMSHRC at 78-79. During the *prima facie* case stage, it is not necessary that the operator be found to have been entirely correct regarding the employee's actions, as the burden is not on the operator.

Accordingly, we believe that the Commission was on solid ground in making the statement in question, *in the context of the prima facie case*.<sup>5</sup>

Even if we assume that the language in *Chacon* applied at the prima facie case stage, we do not believe that the language would provide a basis for reversing the Commission's decision in this case. The judge in his footnote discussion opined that Pendley's interference with the hoist test was not "crucial" to the operator's justification for terminating Pendley's employment. 30 FMSHRC at 495 n.43. The Secretary argues that this resulted in the judge "reformulating" the grounds on which Highland defends its decision to terminate Pendley, which she maintains is contrary to *Chacon*. S. Remand Br. at 5. To reach that question, however, it is first necessary to decide whether the judge was correct in discounting one of the reasons Highland gave for disciplining Pendley. Our reading of *Chacon* is that the judge erred in doing so.

The relevant language of *Chacon* provides that, if an operator's justification survives pretext analysis, i.e., it "is not plainly incredible or implausible," a judge should not question an operator's business justification for an adverse action because the judge has a different view regarding whether the operator's judgment was "just" or "wise" or comports with the judge's "sense of fairness." 3 FMSHRC at 2516-17. Instead, the question is "whether the reason was enough to have legitimately moved that operator to have disciplined the miner." *Id.* at 2517 (citation omitted).

In light of this language from *Chacon*, the judge should not have included in his opinion the footnote discussion discounting the importance of Pendley's interference with the hoist test. That footnote discussion directly and impermissibly questioned Highland's business judgment as to whether Pendley's actions in connection with the hoist test warranted discipline.

Moreover, as the Sixth Circuit itself stated, "[t]he inquiry turns on what the operator actually believed at the time, not what the Commission [or a Commission judge] later reasons the operator *could* have relied upon in making its disciplinary decision." 601 F.3d at 426 (citing *Pasula*, 2 FMSHRC at 2800) (emphasis in original). The judge found that Millburg, when deciding to discipline Pendley, knew that Pendley may not have been fully aware of the hoist test until Creighton acted to prevent him from reaching the control panel. *See* 30 FMSHRC at 481 ("[t]o Millburg, the important thing was Pendley shoved Creighton and interfered with the test") (citing Tr. 1007); TRH Tr. 228 (Millburg stating that Creighton told him immediately after the incident that he had not told Pendley that the hoist test was occurring until Pendley was shoving

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<sup>5</sup> *McGill* and *Chacon* remain good law within their intended context: the operator's establishment of an affirmative defense. To establish an affirmative defense, the burden is on the operator to show that it would have taken the disciplinary action that it did for the unprotected activity alone. That being the issue, the fact finder's focus is on: (1) what conduct of the miner prompted the operator to act, which necessitates a clear position by the operator on the issue; and (2) whether the evidence establishes that the operator in question would have taken such action with respect to a miner who had not engaged in protected conduct.

him). In other words, the record indicates that Millburg believed that Pendley had either intentionally or negligently interfered with the hoist test. Under *Chacon*, the judge was not entitled to second-guess Highland's judgment as to whether Pendley's actions at the hoist test site warranted discipline.

It is significant that neither the judge nor the Commission has found that the hoist test justification was "plainly incredible or implausible" or otherwise proffered in bad faith.<sup>6</sup> Instead, the judge opined that the hoist test interference point was not "crucial" and implied that Pendley may not have been aware of the test. The key statement in the footnote is the following: "It was enough, in my view, that Pendley was involved in the oral altercation with the office employees and the physical altercation with Creighton." 30 FMSHRC at 495 n.43. In other words, the judge believed that the other two incidents so strongly supported the operator that it was not even necessary to fully analyze the remaining justification. However, as discussed above, the judge's approach inadvertently ran afoul of *Chacon* because the result was that the judge rejected part of the operator's business justification without any factual or legal basis for doing so.

Our colleagues, in instructing the judge on remand "to determine the role that the hoist test did or did not play in motivating the operator to discharge Pendley," would have him focus on "what Superintendent Millburg believed when he issued the termination letter." Slip op. at 8. Even if the judge were to address the evidence regarding Millburg's state of mind, at the very least, the evidence clearly supports the conclusion that Millburg knew that Pendley interfered with the hoist test. 30 FMSHRC at 481; TRH Tr. 228. Although the judge's statement that testimony shows that "there was no alarm indicator or tag to indicate a hoist test was underway" (30 FMSHRC at 495 n.43) implies that Pendley may not have been aware of the test, whether Pendley knew a test was underway, i.e., whether he intentionally or inadvertently interfered with the test, is irrelevant to Millburg's state of mind. Moreover, the judge did not address Millburg's testimony that Creighton, by staying near the control panel, was thus serving as the equivalent of a tag, which is a practice the company had engaged in before. TRH Tr. 180, 207-08. Hence, regardless of Pendley's state of mind, the evidence supports the conclusion that at the time that Millburg issued the termination letter, Millburg knew that Pendley had created a safety hazard by interfering with the hoist test. As the Commission stated in *Chacon* and *McGill*, it is not the role of the judge or the Commission to second-guess whether this proffered reason for discharging Pendley is adequate or justified.

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<sup>6</sup> In reviewing defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices."

*Turner*, 33 FMSHRC at 1072 (citations omitted).

In short, the judge's footnote discussion questioning Highland's business judgment was either error or, at the very least, dicta. To the extent that it was error, it should be regarded as harmless error because it did not affect the judge's ultimate conclusion that the Secretary had failed to establish a prima facie case. Accordingly, we believe there is no basis for changing the Commission majority's holding that Pendley failed to meet his burden of establishing unlawful discrimination.<sup>7</sup>

## **B. Post-Reinstatement Changes in Pendley's Job Duties**

The court instructed the Commission to reexamine our reliance on Pendley's job classification in light of our decision in *Glover*, 19 FMSHRC at 1537, and consider our reliance on Pendley's ability to complete the work within his shift in light of Commission precedent and the purposes of the Mine Act. 601 F.3d at 426-27. The Secretary's adverse action claim boils down to the following: "Pendley's duties were changed and he was given more work than an employee would be able to accomplish in his normal hours and more than other employees received." S. Post-Hr'g Br. at 52 (citing Pendley at Tr. 184-85; Alvey at Tr. 521; Baxter at Tr. 434). According to the Secretary, this was sufficient to establish adverse action, because in *Glover* the Commission held that "assignments [that] entailed 'less desirable' and 'more arduous or difficult' work" constituted adverse action. S. Remand Br. at 12.

As an initial matter, we do not necessarily agree with the Secretary that the Commission held in *Glover* that the assignment of more difficult or less desirable tasks constitutes adverse action. We read the Commission's decision in *Glover*, as opposed to the judge's decision, to be focused almost exclusively on the danger posed by the new work assignments. While the Commission held that substantial evidence supported the judge's finding that the miners' new duties also involved less "desirable work," in that they were expected to perform heavy lifting (19 FMSHRC at 1534), the Commission, in upholding the conclusion that adverse action was established, relied only on the findings of the dangers and hazards posed by the work. *See id.* at 1534-35.

We believe that it is simply not enough that the new assignments be ones that are "less desirable," as suggested by the Secretary and Pendley. *See* S. Remand Br. at 7, 9; P. Remand Br.

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<sup>7</sup> We also believe that, notwithstanding the Sixth Circuit's discussion, the *McGill* decision clearly does not apply to this case, even assuming that *McGill* does generally apply to the prima facie case stage of a case. In *McGill*, the Commission ruled that it was impermissible for the judge to conclude that an operator had established an affirmative defense where the judge substituted a different affirmative defense for the affirmative defense that the operator had asserted at the trial and relied upon in presenting its evidence. 23 FMSHRC at 988-989. However, in the instant case, the judge did not substitute a different rationale or justification for the operator's disciplinary action. Instead, he merely stated that he believed that one element of the operator's justification was not "crucial" to that justification.

at 5. In *Glover*, the Commission affirmed its earlier statement in *Secretary on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1533 (Aug. 1990), that adverse action “is not simply any operator action that a miner does not like.” 19 FMSHRC at 1535. In our opinion, using terms like “desirable” in comparing work assignments for purposes of determining whether adverse action occurred comes too close to the admonition in *Jim Walter*.<sup>8</sup>

Instead, we find instructive the example the court gave regarding the reassignment of a miner to spend his day cleaning lavatories. The court characterized such work as a “more onerous and distasteful task,” and suggested that just because the work was not dangerous did not mean the reassignment to it could not qualify as adverse action under the section 105(c). 601 F.3d at 427 n.5. This is consistent with court precedent under Title VII. *See Longstreet v. Ill. Dep’t of Corrections*, 276 F.3d 379, 383-84 (7th Cir. 2002) (requiring that for a reassignment to constitute adverse action, evidence must be sufficient to establish that new duties were “more onerous”).

The question of whether the evidence regarding Pendley’s new assignments meets the standard for adverse action remains. As noted, before the judge the Secretary argued little more than that Pendley was given more than he could accomplish in his eight-hour shift. The judge was not persuaded that such was the case (30 FMSHRC at 497 & n.46), and his conclusion on the issue (as opposed to the relevancy of the issue) was not appealed to the Commission by Pendley, whose counsel handled the post-reinstatement issues.

Pendley’s counsel did argue to the Commission that the record evidence regarding the substance, and not just the quantity, of the tasks Pendley was assigned upon reinstatement established adverse action. Pendley’s testimony regarding Highland’s requirement that he move three full pallets of glue by hand, rather than permitting him to use a forklift, was cited as evidence of the more arduous and difficult work Pendley was assigned when he returned to the mine. P. Br. at 4-5 (quoting Tr. 1081-82 (testimony of Pendley)); *see also* Tr. 521-22 (testimony of co-worker Bernard Alvey). However, both the Commission and the court rejected the glue incident argument, on the ground that it had not been presented to the judge and thus had not been preserved for appeal. 601 F.3d at 428; 31 FMSHRC at 81-82 n.24.

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<sup>8</sup> Pendley cites *Island Creek Coal Co. v. FMSHRC*, No. 80-1799 (4th Cir. Sept. 14, 1981) (unpublished per curiam decision reported at 2 MSHC 1436), for the proposition that reassignment to less desirable work assignments can constitute adverse action. P. Remand Br. at 5-6. In that instance, however, the court was affirming the judge’s decision in *Secretary on behalf of Long v. Island Creek Coal Co.*, 2 FMSHRC 1529 (June 1980) (ALJ). In that case, there is very little discussion of the substance of the new assignments; rather, it was enough for the judge that the new assignment involved abatement of a safety violation the operator suspected the miner of bringing to the attention of MSHA. 2 FMSHRC at 1540-41.

Once arguments on the evidence that have been rejected by the Commission and the court are removed, the Secretary is left only with the testimony of Pendley on his having to wash the “nurse car” that was used to deliver oil. *See* S. Remand Br. at 11-12 (quoting Tr. 185-87). Highland’s brief details the evidence that it believes shows that Pendley’s new nurse car duties were justified under the circumstances and did not rise to the level of adverse action against the miner. H. Remand Br. at 11-12. Consequently, given our opinion that in order to constitute adverse action a new assignment must be more difficult or onerous, and not just less desirable, we conclude that the evidence compels the conclusion that the operator did not take adverse action against Pendley when it assigned him the new duties. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (stating that where evidence supports only one conclusion, remand on that issue unnecessary). In *Longstreet*, where the plaintiff’s evidence that a new job assignment was more onerous consisted solely of her testimony, and there was evidence that she nevertheless was able to perform the new assignment, the court held that the evidence was too “thin” to establish that the new assignment constituted adverse action. 276 F.3d at 383-84.

Because we do not think that Pendley’s new job duties constituted adverse action, it is not necessary to address the question of motivation.<sup>9</sup>

Accordingly, we see no need to remand this case to the judge for further proceedings and affirm the judge’s decision that Highland did not discriminate against Pendley.

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

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

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<sup>9</sup> Our colleagues would have the judge “look anew at the evidence and arguments properly before him and apply the *Burlington Northern* standard to reach a conclusion regarding whether those conditions were materially adverse to Pendley.” Slip op. at 14 (footnotes omitted). As the court acknowledged, the judge and the Commission have not had an opportunity to consider the test articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006), presented for the first time to the court on appeal and now to the Commission on remand by the miner’s representative. 601 F.3d at 428; slip op. at 13 & n.10. The issue has not been briefed by either the Secretary or the operator in this case. Accordingly, we do not think that it is prudent to address it at this stage of the proceeding and would reserve for consideration the application of *Burlington Northern* in Mine Act discrimination cases in another case under more appropriate circumstances.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 30, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2009-422
	:	KENT 2009-423
v.	:	KENT 2009-545
	:	
WEBSTER COUNTY COAL, LLC	:	

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

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Chief Administrative Law Judge Robert Lesnick denied the motions of Webster County Coal, LLC (“Webster County”), to dismiss these proceedings on the ground that the Secretary of Labor had not established adequate cause to file three petitions for assessment of penalty approximately 18 months beyond the 45-day due date for the petitions, set forth in Commission Procedural Rule 28, 29 C.F.R. § 2700.28.<sup>1</sup> Unpublished Order (Sept. 28, 2010) (hereinafter “CALJ Order”). Upon the subsequent reassignment of the case, Administrative Law Judge Susan Biro denied Webster County’s motions to certify the cases to the Commission for interlocutory review of the late-filing issue. Unpublished Order (May 4, 2011) (hereinafter “Certification Denial Order”). Webster County then petitioned the Commission for interlocutory review, which the Commission granted in an order dated September 26, 2011.

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<sup>1</sup> Commission Rule 28(a) provides that “[w]ithin 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a).

Concurrent with this decision, we are issuing a decision in *Long Branch Energy*, 34 FMSHRC \_\_\_\_, Docket Nos. WEVA 2009-492-R, et al. (Aug. 30, 2012) (“*Long Branch*”), which also addresses the issues raised by this case. Applying our decision in *Long Branch* here, we affirm the judge’s order denying Webster County’s motions to dismiss and remand this case to her for further proceedings under the Mine Act.

## I.

### **Factual and Procedural Background**

Webster County’s Dotiki Mine, in Hopkins County, Kentucky, was issued a number of citations and orders by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in December and October 2008. Certification Denial Order at 1. On November 13, 2008, MSHA issued a proposed penalty assessment for 40 citations and one order. On December 11, 2008, Webster County filed a timely notice which indicated it was contesting the proposed penalties for 21 of the citations and the order.

Under Rule 28(a), the Secretary’s penalty petitions were due on or before Monday, January 26, 2009. It was not until the last week of July 2010, however, that the Secretary filed three penalty petitions for the 22 proposed penalties.<sup>2</sup> *Id.* None of the petitions were accompanied by the instant motion required by Commission Procedural Rule 9(b), 29 C.F.R. § 2700.9(b).

On August 20, 2010, Webster County filed its three motions to dismiss. Certification Denial Order at 1-2. When the Secretary did not respond to the motions on a timely basis, on September 21, 2010, the operator requested that the Commission enter an order dismissing the proceedings, with prejudice, based on the Secretary’s failure to justify her 18-month delay in filing the penalty petitions. *Id.* at 2.

One day later the Secretary filed her responses to the motions to dismiss and therein included motions requesting that the Commission accept her previously late-filed penalty petitions. *Id.* The Secretary argued that the adequate cause standard that the Commission established in *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981) (“*Salt Lake*”), was met in this instance. Attached in support of that explanation was an affidavit from “the Conference Litigation Secretary” for District 10, the MSHA district responsible for preparing the penalty petitions. The affidavit the Secretary submitted explained in pertinent part that:

Due to a clerical error, occasioned in significant part by the  
massive increase in contested assessments by coal mine operators

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<sup>2</sup> Nineteen of the proposed penalties comprise Docket No. KENT 2009-422, one more penalty constitutes Docket No. KENT 2009-423, and the final two penalties make up Docket No. KENT 2009-545.

as well as computer linkage issues between this office and the Office of Assessments, I did not become aware of the existence of the contested assessments at issue [in the three dockets] until July 15, 2010. This clerical error was brought to MSHA's attention by Jean Ellen, of [the FMSHRC Docket Office].

S. Resp. to Mot. to Dismiss, Ex. A ¶ 3 (Decl. of Polly Wilson). The Secretary also maintained that Webster County had not been prejudiced by the late filing of the penalty petitions in this instance.

After warning the Secretary that in future cases a motion for leave to file out-of-time should accompany any late-filed penalty petition, the Chief Judge on September 28, 2010, denied the motions to dismiss. CALJ Order at 1-2 & n.1. On October 20, 2010, Webster County moved the Chief Judge to certify his order for interlocutory review by the Commission. Certification Denial Order at 2.

The cases were assigned to Judge Biro on December 1, 2010. Consolidating the three proceedings, she read Webster County's motions for certification to center on its complaint that the Chief Judge had not adequately considered the operator's arguments in favor of its motions to dismiss. *Id.* at 1, 5. Citing the inherent power of district courts to reconsider their own interlocutory orders prior to judgment, the judge treated the Webster County requests as ones for reconsideration of the Chief Judge's order, which she denied along with the operator's requests for certification. *Id.* at 5-9.

The judge primarily focused on the extent of the Secretary's backlog of cases as the justification for the delays in the filing of the penalty petitions at issue. *Id.* at 6-7. Citing Commission case law with regard to both the Secretary's obligation to propose an assessment within a reasonable time as well as the *Salt Lake* decision, the judge concluded that

although the delay here is lengthy and the Secretary's explanation for its cause is not minutely detailed nor crystal clear, [I] find[] that, given the substantial precedent and the Secretary's ever expanding caseload, the Secretary has established cause for the delay that is adequate to move on to a consideration of the resultant prejudice to [Webster County].

*Id.* at 7. The judge also concluded that the operator, having conceded that it could only make general allegations of having been prejudiced in the cases, had thus failed to establish prejudice, which the judge found must be pleaded with specificity. *Id.* at 8.

## II.

### Disposition

Pursuant to our briefing order in this case, Webster County's PIR was treated as its opening brief. In it, Webster County argued that the rulings below presented four issues deserving of interlocutory review: (1) whether the Chief ALJ failed to apply the two-part *Salt Lake* test when he denied the operator's motions to dismiss; (2) whether the Secretary's case fails under the first part of the test, in that she did not establish adequate cause for the late filing of the penalty petitions; (3) whether adequate cause can ever be shown for filing a penalty petition approximately 18 months late; and (4) whether there is inherent prejudice to the operator as a result of the delays sufficient to justify dismissal of the proceedings.

In response, the Secretary, as she did in *Long Branch*, urges the Commission to modify the standard for accepting late-filed penalty petitions that we established in *Salt Lake*. The Secretary also contends that Judge Biro did not abuse her discretion in refusing to reconsider the Chief Judge's order and dismiss the cases. The Secretary submits that a delay of 18 months does not necessarily preclude the Secretary from establishing adequate cause for the delay, and that because there is record evidence to support the judge's finding that adequate cause was established, it must be upheld. The Secretary further argues that the judge correctly disposed of the issue of prejudice in her order.

In its reply brief, Webster County contends that the Commission should leave *Salt Lake* undisturbed. In addition, Webster County maintains that the Chief Judge abused his discretion in failing to consider the issue of prejudice to Webster County in his order denying the motions to dismiss. As for Judge Biro's order, Webster County takes the position that she abused her discretion in finding that the Secretary had established adequate cause for the late filings and in failing to find that Webster County had been prejudiced by such a protracted delay.

In our decision in *Long Branch*, we have clarified that, under *Salt Lake*, while

the Secretary may not, on a "mere caprice," ignore the Commission's procedural rule regarding deadlines for filing penalty petitions . . . , regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners' health and safety. . . . We therefore must balance concerns for procedural regularity against the severe impact of a dismissal on the Mine Act's penalty scheme.

In order to achieve this balance, we clarify that "adequate cause" may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere

caprice” or through willful delay, intentional misconduct, or bad faith. . . .

Once the Secretary meets her burden in this regard, an operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected. . . .

*Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 8. Consequently, we review the judge’s order at issue through this lens. The appropriate standard of review here is review for abuse of discretion in the way of legal errors and whether the factual findings made by the judge in reaching her conclusion is supported by substantial evidence.<sup>3</sup> *See id.*, slip op. at 5-6.

We read the judge’s order in this case as having correctly applied *Salt Lake*, as subsequently clarified by our decision in *Long Branch*. The Secretary explained to the judge that the petitions for assessment of penalty were filed late due to clerical error occasioned by the large increase in contested assessments<sup>4</sup> and computer linkage issues between MSHA’s Office of Assessments in Arlington, VA, and its District 10 Office. Certification Denial Order at 6. Because such an explanation is not “frivolous” or “facially implausible,” the judge was not precluded from accepting it. *See Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 9. These explanations, coupled with the fact that once the clerical error was discovered, the Secretary quickly filed the penalty petition (Certification Denial Order at 6), are enough to “establish that the delay did not result from ‘mere caprice’ or through willful delay, intentional misconduct, or bad faith.” *See Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 8.

Webster County contends that the judge abused her discretion in accepting the Secretary’s explanation for the delays because the Secretary never described the “clerical error” on which she relied, nor did she explain how that error led to the delay. However, in her brief filed with the Commission, the Secretary explained that due to a clerical error, Webster’s notice

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<sup>3</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>4</sup> As we detailed in *Long Branch*, there was an “unprecedented expansion of the Secretary’s workload following the 2006 and 2007 mine disasters at the Sago and Aracoma mines in West Virginia, and the sweeping policy changes that followed those events,” which prevented MSHA district offices from being able to timely fulfill their responsibilities under Rule 28(a). *Id.*, slip op. at 10-12.

contesting the proposed penalty assessment did not get transmitted electronically as it should have been from MSHA's Office of Assessments to MSHA's District 10 office, so the individual in the District 10 office responsible for compiling the documents needed for the penalty petitions did not know Webster County had filed the penalty contest. S. Br. at 11-12.

The operator also argues that while the explanation offered by the Secretary might excuse a short delay, it does not justify the 18-month delay that resulted here. We recognize that, if the Commission docket office has to contact the Secretary to alert her that penalty petitions are 18 months overdue, there definitely was an "error" on the part of the Secretary somewhere in the process, be it clerical or otherwise. In *Salt Lake*, however, where the Commission refused to dismiss the penalty proceeding, it stated that "the Secretary is engaged in voluminous national litigation and mistakes can happen." 3 FMSHRC at 1717 (emphasis omitted). We reach a similar conclusion in this case, and thus conclude that adequate cause for the delay has been established. The judge correctly applied the law and her factual findings are supported by substantial evidence.

We also uphold the judge's conclusion on the issue of prejudice as consistent with our treatment of that issue in *Long Branch*. The judge rejected the notion that the concept of "inherent prejudice" to the operator was applicable in this instance, or that it was simply enough for the operator to make general allegations of having been prejudiced by the delays at issue. Certification Denial Order at 7-8. As we state in *Long Branch*, it is clear that the Commission in *Salt Lake*, in discussing the issue of prejudice to an operator from the Secretary's delay in filing a penalty petition, meant more than the mere "danger of prejudice," or a concern about prejudice to the efficiency of the Mine Act enforcement process. The Commission was imposing a requirement that the prejudice must be "real" or "substantial" and demonstrated by a specific showing by the operator. See *Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 10.

That requirement has not been met here. In arguing that it was prejudiced by the delays, Webster County alleges potential witness memory loss. WC Reply Br. at 22. With the hearing stage of the proceedings occurring months later than the penalty petition stage, it is premature to speculate regarding the effect a late-filed penalty petition will have on any later hearing in these cases. Rather, the focus at this stage of the proceedings should be on whether the operator will suffer immediate prejudice in the next step it must take, which is the preparation and filing of its answers to the petitions. Because here the operator made no such showing, we uphold the judge's conclusion on the issue of prejudice.<sup>5</sup>

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<sup>5</sup> Webster County also argues that the Chief Judge erred in his order by not addressing the issue of prejudice. However, we agree with the Secretary that the error was harmless, given that Judge Biro subsequently addressed the issue of prejudice when she treated the motion for certification as a motion for reconsideration. See S. Br. at 15 n.8. Judge Biro used the opportunity presented by the motions for certification to apply both parts of the *Salt Lake* test. When reiterating in its reply brief that the Chief Judge erred (WC Reply Br. at 15-16), Webster County does not explain why the Commission should not consider that error cured by Judge

(continued...)

### III.

#### Conclusion

For the foregoing reasons, we conclude that the judge's order accepting the late-filed petitions did not constitute an abuse of discretion, affirm the judge's order denying Webster County's motions to dismiss, and remand this case to her for further proceedings under the Mine Act.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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<sup>5</sup> (...continued)

Biro's subsequent treatment of the issue of prejudice. Consequently, we consider the Chief Judge's order moot under the circumstances.

Commissioner Young, concurring:

I agree with my colleagues that the judge's decision should be affirmed because it is supported by substantial evidence. I write separately, however, because I believe the judge could have made a contrary determination, given the facts in this case, and that our affirmation of the outcome here should not be mistaken for approval of the manner in which this case was presented to the Commission.

As a preliminary matter, it is worth noting that the delay in this case is extremely long – more than 17 months beyond the due date imposed by our procedural rules.<sup>6</sup> While we have held that the rule requiring the timely filing of penalty petitions by the Secretary should not operate as a “procedural strait jacket[.]” (*Salt Lake*, 3 FMSHRC at 1716), I would be hard-pressed to fault a judge who found that the deviation from a standard established in our procedural rules, to the degree exhibited here, required more than the desultory and evasive explanation offered by the Secretary in this case.

It is fairly obvious from the facts of record that the case before us was simply lost. Under the circumstances the majority accurately and properly cites, it is completely understandable that this might happen. Nor do I fault the Secretary for not discovering the error without the assistance of the Commission. Something that is lost is not often found until one begins looking for it. However, once the Secretary's agents discovered the delinquency, it was incumbent on them to provide an adequate explanation for the delay, and to seek relief as prescribed by our procedural rules.

I do not find the Secretary's explanation to be complete or persuasive. Had I been called upon to decide this case on that basis alone, I might have reached a different conclusion than the judge. Furthermore, the Secretary did not seek permission to submit her pleadings out of time, as our procedural rules also require. *See* 29 C.F.R. § 2700. 9(b). Finally, when confronted with motions to dismiss the proceedings, the Secretary again failed to respond in a timely manner. Certification Denial Order at 1-2.

In sum, this enforcement action is a serious matter, and it does not appear that the Secretary's agents recognized the gravity of the situation, or that they understood the need to treat the Commission and opposing parties with appropriate courtesy and respect. Nevertheless, I would hold it permissible for our judges to draw inferences from available evidence, as I

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<sup>6</sup> The judge concluded that her decision was not inconsistent with previous cases, while stating that “most” of the cases in which untimely filing was excused involved shorter periods of delinquency. Certification Denial Order at 6-7. In fact, the delay in this case exceeded the longest delay in any other case cited by the judge by nearly *five months*. The *difference* between the longest delay in any of the cases upon which the judge relied and the present case is itself nearly as long as the entire 135-day delinquency in *Brody Mining, LLC*, 32 FMSHRC 718, 719 (June 2010) (ALJ), a recent case involving the current backlog.

believe the judge has done in this case. Relying on such inferences and the facts of record, I would hold that it was within the discretion of the judge to excuse the late filings based on those facts.

While we could certainly remand this case for a more satisfactory explanation of the “clerical error,” and how it was “occasioned . . . by the massive increase in contested assessments . . . as well as computer linkage issues” (*see slip op.* at 2), I don’t believe doing so would serve the interests of justice or judicial economy in this case. I therefore join my colleagues in affirming the decision below.

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

Commissioner Duffy, dissenting:

For the reasons more fully articulated in my dissent in *Long Branch Energy*, 34 FMSHRC \_\_\_\_, Docket Nos. WEVA 2009-492-R, et al. (Aug. 30, 2012) (“*Long Branch*”), which is also issuing today, I would vacate the judge’s order below and remand this matter for the purpose of having the Secretary explain her reasons for failing to timely file the petition for civil penalty. I do not believe that the Secretary’s invocation of the recent increase in contested penalties without further elaboration constitutes adequate grounds for failing to file a petition for 18 months when our Rule 28(a) requires the Secretary to file a petition for civil penalty within 45 days of receiving the operator’s notice of contest. As I stated in *Long Branch*, the contest backlog may not be frivolous, but the steps taken by the Secretary in the face of that backlog are crucial to the determination of whether the Secretary’s excuse for her excessive delay is adequate to avoid dismissal under *Salt Lake*. *Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 17. Moreover, the Secretary’s excuse of a “computer linkage issue” as grounds for forgiving her exceedingly late filing is lacking in detail sufficient enough to evaluate its legitimacy. If the Secretary continues to offer that excuse, the Commission is entitled to a more thorough explanation than has been presented thus far.

In accepting the Secretary’s explanation relating to the contest backlog, the judge relied on both the two-month delay that was found acceptable by the Commission in *Salt Lake* due to the “extraordinarily high caseload” at the time the penalty petition in that case was due, as well as denials by Commission judges of motions to dismiss such petitions that were as much as eight months late due to the large increase in MSHA’s caseload the past few years. Certification Denial Order at 6-7.

I find that the judge misread the Commission’s decision in *Salt Lake* as indicating that adequate cause for a delay, of any length, in the filing of a penalty petition is established if there is evidence of a significant increase in the number of civil penalty contest proceedings during the time in question. In *Salt Lake*, the Commission concluded that, in seeking to file a penalty petition *two months* late because of her pending caseload “the Secretary [had] *minimally satisfied* the adequate cause standard in th[e] case.” 3 FMSHRC at 1717 (emphasis added). I do not understand the Commission in *Salt Lake* to have simply accepted the notion that the invocation of such phrases as “increased caseload” or “large increase in penalty contests” automatically justifies 18-month delays in filing penalty petitions.

It was also legal error for the judge to rely as heavily as she did here on such Commission cases such as *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996), and *Black Butte Coal Co.*, 25 FMSHRC 457 (Aug. 2003). See Certification Denial Order at 6-7. In those cases, the Commission was addressing whether a proposed penalty assessment had been issued by MSHA within a “reasonable time,” as is required by section 105(a) of the Mine Act, 30 U.S.C. § 815(a). As discussed in my *Long Branch* dissent, the question of how long it may take the Secretary to file a relatively simple penalty petition is an entirely separate question from the reasonableness of the amount of time it might take MSHA to go through the more complex penalty assessment process. *Long Branch*, 34 FMSHRC at \_\_\_\_, slip op. at 22.

Moreover, the judge's order as written is not supported by substantial evidence. The Commission has held that:

The substantial evidence standard of review requires a weighing of all probative record evidence *and an examination of the fact finder's rationale in arriving at the decision*. Judges must sufficiently summarize, analyze and weigh the relevant testimony of record, and explain their reasons for arriving at their decision. . . . While we have previously stated that we do not lightly overturn a judge's factual findings and credibility resolutions, neither will we affirm such findings if there is no evidence or dubious evidence to support them.

*Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (citations omitted) (emphasis added).

With regard to the explanation for the delays accepted by the judge in this case, when the Commission finds that it has to contact the Secretary to alert her that penalty petitions are 18 months late, there surely has been an "error." The Commission acknowledged in *Salt Lake* that errors would occur from time to time, stating that "the Secretary is engaged in voluminous national litigation and mistakes can happen." 3 FMSHRC at 1717 (emphasis in original).

That does not mean, however, that the judge is bound to accept without question a conclusory statement tying an 18-month failure to file three penalty petitions to the increased caseload, which the judge did in this instance. Acceptance of such a "bare bones" explanation by the judge contradicts what the Commission stated in *Salt Lake*:

In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately," we hold that if the Secretary does seek permission to file late, [s]he must predicate [her] request upon adequate cause. Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission.

*Id.* at 1716 (citations omitted).

Accordingly, I would vacate the order denying the operator's motion to dismiss, and remand this proceeding to the judge to obtain a more complete statement from a representative of the Secretary that provides a more thorough and understandable reason for the 18-month delay beyond the summary excuse provided in the affidavit of the District 10 CLR secretary. If the Secretary is going to seek permission to file three penalty petitions so late, it is incumbent upon her to supply a witness who can take responsibility for the lack of oversight that clearly contributed to the length of the delays.

This is not necessarily to say that the justifications offered by the Secretary are not the type that can sufficiently excuse an 18-month failure to act. The explanation on remand does not need to be very long to address the most pertinent issues: how the increase in the civil penalty caseload resulted in three cases essentially “falling through the cracks” in the system, and what has been and is being done by MSHA both nationally and in its district offices to prevent a reoccurrence of such errors. Without such an explanation, however, the impression is left that the delays in this case were not actually due to the increase in the number of cases.

The explanation provided on remand should also expand upon the “computer linkage issues” that the Secretary offers as additional explanation for the delays. The judge essentially ignored this aspect of the CLR secretary’s explanation, but if on remand the Secretary is going to continue to rely on such an excuse, it is necessary that she provide the judge a greater understanding of what these computer linkage issues were, and that MSHA has resolved them.

While I would not go so far as to say that the obligations the Commission has, in certain cases, imposed on operators seeking relief from default under section 105(a) are necessarily and fully applicable to the Secretary when she fails to meet the “immediately” requirement under section 105(d), given the desire expressed in *Salt Lake* that any “leeway” granted the parties be at least roughly “analogous,” I do not find that the Secretary offered enough evidence below to establish adequate cause under *Salt Lake*. As noted in *Salt Lake*, the Commission has recognized that mistakes can happen, and that mistakes, once made, may not be caught for quite some time. When that happens, be it by an operator or by the Secretary, the Commission, in its role as an independent agency, should require either party to sufficiently explain how the mistake occurred, why it was not caught sooner, and what is being done so that it does not happen again. Because the judge did not do so here, her order must be vacated and remanded.

With respect to the issue of prejudice, I do not believe that a given length of delay should be considered “inherently” prejudicial to an operator, since each Mine Act case will depend on a different mixture of evidence. For instance, a violation of an MSHA record-keeping regulation may be established simply by documents. In contrast, a violation of a substantive safety standard may be heavily dependent upon witness testimony, and thus rely in large part on the memory of one or more witnesses. Given these very different scenarios, I would be loath to conclude that an 18-month delay in filing a penalty petition should be considered to be *per se* prejudicial.

Moreover, when the hearing stage of a proceeding usually occurs months after a penalty petition is filed, it is premature to speculate regarding the effect a late-filed penalty petition will have on the later hearing in the case. Rather, the focus at this stage of the proceedings should be on whether the operator will suffer immediate prejudice in the next step it must take, which is the preparation and filing of its answer to the petition. Because here the operator made no such showing, I would uphold the judge’s conclusion on the issue of prejudice at this stage of the proceedings.

Of course, the issue of prejudice to the operator flowing from the 18-month delay will remain a live one throughout the proceeding, and Webster County is free to raise the issue of prejudice in the more concrete setting of a pending hearing on the substance of the citations and order.<sup>1</sup>

Accordingly, I would vacate the order and remand for further proceedings.

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

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<sup>1</sup> We are fast approaching the fourth anniversary of the issuance of the underlying citations and order.

Commissioner Cohen, dissenting:

Under Commission Procedural Rule 28, the Secretary's petition for assessment of penalty is to be filed with the Commission within 45 days of MSHA's receipt of an operator's contest of a proposed penalty assessment. 29 C.F.R. § 2700.28. I am dissenting in this case because I do not believe that the Secretary's explanation of why the petitions in these cases were 18 months late was sufficiently complete to enable the judge to determine whether the Secretary had established adequate cause as required by *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981).

In *Long Branch Energy*, 34 FMSHRC \_\_\_\_, Docket Nos. WEVA 2009-492-R, et al. (Aug. 30, 2012) ("*Long Branch*"), also issued today, the Commission has clarified the legal standard of "adequate cause" in *Salt Lake* as follows:

In order to achieve this balance, we clarify that "adequate cause" may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary's excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith.

34 FMSHRC at \_\_\_\_, slip op. at 8. In my opinion, because of the absence of any detail, the explanation provided by the Secretary for the delay in filing petitions in these cases fails to meet this standard.

The Secretary's Response to Motion to Dismiss and Secretary's Motion to Permit Late Filing is supported, factually, only by the "Declaration of Polly Wilson," the Conference Litigation Secretary for MSHA Coal District 10, dated September 22, 2010. The Secretary's entire explanation is contained in two sentences of Ms. Wilson's Declaration:<sup>1</sup>

Due to a clerical error, occasioned in significant part by the massive increase in contested assessments by coal mine operators as well as computer linkage issues between this office and the Office of Assessments, I did not become aware of the existence of the contested assessments at issue in Docket Nos. KENT 2009-422, KENT 2009-423 and KENT 2009-545, until July 15, 2010. This clerical error was brought to MSHA's attention by Jean Ellen,

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<sup>1</sup> My colleagues in the majority opinion note that the Secretary provided slightly more detail in her brief filed with the Commission. Slip op. at 5. However, this information was not provided to Chief Judge Lesnick or to Judge Biro. It cannot be said that their decisions are supported by "substantial evidence" which was not provided to them by the Secretary.

of the Federal Mine Safety and Health Review Commission, on the same date.

These two sentences did not provide sufficient information to the judge. There was no information provided – as there was in *Long Branch* regarding MSHA District 4 – about the increase in contested assessments in District 10 during the relevant period, and how it impacted District 10’s ability to prepare petitions as required by Commission Rule 28.

Nor was there any explanation whatever of the “computer linkage” issues. Apparently, as indicated in the Secretary’s brief, there was some problem in the electronic transmission of notice of the operator’s contests in these cases from MSHA’s Office of Assessments to District 10. Consequently, the officials in District 10 responsible for preparing the Rule 28 petitions were unaware of the need to do so until Jean Ellen, head of the Commission’s docket office, made inquiries to MSHA. The information provided by the Secretary does not inform the judge what the computer linkage problem was, how many contests by operators (Webster County and others) were affected by the problem, whether it required some type of fixing and, if so, how and when the fixing was done.

In my view, the explanation in this case is frivolous. It does not, in terms of the *Long Branch* standard, provide “evidence sufficient to establish that the delay did not result from ‘mere caprice’ or through willful delay, intentional misconduct, or bad faith.” 34 FMSHRC at \_\_\_\_, slip op. at 8. Ultimately, it may well be that the Secretary’s reasons for failing to file these petitions were non-frivolous. However, the explanation itself was frivolous.<sup>2</sup>

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<sup>2</sup> I suppose that the “computer linkage issues” may have been nothing more than the person in the Office of Assessments not hitting the “send” button to transmit the information about Webster County’s contests to District 10. If so, then it is reasonable to conclude that the responsible people in District 10 would have been completely unaware of the contests. As Commissioner Young states in his concurring opinion, “[s]omething that is lost is not often found until one begins looking for it.” Slip op. at 8.

However, the words “computer linkage” and the use of the plural form “issues” suggest that the problems may have been systemic and/or multiple. We do not know because the Secretary failed to provide that information to the Commission. It is possible – the Secretary’s explanation does not preclude the possibility – that information about a considerable number of operators’ penalty contests was not transmitted by the Office of Assessments to District 10, and perhaps other MSHA Districts as well. If this were the case, then District 10, which was used to receiving a certain number of operator contests from the Office of Assessments for which Rule 28 petitions needed to be prepared, may have seen a cessation, or considerable reduction, of contests for which petitions needed to be prepared and filed. In that case, a judge could inquire why the responsible officials in District 10 did not question the sudden reduction in the number of petitions needing to be filed. Such an inquiry is relevant to whether the Secretary was properly performing her job. If the failures surrounding the “computer linkage issues” were

(...continued)

The Secretary's failure in this case to file a timely Rule 28 petition is analogous to an operator's failure to file a timely contest of a proposed penalty assessment under section 105(a) of the Mine Act, 30 U.S.C. § 815(a). In such cases, where operators petition the Commission for relief in the form of reopening the case, the Commission requires a "sufficiently detailed explanation" of the cause of the failure to enable the Commission to determine whether good cause exists for excusing it. *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008) (operator's explanation for the failure was that it "was due to clerical error"); *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 606 (July 2008) (operator's explanation was that there was "an unintentional error in the transfer of the Proposed Assessment from Atlanta Sand to counsel").

Just as the Commission requires operators to submit a "sufficiently detailed explanation" in cases where the operator has failed to file a timely contest of a proposed assessment, so the Commission should require the Secretary to furnish a sufficiently detailed explanation for her failure to timely file a Rule 28 petition. Where the explanation provided is as lacking in detail as it was here, it is not a matter of the judge's discretion whether or not to accept it. Rather, it is a matter of law that the explanation was inadequate.

Therefore, I would vacate the judge's decision and remand the case to the judge to offer the Secretary another opportunity to fully explain, with supporting affidavits, the reasons why the petitions in this case were filed 18 months late.<sup>3</sup>

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

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<sup>2</sup> (...continued)

sufficiently serious, a judge might conclude that the justification provided by the Secretary was frivolous, and hence inadequate under Salt Lake and Long Branch.

<sup>3</sup> In cases such as *Eastern Associated* and *Atlanta Sand & Supply*, *supra*, where the Commission has rejected an operator's explanation for an untimely filing because the explanation was inadequately detailed, the Commission's practice has been to deny the request without prejudice, and afford the operator the opportunity to submit a full and complete explanation. *See* 30 FMSHRC at 394; 30 FMSHRC at 608.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 30, 2012

SECRETARY OF LABOR,	:	Docket Nos.	LAKE 2007-139
MINE SAFETY AND HEALTH	:		LAKE 2008-79
ADMINISTRATION (MSHA)	:		LAKE 2008-41
	:		LAKE 2008-84
	:		LAKE 2008-122
	:		LAKE 2008-237
	:		LAKE 2008-532
	:		LAKE 2008-536
	:		LAKE 2008-537
	:		LAKE 2008-538
	:		LAKE 2008-539
	:		LAKE 2008-42
	:		LAKE 2008-43
v.	:		LAKE 2008-81
	:		LAKE 2008-145
	:		LAKE 2008-533
	:		LAKE 2008-534
THE AMERICAN COAL COMPANY	:		LAKE 2008-535

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

**DECISION**

BY THE COMMISSION:

These consolidated civil penalty cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). At issue is the facial validity of 13 notices of safeguards (“safeguards”) issued by the Mine Safety and Health Administration (“MSHA”). Section 314(b) of the Mine Act grants the Secretary authority to issue “safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). *See also* 30 C.F.R. § 75.1403 (repeating verbatim section 314(b)).

The American Coal Company (“American”) contested 45 citations, as well as the associated civil penalties which were proposed for the alleged violations of these safeguards. The civil penalty proceedings were assigned to Administrative Law Judge Margaret Miller. American then filed motions for summary decision, which alleged that the 13 safeguards were

invalid on their face. Judge Miller denied these motions, concluded that each individual safeguard was facially valid, and issued a decision affirming the citations. 33 FMSHRC 169 (Jan. 2011) (ALJ). American petitioned for review of the judge's decision, which the Commission granted.

We affirm the judge's decision with respect to 12 of the safeguards and the citations associated with them. With respect to the remaining safeguard, Safeguard No. 7582396, we conclude that it was invalidly written for the reasons set forth below. Accordingly, Citation No. 6667919, which alleges a violation of this safeguard, is vacated.

## I.

### Factual and Procedural Background

Section 314(a) of the Mine Act requires mine operators to provide particular safeguards on hoists and other devices used to transport miners. 30 U.S.C. § 874(a). Section 314(b) grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b).

The Secretary has published general criteria to guide an inspector in determining when particular safeguards may be required at a mine. 30 C.F.R. § 75.1403-1. An inspector may also issue safeguards that are not anticipated in the published criteria. *See* 30 C.F.R. § 75.1403-1(a). If the safeguard is not provided by the operator within the time fixed, or if it is not maintained thereafter, the operator will be issued a citation. 30 C.F.R. § 75.1403-1(b).

These proceedings involve safeguards issued to American's Galatia underground coal mine, located in Saline County, Illinois. 33 FMSHRC at 171. The safeguards, issued between 1990 and 2006, addressed transportation hazards involving mobile equipment, travelways, conveyor belts, and hoists.

American contested the facial validity of the safeguards in two motions for summary decision. The first motion, filed May 6, 2010, addressed eight safeguards and 24 citations. The second motion, filed December 2, 2010, addressed five additional safeguards and seven more citations. In total, American requested that the judge declare 13 safeguards to be facially invalid and vacate 31 citations alleging violations of these safeguards. American argued that each of the safeguards failed to “identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” *Mots.* at 3 (citing *Southern Ohio*

*Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (“*SOCCO P*”).<sup>1</sup> The Secretary opposed the motions, contending that the safeguards provided sufficient information regarding both the hazards involved and the methods of abatement.

The judge issued two orders denying the motions for summary decision. In the first order she stated that:

At the heart of this dispute is a disagreement as to what is meant by “hazard.” The Respondent equates “hazard” with potential risks/outcomes that may occur as a result of conditions in a mine. The Secretary argues that a safeguard is valid when the “type” of hazard is identified.

Unpublished Order at 3 (Sept. 20, 2010). The judge concluded that the term “hazard,” as contemplated by section 314(b) of the Mine Act, refers to “conditions [or] objects in the mine . . . that could affect the safe transportation of men and materials.” *Id.* She noted that while the Secretary occasionally chose to include the potential risks in a safeguard, such language is not required. *Id.* The judge found that because each safeguard specified hazardous conditions and provided a remedy, each safeguard was therefore valid on its face. *Id.* at 3-11; Unpublished Order at 4-8 (Jan. 4, 2011).

On October 19, 2010, American filed a Motion for Certification for Interlocutory Review, which was opposed by the Secretary. The judge denied the motion on November 10, 2010.

On December 27, 2010, the parties filed a list of joint stipulations, in which American stipulated that the conditions alleged in each contested citation constituted a violation of the cited safeguard. *See Stips.* at 4-16. The judge stated that “[t]he stipulations allow for a final order to be issued so that the validity of the underlying safeguards can then be appealed.” 33 FMSHRC at 171.

On January 4, 2011, the judge issued a final decision affirming the citations. *Id.* at 178-79. The decision incorporated both of the orders denying summary decision. *Id.* at 178.

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<sup>1</sup> American does not address the discrepancy between the number of citations it sought to vacate (31) and the total number of citations alleging violations of the 13 challenged safeguards (45). In addition, American does not account for its failure to contest the facial validity of a 14th safeguard (Safeguard No. 4267614) at issue in these proceedings. The judge affirmed three citations alleging a violation of this safeguard, bringing the total number of citations affirmed to 48. The citations, which American neither challenged nor appealed (17 in total), have become final orders of the Commission. 30 U.S.C. § 823(d)(1).

## II.

### Disposition

On review, American argues that the safeguards are invalid on their face, because each fails to identify a specific hazard and some fail to specify the conduct required to comply. American submits that, in concluding that the safeguards were facially valid, the judge relied on an interpretation of the term “hazard” that is inconsistent with Commission precedent. American contends that as a result of these alleged defects and other ambiguities in the language of each safeguard, it lacks fair notice of how to comply. In addition, the operator also contends that the safeguards reflect hazards that are general in nature, and not specific to the Galatia mine.

The Secretary contends that the safeguards are facially valid, as they identify with specificity the nature of the hazard and the conduct required by the operator to remedy the hazard. She maintains that the judge’s interpretation of the term “hazard” in section 314(b) of the Act is consistent with Commission precedent: a safeguard identifies “the nature of the hazard” when it identifies the hazardous condition at which it is directed. Finally, the Secretary submits that because American never alleged, or offered evidence, that the safeguards were not specific to the mine, the Commission should not consider this issue on appeal.

#### **A. American’s Argument that the Safeguards Were Not Based on Specific Conditions at the Mine is Not Properly Before the Commission**

At the outset, we first address American’s request that the Commission adopt “a rebuttable presumption against the validity of . . . safeguards [that are] issued repeatedly, to mine after mine over the years.”

Section 113(d)(2)(A)(iii) of the Mine Act provides that “[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.” 30 U.S.C. § 823(d)(2)(A)(iii). Nonetheless, the Commission has stated that the limitation in section 113(d)(2)(A)(iii) is not viewed as a “procedural straitjacket.” *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320 (Aug. 1992). The Commission has recognized that a matter urged on review may have been implicitly raised below or is so intertwined with something tried before the judge that it may properly be considered on appeal. *See, e.g., id.* at 1321; *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1580 (July 1984). The Commission’s practice has been to resolve these “opportunity to pass” questions on a case-by-case basis. *See, e.g., Ozark-Mahoning Co.*, 12 FMSHRC 376, 379 (Mar. 1990). If none of these criteria is met, an issue may still be heard on appeal upon a showing of “good cause.” 30 U.S.C. § 823(d)(2)(A)(iii).

The only argument that American presented before the judge was that the safeguards were invalid on their face. American did not contend that the safeguards were of a general nature and not based on conditions observed by inspectors at the Galatia mine. Rather, by filing

summary decision motions, American asserted that there were no issues of material fact in dispute. *See* Commission Procedural Rule 67(b)(1), 29 C.F.R. § 2700.67(b)(1) (summary decision shall be granted if “there is no genuine issue as to any material fact”). Furthermore, American has neither contended nor shown that good cause exists for raising its argument for the first time on appeal. Accordingly, we decline to review this issue as it is not properly before us.

## **B. Precedent Addressing Safeguards**

The Commission has ruled that safeguards must be drafted with specificity, so that operators receive adequate notice of the conduct required and the conditions covered by the safeguard. *SOCCO I*, 7 FMSHRC at 512 (stating that “a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard”). In *SOCCO I*, the operator was cited for violating a safeguard which stated:

A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.

All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts.

This is a notice to provide safeguards.

*Id.* at 510. The Commission treated this safeguard as validly issued pursuant to section 314(b). *See id.* at 514. The safeguard specified hazardous conditions, i.e., fallen rocks and cement blocks obstructed a travelway at three locations, and a remedy, i.e., all conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts. The Commission concluded implicitly that a safeguard which specifically identified *hazardous conditions* specified “the nature of the hazard.”

However, in *SOCCO I*, the Commission held that the language of a safeguard is to be narrowly construed.<sup>2</sup> *Id.* at 512. Accordingly, the Commission vacated the contested citation which identified accumulated water in the travelway. The Commission concluded that the safeguard did not specifically provide notice that accumulated water was prohibited. *Id.* at 513-14.

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<sup>2</sup> The D.C. Circuit affirmed, *inter alia*, the Commission’s narrow construction of safeguards in *Wolf Run Mining Co.*, 659 F.3d 1197, 1202 & n.8 (D.C. Cir. 2011), *affirming* 32 FMSHRC 1228 (Oct. 2010). The court stated that “in order to minimize the risk of arbitrary enforcement of section 314(b), the Commission has through adjudication interpreted the criteria so as to ensure that an operator has adequate notice of what safeguard is required.” *Wolf Run*, 659 F.3d at 1202 (citing *Southern Ohio Coal Co.*, 14 FMSHRC 1, 12 (Jan. 1992); *SOCCO I*, 7 FMSHRC at 512).

Although we have never expressly ruled on the facial validity of a safeguard, we have consistently treated safeguards which specify hazardous conditions and provide a remedy, as valid. *See also, e.g., Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992) (“*SOCCO II*”); *Southern Ohio Coal Co.*, 14 FMSHRC 748 (May 1992) (“*SOCCO III*”); *Green River Coal Co.*, 14 FMSHRC 43 (Jan. 1992).

In *SOCCO II*, the Commission reviewed a judge’s determination that a safeguard was invalid because it was not issued on a “mine-by-mine” basis. 14 FMSHRC at 2. The safeguard stated:

Shelter holes are not provided at 105 foot intervals on the 1 Left section supply track for a distance of 400 feet. Shelter holes shall be provided on all track haulage roads in this mine . . . .

*Id.* at 3. The Commission remanded the case to the judge to reconsider the validity of the safeguard, including the facts which led to its issuance. *See id.* at 13-15. However, the Commission declared “the safeguard in question is valid if it was based on the specific conditions at SOCCO’s mine and on a determination . . . that those conditions created a transportation hazard . . .” *Id.* at 14. Facially the safeguard in *SOCCO II* specified a hazardous condition, i.e., “[s]helter holes are not provided at 105 foot intervals,” and a remedy, i.e., “[s]helter holes shall be provided on all track haulage roads.” *Id.* at 3.

In *SOCCO III*, the Commission reviewed a judge’s decision to affirm a safeguard as valid because it was based on criteria published in 30 C.F.R. § 75.1403-10(h). 14 FMSHRC at 749-50. The operator contended that the judge erred and that the safeguard was invalid because it was directed at hazards that were of a general nature rather than specific conditions at the mine. *Id.* at 750. The safeguard stated:

Only 6 inches of side clearance was provided for the company no. 5062 rubber-tired scoop car being operated along the 3L2SW (014-0 mmu) supply track where supplies were being loaded into the scoop bucket. This is a Notice to Provide Safeguards requiring that a total of at least 36 inches of unobstructed side clearance (both sides combined) be provided for all rubber-tired haulage equipment where such equipment is used.

*Id.* at 749. The Commission remanded the case to the judge to consider whether “the safeguard was based on the judgment of the inspector as to the specific conditions at the [mine] and on the inspector’s determination that a transportation hazard existed that was to be remedied by the action prescribed in the safeguard.” *Id.* at 752. Importantly, the Commission did not conclude that the safeguard was invalid on its face when it specified a hazardous condition, i.e., “[o]nly 6 inches of side clearance” for a scoop car, and a remedy, i.e., “a total of at least 36 inches of unobstructed side clearance [shall] be provided for all rubber-tired haulage equipment.” *Id.* at 749.

Similarly, in *Green River Coal Co.*, the Commission reviewed a judge's decision to vacate a citation because the conditions alleged therein were not encompassed within the underlying safeguard. 14 FMSHRC at 44-45 (the citation alleged that a roof fall obstructed the travelway). The safeguard stated:

A clear travelway at least 24" wide was not provided on both sides of the "7B" belt between xcuts No's 88 & 89. There was less than 24" on one side of belt between roof support (timbers) and rib nor between belt and roof support. This is a notice to provide safeguard.

*Id.* at 44. The Commission indicated that the "the nature of the hazard" in this safeguard was the "obstructions in travelways caused by the placement of roof support timbers" and treated the safeguard as valid, while affirming the judge's decision to vacate the citation. *Id.* at 47-49.

In summary, the cases above demonstrate that the Commission has consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards.

**C. The Judge's Interpretation of the Term "Hazard," as Used in Section 314(b) of the Mine Act**

The judge stated that "the 'hazard,' as contemplated by section 314(b) of the Mine Act, refers to conditions [or] objects in the mine . . . that could affect the safe transportation of men and materials." *See* Unpublished Order at 3 (Sept. 20, 2010); Unpublished Order at 3 (Jan. 4, 2011).

As discussed at length above, the term "hazard" in section 314(b) of the Mine Act has been applied by the Commission as meaning hazardous conditions. Accordingly, we conclude that the judge's interpretation of "hazard" comports with Commission precedent. *See, e.g., SOCCO I*, 7 FMSHRC at 512 (where the Commission treated a safeguard as specifying "the nature of the hazard" when it alleged a hazardous condition, and not a harm). We note significantly that the judge rejected the necessity of naming a harm or risk in a safeguard for the practical reason that "far too many potential risks exist with any hazard for an [i]nspector to be expected to identify each and every one." Unpublished Order at 3 (Sept. 20, 2010).

Moreover, we have recognized that the term “hazard” has more than one potential definition. *See Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 & n.7 (Apr. 1981) (referring to Webster’s Third New International Dictionary 1041 (1971)). The Commission reaffirmed that the term can have multiple definitions in *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997) (interpreting “hazardous condition” in 30 C.F.R. § 75.360(b)). In *Enlow Fork*, the Commission noted that hazard can both mean “a possible source of peril, danger, duress, or difficulty” and “a condition that tends to create or increase the possibility of loss.”<sup>3</sup> *Id.* (citation omitted).

American contends that the judge erred in her interpretation of the term, asserting that the safeguard must articulate the specific risk or harm the miners face. The operator relies on the description of “hazard” found in the Secretary’s Program Policy Manual (“PPM”),<sup>4</sup> the decision of an ALJ in *SOCCO III*, and the Canadian Centre for Occupational Health and Safety’s website. *Id.* at 9-11.

American’s arguments are not persuasive. First, it is well-established that the Secretary’s PPM does not prescribe rules of law that are binding on the Secretary or the Commission. *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC

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<sup>3</sup> Our analysis in the present case is confined to the use of the term “hazard” in section 314(b) of the Mine Act, and does not extend to the use of the term “hazard” as it is used in other sections of the Act.

<sup>4</sup> In pertinent part, the PPM states:

Where an inspector determines that a safeguard notice is necessary in order to address a transportation hazard, the specific safeguard requirements are to be determined by the inspector based on the actual, specific conditions or practices that constitute a transportation hazard at that particular mine. The inspector should document either in the notice or in the inspector’s notes the conditions which provide the basis for the issuance of the safeguard notice. *The safeguard notice should also identify the nature of the hazard to which it is directed.* For example, if a notice to provide safeguards is issued to require a specific minimum clearance distance between pieces of haulage equipment, *the safeguard should also include a statement of the hazards that the clearance distance is intended to prevent, such as injury to equipment operators from pieces of rib coal which could be knocked loose or, if the area is a walkway, injury to pedestrians by the equipment due to insufficient clearance.*

V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75, at 129 (2003) (emphasis added).

1417, 1420 (Jun. 1981). Moreover, although the PPM may encourage inspectors to identify a harm in a safeguard, it is not an obligation. We agree with the conclusion of the judge, who stated that “while, on occasion, the Secretary chooses to include language in the safeguard which addresses the potential risks [or] outcomes associated with hazards, such inclusion is not necessary under Commission case law.” Unpublished Order at 3 (Sept. 20, 2010).

We are also not persuaded by American’s reliance on the judge’s decision on remand in *SOCCO III*. In *SOCCO III*, the safeguard stated that there was “only 6 inches of side clearance . . . for the scoop car being operated along the [] supply track” and it required “36 inches of unobstructed side clearance (both sides combined) [to] be provided for all rubber-tired haulage equipment where such equipment is used.” *Southern Ohio Coal Co.*, 14 FMSHRC 1404, 1405 (Aug. 1992) (ALJ). This safeguard both specified a hazardous condition, i.e., six inches of side clearance for the scoop, and specified a remedy, i.e., provide 36 inches of unobstructed side clearance. Therefore, this safeguard complied with the requirements of *SOCCO I*. However, after the Commission decision in *SOCCO III*, the judge on remand ruled that the safeguard was invalid because it did not identify “[t]he hazards to the scoop operator [of] potential injuries from striking the rib or the supply cars or in being struck by rib coal coming through the canopy [or the] [h]azards to pedestrians [of] being struck by a scoop or by a dislodged supply car.” *Id.* at 1407. The judge’s requirement to list the harms is contrary to *SOCCO I*’s requirement that a safeguard state a hazardous condition and a remedy. Additionally, in the preceding Commission decision in *SOCCO III*, the safeguard was not found to be invalid on its face. *See SOCCO III*, 14 FMSHRC at 752 (remanding for the judge to consider, in part, whether the safeguard was based on the specific conditions in the mine). In any event, the judge’s decision in *SOCCO III* is, of course, not binding precedent upon the Commission. *See* 29 C.F.R. § 2700.69(d).

Finally, American’s reliance on the interpretation of the term “hazard” by the Canadian Centre for Occupational Health and Safety is also not binding on the Commission nor is it persuasive. American relies on a selected quote that states: “[s]ometimes a hazard is referred to as being the actual harm or the health effect it caused rather than the hazard. For example, the disease tuberculosis (TB) might be called a hazard by some but in general the TB-causing bacteria would be considered the ‘hazard’ or ‘hazardous biological agent.’” PDR at 10 n.6 (citation omitted). This quotation fails to provide any guidance in the present case.

In summary, we conclude that the judge correctly interpreted “hazard” in section 314(b) of the Mine Act to mean “conditions/objects that could affect the safe transportation of men and materials.”

#### **D. Facial Validity of the Individual Safeguards**

The parties stipulated for each citation “that the condition or practice described in . . . this citation is a violation of the underlying safeguard cited.” E.g., Stips. at 4. Therefore, the only issue before us is the facial validity of each safeguard, which is a purely legal issue. Accordingly, we review the judge’s decision *de novo*. See *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194 (Nov. 1999).

American argues that each safeguard is fatally ambiguous. However, in a prescient footnote in *SOCCO I*, the Commission expressly cautioned against the approach taken by American in this case, stating that “[t]he requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments. We recognize that safeguards are written by inspectors in the field, not by a team of lawyers.” *SOCCO I*, 7 FMSHRC at 512 n.2 (citation omitted).

For the following reasons, we find that 12 of the 13 safeguards at issue are facially valid, as they meet the requirements of *SOCCO I*:

##### **1. Safeguard No. 7582643**

The safeguard states:

The active 13th West Long wall working section, 058 MMU, was not provided with a clear travelway between the long wall face conveyor and the shield bases for the entire length of the long wall face. Coal and gob was observed deposited in the walkway and on the shield bases at various depths. This is a notice to provide safeguard(s) requiring that all long walls at this mine shall maintain the walkways and shield bases, between the face conveyor and the shields, free of all extraneous materials that would affect the safe travel of miners.

American alleges that the safeguard identifies conditions and not a hazard. The operator also alleges that the term “extraneous material” lacks necessary specificity. In addition, it argues that the safeguard does not adequately specify the corrective measures required of the operator. The Secretary submits that the safeguard is appropriately specific.

We conclude that the safeguard specifies “the nature of the hazard,” i.e., coal and gob in the walkway that would affect the safe travel of miners. The safeguard also specifies a remedy to the hazard, i.e., maintain the walkway and shield bases free of extraneous materials that would affect the safe travel of miners. Accordingly, we affirm the judge’s conclusion that the safeguard

is valid on its face. Unpublished Order at 9 (Sept. 20, 2010). Additionally, whether material is “extraneous” would have been, at least in part, a question of fact to be resolved by the judge after a hearing, which American waived.

**2. Safeguard No. 4054826**

The safeguard states:

Accumulations of rib rash, rock, crib ties, belt rollers, and other extraneous material was observed along both sides of the 1st section main east belt conveyor, starting at survey station 675 east and extending inby to survey station 5175 east at the 1st section belt tail. These accumulations were at various locations and were not continuous.

This is a notice to provide safeguard requiring a clear 24 inch travelway be maintained free of debris and extraneous material, along both sides of all belt conveyors.

American argues that this safeguard on its face does not comply with *SOCCO I*, in part because the language used is ambiguous as it does not specify what is considered “extraneous material.” In its brief American asks hypothetically whether a fire extinguisher could be “extraneous material” under the safeguard. The Secretary states that whether an item constitutes “extraneous material” depends on the factual context.

We conclude that because the safeguard specifically identifies “the nature of the hazard,” i.e., rib rash, rock, crib ties, belt rollers, and other extraneous materials and specifies a remedy, i.e., a clear 24-inch travelway, it is valid on its face. Moreover, we conclude that whether a fire extinguisher in a travelway constitutes “extraneous material” is partially a question of fact that is to be resolved by a judge after a hearing, which American has waived. As a result, we affirm the judge’s conclusion that the safeguard is valid on its face.

### 3. Safeguard No. 7568565

The safeguard states:

Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways at the following locations: on the Main East travelway from no. 69 to no. 85 crosscut, on the 6th North travelway from the mouth to no. 28 crosscut, and for the entire 6 North 5A unit travelway, a distance of approximately 20 crosscuts. This Notice to Provide Safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions that could affect the control of mobile equipment traveling these areas.

American argues that this safeguard is ambiguous, does not provide it with notice of the hazard, and does not specify the corrective measures required. In particular, the operator asserts that the safeguard is ambiguous because it lacks a description of “bottom irregularities” and the phrase “as free as practicable” is too subjective. The Secretary states that the possibility of a disagreement between the operator and the Secretary over the interpretation of a safeguard does not establish vagueness. She contends that the operator is making the type of semantic arguments cautioned against in *SOCCO I*. She adds that, according to *SOCCO I*, any vague language in the safeguard would be construed narrowly.

We conclude that this safeguard specifies “the nature of the hazard,” i.e., bottom irregularities, debris, and muddy conditions in a travelway that could affect the control of mobile equipment and specifies a remedy, i.e., all mine travelways are to be kept as free as practicable of bottom irregularities, debris and muddy conditions that could affect the control of mobile equipment. Hence, we affirm the judge’s conclusion that the safeguard is valid on its face.

### 4. Safeguard No. 3538483

The safeguard states:

[T]he established rubber-tired (off track) haulage roadway located in the no. 1 entry of the 1st East Longwall tailgate entries was not maintained to allow safe passage of miners and material. Numerous pieces of bridging lumber (2 ½" x 10 ½" x 12' - 14'), which were used to stabilize the mine floor, were dislodged or protruding from the mine floor along this travel entry. This is a notice to provide safeguards requiring all bridging lumber used on the mine floors be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway.

American asserts that the safeguard does not provide notice of the harm it was intended to prevent or how to remedy the condition. The Secretary counters that American's "contention is based on the flawed premise that knowledge of the potential harm(s) is necessary for the operator to know how to comply with the notice . . . rather, the notice must specifically identify the means of compliance." S. Br. at 17.

We conclude that the safeguard specifies "the nature of the hazard," i.e., haulage track roadway was not maintained to allow safe passage because it contained dislodged or protruding pieces of lumber, and specifies a remedy, i.e., secure or remove the loose pieces of lumber. We affirm the judge's conclusion that the safeguard is valid on its face.

#### **5. Safeguard No. 4268263**

The safeguard states:

A clear travelway at least 24" inches wide was not provided on the No. 4 Galatia Belt from the No. 4 Belt Drive for approximately 100' feet, due to water and slurry conditions in an excess of 16" inches. This is a notice to provide a safeguard for a clear travelway at least 24" inches wide shall be provided on both sides of all belt conveyors and kept free from water and or slurry conditions that would affect safe travel of miners.

American states that the safeguard fails to state a hazard. It also suggests that the safeguard duplicates Safeguard No. 4054826. The Secretary asserts that the safeguard identifies a hazardous condition that affected the safe travel of miners, and that this safeguard differs from Safeguard No. 4054826, as the latter did not identify water accumulations.

We conclude that this safeguard specifies "the nature of the hazard," i.e., water and slurry conditions in excess of 16 inches in a travelway, and a specifies a remedy, i.e., a clear travelway of at least 24 inches wide shall be provided on both sides of the belt conveyor. We affirm the judge's conclusion that the safeguard is valid on its face.

In addition, we conclude that the safeguard in issue does not duplicate the protections afforded by Safeguard No. 4054826. A safeguard must specifically provide notice that it is intended to prevent accumulated water. *SOCCO I*, 7 FMSHRC at 513 (in which the Commission vacated a citation issued for accumulated water in the travelway, because the safeguard did not explicitly prohibit the accumulated water). This safeguard is aimed at preventing water accumulations, whereas Safeguard No. 4054826 did not identify wet conditions.

**6. Safeguard No. 4054971**

The safeguard states:

A miner was observed being hoisted from this coal mine, on the MAIN – MAN and MATERIAL CAGE with the NORTH gate secured in the open position. This gate measures nine (9) feet wide by seven (7) feet high. This is a NOTICE to provide safeguards requiring the gates on all cages, at this coal mine, be secured in the closed position when persons are being hoisted or lowered.

American asserts that the safeguard is invalid on its face. The Secretary argues that “[i]f the language of this safeguard notice is not sufficiently specific, no language will ever suffice.” S. Br. at 20.

We conclude that this safeguard specifies “the nature of the hazard,” i.e., a miner being hoisted in a man cage with the gate secured in an open position, and specifies a remedy, i.e., secure the gate in the closed position when persons are being hoisted. In addition, we agree with the Secretary that it requires only common sense to know that it is unsafe to travel in a hoist with an open gate and that the remedy is to close the gate. S. Br. at 20. We affirm the judge’s conclusion that the safeguard is valid on its face.

**7. Safeguard No. 4272082**

The safeguard states:

Construction tractor (CT10) was not provided with a proper coupling device. The construction tractor was enroute to the 8th west headgate unit pulling a material trailer loaded with crib ties coupled only with a belt chain. This is a notice to provide safeguard requiring that a proper coupling device be used on CT10 and all other mobile equipment used at this mine to transport materials and equipment.

American asserts that the safeguard is invalid on its face because it does not specify a hazard or the corrective measures required. American suggests, in part, that the term “proper coupling device” is too ambiguous. The Secretary contends that American has made the type of semantic argument that *SOCCO I* cautioned against. She asserts that the safeguard specifies a hazard (a belt chain used as a coupling device) and provides a remedy (the operator must use a device made specifically for coupling).

We conclude that this safeguard specifies “the nature of the hazard,” i.e., a construction tractor that was pulling a material trailer with only a belt chain, and specifies a remedy, i.e., a proper coupling device shall be used to transport materials and equipment. We affirm the judge’s conclusion that the safeguard is valid on its face.

**8. Safeguard No. 7570492**

The safeguard (as modified) states:

Accumulations of water and coal fines were present in the 2nd West Longwall walkway from Shield # 102 to Shield No. 122. These accumulations created a hazard for miners who must travel the longwall walkway. This is a notice to provide safeguards requiring that all longwall walkways be maintained free of water and slurry in depths that affect the safe travel of miners.

American argues that the safeguard provides no indication of how much water and material is prohibited. Furthermore, American suggests that this safeguard is duplicative of Safeguard No. 7582643. The Secretary states that the safeguard does specify how much water and material is prohibited – the level that “affect[s] the safe travel of miners.”

We conclude that the safeguard specified “the nature of the hazard,” i.e., accumulations of water and coal fines in the longwall walkway that affect the safe travel of miners, and a remedy, i.e., all longwall walkways are to be maintained free of water and slurry in depths that affect the safe travel of miners. We affirm the judge’s conclusion that the safeguard is valid on its face.

In addition, we conclude that the safeguard at issue does not duplicate the protections afforded by Safeguard No. 7582643. As previously discussed, according to *SOCCO I*, a safeguard must specifically provide notice that it intended to prevent accumulated water. 7 FMSHRC at 513. This safeguard is aimed at preventing water accumulations, whereas Safeguard No. 7582643 did not identify wet conditions.

**9. Safeguard No. 4056981**

The safeguard states:

The MT-11 personnel carrier located on the MMU 004, was not provided with a well maintained audible warning device. It failed to sound an alarm or warning when operated.

This is a notice to provide safeguards that all personnel carriers shall be equipped with well maintained, functional audible warning devices.

American argues that this safeguard does not describe a hazard with specificity, and is therefore invalid on its face. The operator also contends that the safeguard should be vacated because it is duplicative of an existing mandatory standard, 30 C.F.R. § 75.1725(a) (requiring mobile equipment to be maintained in safe operating condition). The Secretary contends that the safeguard is valid, as it clearly states that the hazard is the lack of an audible warning device.

We conclude that this safeguard specifies “the nature of the hazard,” i.e., a personnel carrier was not provided with a well maintained audible warning device, and specifies a remedy, i.e., all personnel carriers shall be equipped with well maintained, functional audible warning devices. We affirm the judge’s conclusion that the safeguard is valid on its face.

With respect to the duplication argument, American did not raise this issue before the judge, and as a result it is not properly before us. *See Beech Fork*, 14 FMSHRC at 1319-20 (holding that according to section 113(d)(2)(A)(iii) of the Mine Act, new theories are not considered on review in the absence of good cause).

#### **10. Safeguard No. 7582396**

The safeguard states:

This is a notice to provide safeguard for all long wall units, the hydraulic manifolds, hoses and CIU shield control boxes shall be mounted in a manner to provide the maximum walkway clearance between the pan line cable tray rail and the shield components. In the event that the clearances cannot be maintained to provide safe travel in these areas for the miners the conveyor shall be shut off and the electrical isolation switch at the head gate opened before miners travel through the affected area.

American argues that this safeguard is invalid on its face because it does not identify the “problem that required a safeguard.” In addition, the operator contends that it is uncertain how to comply with the safeguard’s directive as it does not address a specific amount of clearance that is required. The Secretary counters that the safeguard complies with the requirement of *SOCCO I* on its face. She asserts that the operator has demanded an impossible level of specificity.

The judge concluded that the safeguard was valid. Unpublished Order at 5 (Jan. 4, 2011). She stated that the safeguard identified with necessary specificity, “the hazard of hydraulic manifolds, hoses, and CIU shield control boxes which could obstruct the walkway . . .” *Id.* In addition, she concluded that the conduct required to remedy the hazard, namely the objects must be mounted in such a way that provides maximum walkway clearance between the pan line cable tray rail and the shield components, was also sufficiently specific. *Id.*

We disagree. We conclude that this safeguard does *not* describe “the nature of the hazard” with specificity, and is therefore invalid on its face. The inspector did not describe the conditions that he observed in the mine that led him to issue the safeguard. While one may be able to infer that the inspector observed hydraulic manifold, hoses, and CIU shields boxes that were not mounted in a manner that provided maximum walkway clearance, the safeguard does not specifically state if some or all these conditions were observed by the inspector. As a result, it does not comply with *SOCCO I*’s directive to “identify with specificity the nature of the hazard.”

Therefore, the safeguard is invalid on its face. Accordingly, we reverse the judge's conclusion that the safeguard was valid.<sup>5</sup>

**11. Safeguard No. 4267616**

The safeguard states:

The PV55 was not equipped with a sealed-beam headlight, or its equivalent, on each end. The rear lights had a blown fuse. This is a notice to provide safeguards that all personnel carriers shall be equipped with a functional sealed-beam headlight or its equivalent on each end.

American alleges that the portion of this safeguard involving a blown fuse does not identify the hazard with specificity and that the safeguard is invalid on its face. The operator also alleges that the requirements of the safeguard duplicate the requirements of the mandatory standard in 30 C.F.R. § 75.1725(a). The Secretary asserts that the safeguard is valid. She states that the safeguard requires the operator to either fix a blown fuse, or remove the vehicle from service.

We conclude that this safeguard specifies “the nature of the hazard,” i.e., a PV55 that is not equipped with sealed-beam headlights and has a blown fuse on the rear lights, and specifies a remedy, i.e., all personnel carriers are to be equipped with a functional sealed-beam headlight or its equivalent on each end. We affirm the judge's conclusion that the safeguard is valid on its face.

With respect to the duplication argument, American again did not raise the issue before the judge, and as a result it is not properly before us. *See Beech Fork*, 14 FMSHRC at 1319-20.

**12. Safeguard No. 7577893**

The safeguard states:

A material trailer was observed parked along the 4th North Headgate at crosscut Number 24. The cable roof bolts, on the trailer, extended outby the ribline approximately four feet into the travelway. A continuous mining machine was also parked, along the Main West Travelway, at crosscut Number 36 with the tail extending outby the

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<sup>5</sup> In addition, the safeguard's directive to mount the equipment in a manner that provides “maximum” clearance in the walkway is not sufficiently specific.

rib line approximately three feet. This is a Notice to provide safeguards requiring all trailers and mine equipment be parked in by the rib line at all times.<sup>6</sup>

American alleges that this safeguard is invalid on its face, because in part, the safeguard does not specify how the alleged condition contributes to a hazard. The Secretary asserts that the hazard was the parked vehicles and equipment in the travelways.

We conclude that the safeguard specifies “the nature of the hazard,” i.e., a material trailer that contained equipment that extended into the travelway and a continuous mining machine with a tail that extended into the travelway, and specifies a remedy, i.e., all trailers and mine equipment are to be parked in by the ribline. We affirm the judge’s conclusion that the safeguard is valid on its face.

### **13. Safeguard No. 7581083**

The safeguard states:

A suitable crossing facility was not provided for the energized 6th North Conveyor Belt in the belt drive area, where miners are routinely crossing under the energized belt conveyor. A bridge has been built under the belt in this area for miners to cross under the moving belt. This is a Notice To Provide Safeguards requiring where persons cross moving belt conveyors that a suitable crossing facility shall be provided.

American alleges that the safeguard does not describe a hazard that could result from a miner crossing under a belt. Furthermore, it asserts that the conduct described in the safeguard is too vague, and does not provide meaningful notice how to comply. The Secretary responds that if a dispute were to arise over the meaning of a “suitable crossing facility” at a hearing, the Commission would narrowly construe the language of the safeguard.

We conclude that the safeguard specifies “the nature of the hazard,” i.e., a suitable crossing facility was not provided in a drive area where miners are routinely crossing, and specifies a remedy, i.e., the operator is to provide a suitable crossing facility where persons can cross moving belt conveyors. We affirm the judge’s conclusion that the safeguard is valid on its face.

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<sup>6</sup> The judge also noted that the safeguard was modified to add the following language at the end: “If not possible, then (sic) a readily visible warning device will be posted on each side to alert oncoming traffic.” Unpublished Order at 7 (Jan. 4, 2011).

### III.

Although we have upheld all but one of the Secretary's safeguards in this case, we again take this opportunity to question, as a policy matter, "whether the proliferation of safeguards is the most effective method of addressing the more commonly encountered hazards in underground coal mine transportation." *SOCCO II*, 14 FMSHRC at 15.

Transportation hazards are a major cause of injuries and fatalities in underground coal mines. *Id.* Nonetheless, the Secretary has acknowledged that she has very few mandatory standards addressing the haulage hazards in underground mines. *Id.* at 15-16 (citing the Secretary's Regulatory Agenda, 56 Fed. Reg. 53584 (1991); *see also Wolf Run*, 32 FMSHRC at 1241 (Commissioner Duffy, dissenting)). We note that the absence of certain mandatory haulage safety standards in underground coal mines stands in sharp contrast to the Secretary's regulation of transportation hazards at surface metal and nonmetal mines (30 C.F.R. Part 56), underground metal and nonmetal mines (30 C.F.R. Part 57), and surface coal mines (30 C.F.R. Part 77). As a result of this disparity, a miner in a surface coal mine receives greater protection against transportation hazards than a miner working in an adjacent underground coal mine. This is because an underground coal mine may lack a safeguard that adequately addresses a common transportation hazard, and even if the safeguard does exist, as previously established, it only applies narrowly to the conditions described by the issuing inspector. *See SOCCO I*, 7 FMSHRC at 512. In comparison, the surface coal miner is protected by generally applicable mandatory standards, which are interpreted broadly. *See, e.g., Allied Chemical Corp.*, 6 FMSHRC 1854, 1859 (Aug. 1984); *Cleveland Cliffs Iron Co.*, 3 FMSHRC 291, 293-94 (Feb. 1981).

Accordingly, we reiterate our stance, taken in *SOCCO II*, that "because the use of individual safeguards, issued on a mine-by-mine basis, may not adequately protect *all* affected miners from haulage related hazards, we strongly suggest that the safety of underground coal miners would be better advanced by the promulgation of mandatory safety standards aimed at eliminating transportation hazards." *SOCCO II*, 14 FMSHRC at 16 (emphasis in original).

#### IV.

#### Conclusion

In summary, we conclude that twelve of the safeguards at issue are facially valid. The valid safeguards are Safeguard Nos. 4054826, 4054971, 4272082, 7568565, 3538483, 4268263, 7582643, 7570492, 4056981, 4267616, 7577893, 7581083. Accordingly, the judge's decision upholding the citations which allege a violation of these safeguards is affirmed.<sup>7</sup>

With respect to Safeguard No. 7582396, we conclude that this safeguard is invalid on its face. Accordingly, the judge's decision with respect to Safeguard No. 7582396 is reversed, and Citation No. 6667919, which alleges a violation of that safeguard, is vacated.

/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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<sup>7</sup> The following citations are valid: Citation Nos. 7490888, 7490890, 6668512, 6673822, 6672946, 6674186, 6667854, 6673539, 6674210, 6673286, 6673913, 6673926, 6674135, 7490598, 6672947, 6672815, 7491576, 6668128, 7490889, 6673246, 6673534, 7491342, 6668111, 6668169, 6667302, 6668322, 6668325, 6668301, 6669738.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 30, 2012

LONG BRANCH ENERGY	:	
	:	
v.	:	Docket Nos. WEVA 2009-1492-R
	:	WEVA 2009-1493-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	Docket Nos. WEVA 2009-1788
MINE SAFETY AND HEALTH	:	WEVA 2010-63
ADMINISTRATION (MSHA)	:	WEVA 2010-466
	:	WEVA 2010-467
v.	:	WEVA 2010-652
	:	WEVA 2010-653
LONG BRANCH ENERGY	:	WEVA 2010-654

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

DECISION

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

These contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). On August 22, 2011, Judge Thomas P. McCarthy granted the motions of Long Branch Energy (“Long Branch”) and dismissed seven civil penalty proceedings, along with two associated contest proceedings. He concluded that the Secretary of Labor and the Department of Labor’s Mine Safety and Health Administration (“MSHA”) had inexcusably delayed filing petitions for assessment of penalty in the penalty cases well beyond the 45-day deadline in Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), for filing such petitions. 33 FMSHRC 1960 (Aug. 2011) (ALJ). The Commission granted the Secretary’s Petition for Discretionary Review of the judge’s decision. The Commission also granted the subsequent motion of the United Mine Workers of America (“UMWA”) to participate as amicus curiae in support of the Secretary.

For the following reasons we reverse the judge's decision and remand these proceedings to him.

## I.

### **Factual and Procedural Background**

At issue in these proceedings are 75 contested citations and orders for which the Secretary had proposed a total of \$75,762 in penalties. 33 FMSHRC at 1979. The Long Branch mines were located in MSHA District 4, so that district office was originally responsible for preparing and filing the seven penalty petitions. *Id.* at 1962.<sup>1</sup>

Under Rule 28(a), the seven civil penalty petitions were originally due to be filed by the Secretary at various times between September 2009 and March 2010. However, none were filed within 45 days of MSHA's receipt of the operator's notice of contest as the rule requires.<sup>2</sup> *Id.* at 1961. As summarized by the judge, three petitions were filed about 7-1/2 months late, two about 8-1/2 months late, one 9-1/2 months late, and one about 11 months late. *Id.* Six of the seven were not filed until November 5, 2010. *Id.* at 1961, 1978-79.<sup>3</sup>

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<sup>1</sup> District 4 at the time was one of 11 (now 12) MSHA Coal Mine Safety and Health district offices throughout the country, and covered the southern West Virginia region, with its office in Mount Hope, WV. See <http://www.msha.gov/CONTACTS/COALNOS.HTM#FO>. As the judge noted, while the motions to dismiss were pending, MSHA announced that it was splitting District 4 into two districts: District 4 and District 12. See 33 FMSHRC at 1975 (citing Press Release, MSHA, *MSHA's Newly Formed Coal District 12 Begins Operations* (June 14, 2011) (available at <http://www.msha.gov/media/press/2011/nr110614.asp>)).

<sup>2</sup> In none of the instances did the Secretary file a motion pursuant to Commission Procedural Rule 9(a), 29 C.F.R. § 2700.9(a), for an extension of time before the 45 days had run. *Id.* at 1961. Instead, with the petitions she filed concurrent ("instanter") motions pursuant to Rule 9(b) requesting leave to file out of time. *Id.*

<sup>3</sup> Only one of the seven petitions was eventually filed by District 4 staff (Docket No. WEVA 2009-1788, filed on July 6, 2010). See S. Mem. in Support of Leave to File Petitions Out of Time, Gov't Ex. 3, at 2 (declaration of Noah Anstraus, backlog attorney in Philadelphia Regional Solicitor's Office). The other six were reassigned to the "backlog project," a program for which Congress had appropriated additional funding to the Commission, MSHA, and the Secretary's Office of the Solicitor. See Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, 124 Stat. 2317. According to the project attorney who became responsible for them, the six petitions were filed on November 5, 2010, and proceeded through the Commission litigation process. S. Mem., Gov't Ex. 3, at 2. Settlement agreements were reached in three of the cases. *Id.* at 2-3.

In each of the seven cases, Long Branch filed with its answer to the petition an opposition to the Secretary's motion for leave to file out of time which included a motion to dismiss the proceeding on the ground that the Secretary had failed to establish adequate cause for the late filing of the petition. 33 FMSHRC at 1961. The Secretary opposed the motions to dismiss, arguing that there was adequate cause for the late filings and that her failure to meet the deadlines was excusable due to the huge increase in the volume of work being handled in MSHA District 4. *Id.*

The judge deemed the Secretary's responses to the motions to dismiss to be insufficient, but resisted his initial inclination to grant the motions and instead held oral argument, during which limited testimony was permitted. *Id.* at 1961-63. The Secretary submitted such testimony by way of three declarations from representatives of the Secretary or MSHA.<sup>4</sup> 33 FMSHRC at 1963.

The judge subsequently granted all seven of Long Branch's motions and dismissed the penalty proceedings. *Id.* at 1977. In so doing, he identified the Commission's decision in *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981) ("*Salt Lake*"), as the applicable precedent under Rule 28. 33 FMSHRC at 1964-66. The judge rejected the Secretary's arguments that Supreme Court cases decided subsequent to *Salt Lake* should be read to nullify the "adequate cause" test the Commission fashioned in that case.<sup>5</sup> *Id.* at 1962, 1964-69. Applying the *Salt Lake* test, the judge concluded that the Secretary had failed to establish adequate cause for the late penalty petition filings. *Id.* at 1970-77. He found that her general statements about the nature of her case backlog before the Commission, high workload, and lack of personnel did not address the specific circumstances of the cases at issue. *Id.* at 1971-72. He noted that while the 45-day deadline in Rule 28(a) was not to be a procedural strait jacket and dismissal was a harsh outcome, the filing delays in the instant proceedings were significantly greater than those the Commission had previously excused under the *Salt Lake* standard. *Id.* at 1975-77. He further opined that there appeared to be nothing else that would spur the Secretary to more timely action on penalty petitions. *Id.* at 1976-77 & n.18.

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<sup>4</sup> The declarations were attached to the memorandum the Secretary filed at argument in support of her motions for leave to file the petitions out of time. *Id.* at 1963. Long Branch was subsequently given the opportunity to depose those declarants, and did so with respect to Richard Hosch, MSHA local Conference and Litigation Representative ("CLR") in District 4. *Id.*; see S. Mem., Gov't Ex. 2 ("*Hosch Decl.*"). Long Branch submitted the transcript of his testimony as an attachment to its response to the Secretary's memorandum. LB Resp. to S. Mem., Ex. A ("*Hosch Dep. Tr.*").

<sup>5</sup> The judge discussed *Brock v. Pierce County*, 476 U.S. 253 (1986); *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); and *Dolan v. United States*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2533 (2010). 33 FMSHRC at 1966-70.

## II.

### Disposition

The Secretary submits that the Commission should modify the *Salt Lake* test by taking into account in all instances the extent to which an operator has shown that it has been prejudiced by a late filing. As a result, she contends that the factor of “adequate cause” should always be considered in conjunction with the factor of “prejudice” to the operator. For example, according to the Secretary, if the operator cannot establish any prejudice, a weak reason for the delay may be sufficient. The Secretary maintains that application of the modified test would require a remand in these cases. The Secretary further maintains that, even if the current *Salt Lake* test is applied, the judge’s dismissal order constituted an abuse of discretion, in that key factual findings underlying his decision were not supported by substantial evidence and he relied upon an improper understanding of applicable law.

Amicus curiae UMWA takes the position that applicable Supreme Court precedent mandates reversal of the judge’s decision, because neither the Mine Act nor Rule 28(a) specifies a consequence for the late filing of a penalty petition or indicates an intention to deprive the Commission of the power to act. According to the UMWA, given the important public rights at stake, it is incumbent upon the Commission to use the less drastic remedies it has at its disposal in this instance. The UMWA also submits that the judge misread *Salt Lake*, and that if it is determined he did not, Supreme Court precedent requires that it be overturned.

Long Branch responds to the Secretary by arguing that the Commission should not disturb *Salt Lake*. With regard to the judge’s ruling, Long Branch takes the position that it did not contain an error of law and was supported by substantial evidence, so consequently the Secretary’s view that it was an abuse of discretion should be rejected. Long Branch further contends that the judge correctly interpreted Rule 28(a) to be a “claims processing” rule, and therefore the burden had been properly placed upon the Secretary to show that enlargements of time were justified in these circumstances.

#### **A. Background of Rule 28**

Section 105 of the Mine Act sets forth the basic framework for the proposal and contesting of civil penalties. Section 105(a) of the Act states that the Secretary is to provide the operator notice of a proposed penalty “within a reasonable time” after the issuance of a citation or order. 30 U.S.C. § 815(a). Section 105(d) of the Act states that when an operator files a notice contesting a proposed penalty, “the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.” 30 U.S.C. § 815(d).

The Commission, through its procedural rules, has implemented the statutory framework. Commission Rule 26 echoes the Mine Act, stating in pertinent part that “[t]he Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty

assessment.” 29 C.F.R. § 2700.26. Commission Rule 28(a) provides the following regarding the timing of the next step in the penalty process:

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

(a) Time to file. Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

29 C.F.R. § 2700.28(a).<sup>6</sup>

The same or substantially similar procedures have been in effect since the Commission began hearing cases in 1978, and there is no indication in the regulatory history that the Secretary objected to the deadline as unrealistic. The Commission has stated that the 45-day time limit in Rule 28(a) “[i]n essence . . . implements the meaning of ‘immediately’ in section 105(d).” *Salt Lake*, 3 FMSHRC at 1715. In *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982), the Commission explained that the Secretary has two notification requirements arising from section 105(d): notification under Rule 26 for clerical purposes and notification under Rule 28 for pleading purposes.<sup>7</sup>

**B. Standard of Review**

In *Black Butte Coal Co.*, 25 FMSHRC 457, 459-60 (Aug. 2003), the Commission stated that “[w]hen reviewing a judge’s pre-trial rulings, . . . the appropriate standard of review to apply . . . is abuse of discretion, though any factual determinations he made in arriving at his conclusion are subject to substantial evidence review.” The Commission also acknowledged that it “cannot merely substitute its judgment for that of the administrative law judge . . . . The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his

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<sup>6</sup> While in 1993 the numbering of the Commission’s procedural rules dealing with civil penalty cases slightly changed, with what was Rule 27 becoming Rule 28, the 45-day time limit did not change. See *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 n.1 (Oct. 1993) (citing 58 Fed. Reg. 12158-74 (Mar. 3, 1993)), *aff’d*, 57 F.3d 982 (10th Cir. 1995).

<sup>7</sup> The penalty petition is also the first indication an operator receives that its contest was docketed with the Commission. Here, the Secretary takes the position that the first document in a Commission penalty proceeding is the operator’s notice of contest form, because Commission Rule 26 requires that MSHA transmit it to the Commission. S. Reply Br. at 5. What MSHA transmits in practice to the Commission’s docket office, however, is a list of contested assessments and the citations and orders being contested. We do not view the contest form as the document which initiates a case before the Commission.

discretion *and* whether substantial evidence supports his factual findings.” *Id.* (emphasis added) (quoting *Asarco, Inc.*, 12 FMSHRC 2548, 2555 (Dec. 1990)).

This case involves the Commission’s interpretation and application of its own regulations. Consequently, we have “considerable legal leeway” to interpret our regulation, as long as that interpretation is not “plainly erroneous or inconsistent with the regulation.” *Barnhart v. Walton*, 535 U.S. 212, 217 (2002); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

### **C. Application of the Test Set Forth in *Salt Lake***

The Secretary suggests that the Commission should revisit or modify the standard set forth in *Salt Lake*, arguing that the Commission recognized in the case that the “drastic course” of dismissal had the potential to frustrate the public interest embodied by the Mine Act. S. Br. at 9-10. Long Branch responds that disturbing the *Salt Lake* test now would violate the principle of *stare decisis*. LB Br. at 10-13.

For the reasons set forth below, we do not believe that modification of the *Salt Lake* standard is necessary. However, it is appropriate for us to clarify our ruling in that decision, particularly in light of subsequent Commission cases, in order to determine whether the judge abused his discretion in this instance.

Distilled to its essence, our opinion in *Salt Lake* identifies and prioritizes the interests implicated by the case before us and provides guidance for determining how judges should proceed when those interests collide. At its core, the decision reflects an “overriding concern with enforcement.” 3 FMSHRC at 1715. In support, *Salt Lake* cites the legislative history of the Mine Act, which noted that there may be rare circumstances where prompt proposal of a penalty would not be possible, but that the Senate Committee did “not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (“*Legis. Hist.*”).

While the Commission noted the paramount importance of penalties to the Act's enforcement scheme, *Salt Lake* also noted other considerations implicated by the language of section 105(d) of the Mine Act, which requires the Secretary to advise the Commission immediately when a penalty contest is received. 3 FMSHRC at 1715. This provision, we observed, “incidentally promotes ‘fair play’ by protecting operators from stale claims.” *Id.*

Although we recognized the value of fairness inherent in the prompt filing of penalty petitions, we also clearly stated that Commission Rule 28(a)’s requirement that a penalty petition be filed within 45 days, while effectively ensuring the prompt filing of penalty petitions, is not a statute of limitations. *Id.* at 1715-16. The central tenet of the decision was that Rule 28 must be interpreted in light of section 105(d) of the Act: “Accordingly, the Secretary is not free to ignore the time constraints in Rule 2[8] for any mere caprice, as that would frustrate the enforcement purpose of section 105(d) and, in some cases, deny fair play to operators.” *Id.* at 1716.

Thus, *Salt Lake* clearly established that Commission enforcement of the filing time limits is a secondary consideration to the primary purpose of section 105(d), i.e., ensuring prompt enforcement of the Act's penalty scheme. Consistent with this purpose, we held that the rule establishing a time limit for penalty proposals could not be viewed as a "procedural strait jacket[]." *Id.*

We further observed that strict compliance may not always be possible, and that "[n]onsuiting the Secretary . . . presents quite a different situation from defaulting the tardy private litigant." *Id.* Thus, *Salt Lake* rests firmly on the principle that "considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute, and, hence, the public interest itself." *Id.*

We then provided guidance for conducting the requisite balancing in subsequent cases: "In order to help strike a proper balance and to insure [sic] that the Secretary does not ignore section 105(d)'s injunction to act 'immediately,' we hold that if the Secretary does seek permission to file late, *he must predicate his request upon adequate cause.*" *Id.* (emphasis added).<sup>8</sup>

The requirement in Rule 28(a) to file a penalty petition within 45 days cannot be viewed as an avenue for an operator to seek dismissal on a mere technicality. Despite stern admonitions to the Secretary, the clear and express holding of *Salt Lake* is that cases should not be dismissed on mere procedural grounds, as this would frustrate section 105(d)'s overriding purpose of ensuring prompt and efficient enforcement. Rather, *Salt Lake* compels the Secretary to adequately explain any late filing. However, once a showing of adequate cause is made, a demonstration of prejudice by the operator is a predicate for dismissal, because agency proceedings "are not to be overturned because of a procedural error, absent a showing of prejudice." *Id.* at 1716.<sup>9</sup>

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<sup>8</sup> We analogized this to the latitude extended to operators to file late answers (*Valley Camp Coal Co.*, 1 FMSHRC 791, 792 (July 1979)), while noting that the considerations affecting the Secretary made for an imperfect comparison. *Id.*

<sup>9</sup> In so holding, we relied on several appellate court cases in which the courts required a showing of prejudice before permitting a procedural defect to serve as a basis for dismissing a case. *E.g.*, *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1383 (8th Cir. 1980) ("Unless required by law, this court will not set aside a Board decision in the absence of a showing that the alleged procedural defect *substantially prejudiced the rights of the complaining party.*") (emphasis added); *see also Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 286 (D.C. Cir. 2005) ("[w]e further note that it would be particularly inappropriate to set aside the Secretary's recommendation for penalty in this case [for failure to promptly propose a penalty] given that Twentymile, after repeated opportunity, has yet to show any prejudice to itself from whatever delay in fact occurred.").

In sum, pursuant to *Salt Lake*, the Secretary may not, on a “mere caprice,” ignore the Commission’s procedural rule regarding deadlines for filing penalty petitions. At the same time, we must adhere to the basic administrative law principle that, where the government can be said to have acted reasonably – i.e., not on a whim or in dereliction of its duties to uphold the law – an overarching interest in prompt and efficient enforcement precludes the dismissal of substantive proceedings on procedural grounds in the absence of prejudice. *Id.* Thus, regardless of how important procedural regularity may be, it is subservient to the substantive purpose of the Mine Act in protecting miners’ health and safety. As stated in *Salt Lake*, “[w]e do not mean to intimate that insuring procedural fairness is not an important concern under the Mine Act. However effectuation of the Mine Act’s substantive scheme, in furtherance of the public interest, is more crucial.” *Id.*<sup>10</sup> We therefore must balance concerns for procedural regularity against the severe impact of a dismissal on the Mine Act’s penalty scheme.

In order to achieve this balance, we clarify that “adequate cause” may be found to exist where the Secretary provides a non-frivolous explanation for the delay. The Secretary’s excuse may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from “mere caprice” or through willful delay, intentional misconduct, or bad faith.<sup>11</sup> This ensures that the Secretary is upholding her commitment to the public interest, while recognizing that dedicated public servants may stumble in the performance of their duties.

Once the Secretary meets her burden in this regard, an operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected. Of course, occasions may arise where a judge will find that the Secretary has demonstrated adequate cause and that the operator has brought forth evidence of actual prejudice. The judge in such instances must weigh the interest of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).

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<sup>10</sup> The Mine Act’s substantive scheme does depend upon reasonably prompt adjudication of penalties. Thus, evaluation of the adequacy or plausibility of the Secretary’s excuse should generally consider the length of the delay, and whether the excuse offered for a delinquency of that length is both credible and consistent with an agency’s acting in good faith to uphold the public purposes of the Act.

<sup>11</sup> The Commission presumes that the Secretary’s agents generally act in good faith to uphold the timely enforcement of penalties assessed under the Act. *Cf. Kalvar Corp. v. United States*, 543 F.2d 1298, 1299 (Ct. Cl. 1976) (“[t]here is a strong presumption that” government employees perform their duties in good faith). However, in deciding whether to accept the Secretary’s proffer of “adequate cause,” a judge should take into account rebuttal evidence presented by the operator, if offered, showing that the Secretary acted in bad faith or for an improper purpose.

The Commission was not required to engage in such balancing in the two major cases analyzing this issue post-*Salt Lake* because the operator failed to establish prejudice in either case. In *Medicine Bow*, the Commission characterized the *Salt Lake* standard as a “two-part” test,<sup>12</sup> requiring the Secretary to demonstrate adequate cause and, upon such showing, calling on the operator to demonstrate “prejudice,” such as “missing witnesses” or “lateness so great as to unduly delay a hearing.” 4 FMSHRC at 885. Despite the Commission’s rejection of the Secretary’s suggestion that “significant malfeasance” be demonstrated before dismissing a penalty, *id.* at 885 n.6, and implicit criticism of the “minimally adequate” excuse offered by the Secretary, *id.* at 885, the Commission affirmed the judge’s denial of the operator’s motion to dismiss, where no actual prejudice was established. *Id.* at 885-86.

Similarly, in *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), *aff’d*, 57 F.3d 982 (10th Cir. 1995), we reversed a judge’s dismissal of a penalty proceeding where prejudice was not established. Again, the Commission noted that adequate cause is required apart from any consideration of prejudice. 15 FMSHRC at 2093. In evaluating the Secretary’s excuse, we found compelling the “unusually heavy” caseload occasioned by the impact of a Commission decision on the Secretary’s penalty calculations in general, as well as a shortage of clerical personnel that could be assigned to reprocess the cases. *Id.* at 2093-94. The “rare” two-week delay, under the circumstances, was deemed justified. *Id.* at 2094.

Similar to our precedent in *Salt Lake* and its progeny, we note that the cases before us may be decided solely on the adequacy of the cause proffered by the Secretary. In none of these cases has the operator provided evidence of any actual prejudice.

We further note that although here the judge stated that he was not reaching the issue of prejudice, he suggested that it was enough to establish prejudice under *Salt Lake* “that Long Branch has raised a ‘danger of prejudice’ due to the Secretary’s untimely filings, and those filings are prejudicial to the interests of efficient adjudicatory administration.” 33 FMSHRC at 1976 n.17. Application of such a standard of prejudice would have been erroneous. The Commission in *Salt Lake* did not expand upon what it meant by “a showing of prejudice” to “the preparation and presentation of the operator’s case.” 3 FMSHRC at 1716. It is clear from the cases that it cited, however, that it meant more than “a danger of prejudice,” or a concern about prejudice to

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<sup>12</sup> While the *Salt Lake* formulation may operate as a two-part test in some cases, it is more precisely understood as a requirement that each party bear the burden of production on the respective issues of adequate cause and prejudice, with the judge required to balance the public interest and the harm to each party if both adequate cause and prejudice are shown. Thus, if the Secretary fails to demonstrate adequate cause, the operator has no burden to establish prejudice, and there is no “two-part test.” Similarly, if both are established, the “two-part test” does not resolve the issue in and of itself, because the judge would be required to resolve the tension among competing interests. Our decision today, like those in *Medicine Bow* and *Rhone-Poulenc* reasserts, and is consistent with, this framework constructed in *Salt Lake*.

the efficiency of the Mine Act enforcement process.<sup>13</sup> The cases the Commission cited stand for the proposition that the prejudice must be “real” or “substantial,” and demonstrated by a specific showing by the operator.

Our holding today, in addition to conforming to our precedent, is in accord with that of several federal courts, which have demonstrated a similar reluctance to dismiss a case against a private litigant who has “merely seize[d] upon a procedural irregularity to justify the drastic remedy of dismissal.” *Salt Lake*, 3 FMSHRC at 1717. For example, in *Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275 (9th Cir. 1980), the court approved a similar approach:

Where a plaintiff has come forth with an excuse for his delay that is anything but frivolous, the burden of production shifts to the defendant to show at least some actual prejudice. If he does so, the plaintiff must then persuade the court that such claims of prejudice are either illusory or relatively insignificant when compared to the force of his excuse. At that point, the court must exercise its discretion by weighing the relevant factors – time, excuse, and prejudice.

*Id.* at 1281.

#### **D. Whether the Judge Abused his Discretion in Dismissing the Proceedings**

Applying the *Salt Lake* standard to the cases before us requires a determination whether adequate cause exists for the late filings, considering the cause and length of the delay and the plausibility of the excuse. Consistent with *Rhone-Poulenc*, we take into account the unprecedented expansion of the Secretary’s workload following the 2006 and 2007 mine disasters at the Sago and Aracoma mines in West Virginia, and the sweeping policy changes that followed those events.

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<sup>13</sup> These cases include *Alumbaugh Coal*, 635 F.2d at 1383-84 (“Unless required by law, this court will not set aside a Board decision in the absence of a showing that the alleged procedural defect *substantially prejudiced the rights of the complaining party.*”) (emphasis added); *Jensen Constr. Co. v. OSHRC*, 597 F.2d 246, 247-48 (10th Cir. 1979) (“absent a more specific showing that [the employer] suffered *real prejudice* due to the delay of some 28 days [in filing the complaint], and in light of the potentially serious nature of the offenses . . . the Judge did not abuse his discretion in refusing to dismiss the complaint.”) (emphasis added); and *Todd Shipyards Corp. v. Sec’y of Labor*, 566 F.2d 1327, 1330 (9th Cir. 1977) (recognizing merit in OSHRC rule that delay in issuance of citation to employer will only result in vacature of citation “if delay in issuance has resulted in *demonstrable prejudice* to the employer.”) (emphasis added).

Those accidents resulted in multiple miner fatalities in early 2006, after which it is clear that MSHA increased its enforcement efforts under the Mine Act. MSHA's web site contains extensive statistics from calendar years 2002 to 2011 that illustrate what was occurring both in the field and at MSHA's centralized assessment office.<sup>14</sup> The number of citations and orders issued by the agency increased steadily in the first half of the decade, before increasing over 20 percent in 2008 and remaining nearly that high the next two years.<sup>15</sup>

In light of the fatal accidents, MSHA's enforcement responsibilities under the Mine Act also were expanded with that statute's amendment by the Mine Improvement and New Emergency Response Act of 2006 (known as the MINER Act). *See* Pub. L. 109-236, 120 Stat. 493. Moreover, effective as of April 2007, the agency amended its civil penalty regulations in light of the new law to provide for, among other things, higher penalty amounts. *See* 72 Fed. Reg. 13592 (Mar. 22, 2007) (amending 30 C.F.R. Part 100). Consequently, the total dollar amount of penalties proposed by MSHA increased nearly five-fold in the 2007 to 2011 time frame over the previous five-year period. Considering only coal mines, the increase in proposed penalties was even greater, from \$17.4 million in 2005 to \$29.9 million in 2006 and then \$98.9 million in 2007 and \$110.4 million in 2008.<sup>16</sup>

The results of these changes in the enforcement environment can be easily seen, particularly in District 4. The Secretary presented evidence that the number of cases there, measured both in terms of contested assessments and contested individual penalties, roughly tripled between 2008 and 2009, and then nearly doubled again the following year, resulting in District 4 having a workload that was approximately twice that of any other coal district in the country. *See* Gov't Ex. 1, at 3-4 & attachments (declaration of Linda C. Weitershausen, Deputy Director, MSHA Office of Assessments).

While the judge mentioned this evidence in his decision below, he did so prior to the clarification of the *Salt Lake* standard we are providing today. Consequently, although we can see how he came to the conclusions that he did, we are constrained to hold that he abused his discretion by not giving adequate weight to this evidence in his analysis of the issues.

The Secretary argues that the influx of cases overwhelmed the responsible District 4 staff. Mr. Hosch, the District 4 CLR, stated in his declaration, and later expanded upon at his deposition, that the three CLRs and the one secretary assigned to assist them were unable to keep up with the sheer number of cases for which they were expected to prepare penalty petitions. *See* Hosch Decl., 13, Hosch Dep. Tr. at 48-53.

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<sup>14</sup> *See* <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers.asp>.

<sup>15</sup> <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalendarYear/Citations%20and%20Orders%20Issued.pdf>.

<sup>16</sup> <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalendarYear/Assessments%20data.pdf>.

Although the judge in his decision focused on what he found to be an inadequate response by MSHA and the Secretary to the sudden deluge of new cases experienced by District 4 (*see* 33 FMSHRC at 1972-73), we question whether any agency could have responded in a completely sufficient fashion, given the circumstances outlined above.<sup>17</sup> While other district office staff members were in theory available (*id.* at 1973), the increase in mine safety enforcement and new MSHA responsibilities increased the duties of most if not all of those employees as well.<sup>18</sup>

Consequently, we conclude that the delays at issue here, while regrettable, were adequately explained by the unusual circumstances that existed during the relevant time period. Given the record evidence, the Secretary's excuse for the late filings is plainly a plausible one, and adequate cause for the delay has been established. Consequently, we reverse the judge's decision dismissing the seven penalty proceedings (and two associated contest proceedings).

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<sup>17</sup> The dissent would affirm the judge based on a reasonable inference that MSHA should have done more to anticipate the massive increase in workload in District 4. Slip op. at 18-19. There are two problems with this approach. First, assuming that the inference is proper, the origin of the problem remains the undisputed, transformational explosion in work. The Secretary's explanation details how this problem *arising from the facts as they existed*, led directly to the failure to timely file petitions in this case. The dissent would have us dismiss these enforcement proceedings because of management inefficiencies that, as a general matter, seriously and adversely affected the ability of MSHA's staff to do its job. Thus, we would be deciding the case, not on these particular facts, but on the general premise that MSHA's poor planning caused or created the problem in District 4 and that rendering hundreds or perhaps thousands of untimely actions vulnerable to dismissal is the appropriate remedy. That brings us to the second problem: the Commission is ill equipped, even with the benefit of hindsight, to give management advice to MSHA. There are countless alternatives the agency might have pursued to avoid or ameliorate the consequences of the explosion in penalty contests. It is not possible, on the record before us, to determine exactly how the agency might have better anticipated the problem, and it would be irresponsible to hold speculatively that the agency should be held fatally accountable for decisions that are called into question by hard experience.

<sup>18</sup> We note that the judge also erred to the extent that he took into account the supplemental Congressional appropriations that funded the backlog project as a factor in favor of *granting* the motions to dismiss. *See supra* n.3. The judge viewed District 4 management's refusal to provide assistance to Hosch as an aggravating factor in his analysis, given the "influx of funds" provided by the supplemental appropriations. *See* 33 FMSHRC at 1973. As the Secretary points out, however, it appears that the judge understood the legislation to have taken effect well before it actually did. S. Br. at 16-17. The penalty petitions in question were all due between September 2009 and March 2010. The supplemental appropriations act was not enacted until July 29, 2010. *See* Pub. L. No. 111-212, 124 Stat. 2302 (July 29, 2010).

Our decision provides appropriate standards for a proper balancing of the public and private interests at stake.<sup>19</sup> While we reaffirm our paramount concern with ensuring the preservation of the important substantive protections provided by the Mine Act, we also recognize, in proportion, the value of order and procedural regularity, the need for government agencies to be held accountable for inefficiencies which harm the public interest, and the commitment to ensuring that delays caused by the Secretary do not unfairly burden private litigants in their contests before the Commission.

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<sup>19</sup> Our dissenting colleague points out that the integrity of the Commission's processes is also a consideration when balancing the interests at stake. Slip op. at 23. We agree. We note, however, that most of the Commission's balancing in cases involving late filings occurs in the context of requests to be relieved from default judgments filed by mine operators who have failed to timely contest the Secretary's proposed penalties or who have failed to file answers to the Secretary's petitions for assessment of penalty. While the integrity of the statutory or regulatory time frames is a consideration that we take into account in evaluating the adequacy of the operator's excuse, we frequently grant relief, noting that "default is a harsh remedy." *See, e.g., Asarco LLC*, 33 FMSHRC 1577, 1578 (July 2011). Moreover, despite our colleague's umbrage at the Secretary's acknowledgment at oral argument that if the roles were reversed the Secretary would insist that the operator be held to the Commission's filing deadlines, slip op. at 23, the fact is that the Secretary does not oppose most motions by operators seeking relief from defaults.

### III.

#### Conclusion

For the foregoing reasons, we reverse the judge's decision dismissing the seven penalty proceedings and two associated contest cases, and remand this matter to him for further proceedings consistent with this decision.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

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

Commissioner Duffy, dissenting:

I would affirm the decision below as a model of clarity, logic, persuasion, and adherence to Commission precedent. Moreover, the judge's disposition of these matters, the dismissal of the civil penalty proceedings for lack of timely prosecution by the Secretary, is fully justified by the record and is a necessary and appropriate means for ensuring that the Commission's processes and its pivotal role in the administration of the Mine Act are vindicated.

The judge, applying his reading of the Commission's decision in *Salt Lake*, concluded that the Secretary did not establish "adequate cause" for the late filing of the seven petitions, and dismissed the seven penalty proceedings on that basis alone. He made only a brief reference to the issue of prejudice on the grounds that once the Secretary is unable to establish adequate cause for her failure to comply with Rule 28(a), the issue of prejudice need not be decided. 33 FMSHRC at 1970, 1976-77 & n.17. I agree with both of those holdings.

The Secretary argues that the judge abused his discretion in so holding and asks that the Commission reconsider the analytical approach in *Salt Lake* so as to hold that dismissal of a civil penalty due to the Secretary's failure to timely file a petition, or adequately explain her reasons for not doing so, cannot be had without a showing of prejudice by the operator. *Salt Lake*, however, was just the first Commission case to rule on the standard to be applied when an operator moves to dismiss a proceeding on the ground that the Secretary has failed to comply with the 45-day deadline for filing a penalty petition. Subsequent Commission cases applying the principles adopted in *Salt Lake* make it abundantly clear that the correct analytical framework for determining whether dismissal is appropriate is a two-part test in which the question of adequate cause is first determined, and then, if necessary, the question of prejudice is addressed. In *Medicine Bow*, a case the Commission described as "basically involv[ing] a straightforward application of *Salt Lake* to the relevant facts," the Commission stated:

The judge correctly interpreted *Salt Lake* as creating a two-part test. *Salt Lake* first established that the Secretary must show adequate cause for any delayed filing. 3 FMSHRC at 1715-17. . . .

We also held in *Salt Lake* that adequate cause notwithstanding, dismissal could be required where an operator demonstrates prejudice cause by the delayed filing. 3 FMSHRC at 1715-18.

4 FMSHRC at 884, 885. Subsequently, in *Rhone-Poulenc*, the Commission further explained that

under *Salt Lake* and *Medicine Bow*, the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. In general, if the Secretary fails to establish adequate cause, the case may be subject to dismissal.

15 FMSHRC at 2093.<sup>1</sup>

Taking into consideration these later iterations of the principles underlying the Commission's decision in *Salt Lake*, I find that the judge properly held that the Secretary, if challenged, is obligated to establish adequate cause for filing a penalty beyond the 45 days specified in Rule 28(a) notwithstanding whether the delay prejudices the mine operator. Accordingly, I agree with my colleagues that modification of the standards adopted in *Salt Lake* is neither necessary or appropriate.<sup>2</sup>

More importantly, reaffirming the standard the Commission established in *Salt Lake* reassures the regulated community that the Secretary does not have "carte blanche" to ignore the Commission's rules, particularly with respect to those as important as Rules 9 and 28(a), without which, as the judge recognized, "the adjudicatory process languishes." See 33 FMSHRC at 1973, 1976. I part company with the majority, however, on the application of *Salt Lake*'s principles to the circumstances presented in these proceedings.

The Secretary takes issue with the judge's finding that her evidence was not specific enough with regard to how the rising tide of District 4 penalty proceedings prevented the seven penalty petitions here from being prepared for several months beyond the 45-day deadline in Rule 28(a). According to the Secretary, it was sufficient that she presented evidence that the number of cases in the district, measured both in terms of contested assessments and contested individual

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<sup>1</sup> For reasons to be explored below, it is instructive to note the degrees of Secretarial tardiness in *Salt Lake*, *Medicine Bow*, and *Rhone Poulenc*. The petitions filed in those cases were, respectively two months, 15 days and 11 days late. 33 FMSHRC at 1974. By contrast, the delays at issue in this proceeding are 7-1/2 months, 8-1/2 months, and 11 months. *Id.* at 1961.

<sup>2</sup> I question whether the our decision in *Salt Lake* needs to be "clarified." In affirming the Commission's decision in *Rhone Poulenc*, the 10th Circuit stated "[t]he Commission's decision in *Salt Lake*, as well as its subsequent application of the same standard in *Medicine Bow*, clearly requires a judge to weigh all of the relevant circumstances in determining whether a late filing should be permitted." 57 F.3d 982, 985 (10th Cir. 1995). That is precisely what the judge did here and what the Commission should do in weighing whether the Secretary has provided adequate grounds for her failure to comply with Rules 9 and 28(a). No further clarification is needed.

penalties, roughly tripled between 2008 and 2009, and then nearly doubled again the following year, resulting in District 4 having a workload that was approximately twice that of any other coal district in the country. S. Br. at 13-14. The judge clearly acknowledged the evidence which the Secretary cites. *See* 33 FMSHRC at 1971 (citing an average 267-day delay in the filing of penalty petitions), 1974 n.14 (statistics on influx of cases in District 4).

The judge was not presented, however, with the question of how the overall increase in penalty contests would affect the average time it would take to process a case. Rather, the judge was presented with a specific factual situation – the Secretary’s failure for months beyond the applicable deadlines to file seven specific penalty petitions, and he plainly found that the Secretary made no effort to explain how the seven cases, given their relative temporal position in the backlog,<sup>3</sup> could not be acted upon relative to the cases for which District 4 was able to prepare petitions and instanten enlargement motions. Moreover, as Long Branch explains in detail, the Secretary’s evidence lacked the detail necessary to explain sufficiently whether District 4 was working at all to file penalty petitions. *See* LB Br. at 26. While it may be true that the extensive backlog of contested enforcement actions in District 4 was not frivolous, the central issue is whether the Secretary can show that her efforts to address that backlog constituted an adequate excuse for the severe delays in complying with Commission Rules 28(a) and 9. The judge found that the Secretary’s efforts constituted “inexcusable neglect,” 33 FMSHRC 1971, and I conclude that substantial evidence supports his conclusion.

Because of the importance of the issue before him, the judge was not unreasonable in expecting more from the Secretary:

The Secretary’s responses contain only general statements about the nature of the backlog, high caseload, and lack of personnel, which allegedly caused the untimeliness of the petitions. The specific circumstances affecting the present cases are not addressed. If such a vague and general explanation was allowed to establish adequate cause then the Commission would be forced to accept nearly every late petition. The Commission’s properly promulgated filing deadlines and the Congressional desire for expeditious determination of civil penalty petitions would be rendered meaningless.

33 FMSHRC at 1971-72.

As the majority indicates, slip op. at 10-11, the Secretary presented statistics on the dramatic rise in the number of penalties contested by operators after 2005. The Secretary’s evidence focused on the contest rate and raw contest numbers between 2007 and 2010, and

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<sup>3</sup> Hosch described District 4 as using a “first-in-first-out” method of preparing penalty petitions. Hosch Dep. Tr. 43-44.

attributed the increase to the passage of the 2006 MINER Act and the higher penalties imposed under MSHA's Part 100 penalty regulations after they were revised in March 2007. *Id.* This only tells part of the story, however, and thus is an incomplete discussion of the problems MSHA was facing, particularly in District 4.

Following at least three coal mining accidents resulting in multiple miner fatalities in early 2006, it is clear that MSHA stepped up enforcement of the Mine Act. While a detailed discussion of the issue is not necessary here, MSHA's web site contains extensive statistics from the calendar year 2002 to 2011 time period that illustrate what was occurring in both the field and at MSHA's centralized assessment office.<sup>4</sup>

Between 2004 and 2007, coal mines were cited for violations at a rate-per-inspection hour that increased nearly 50 percent, before the rate began gradually decreasing. The result was a large increase in the number of citations and violations, particularly after more inspections apparently started taking place in 2008.

Not surprisingly, this increase in citations and orders resulted in a higher assessment of penalties. In just the two years immediately following 2005, the total dollar amount of coal mine penalties proposed by MSHA increased 569 percent, and then further increased in two of the following three years.

The Secretary, however, discounted that the foregoing could be a cause of the increase in penalty contest cases. Rather, citing a 60 to 80 percent increase in the contest rate for penalties, the Secretary claimed that "[t]he increase in contested civil penalties was substantially caused by mine operators contesting civil penalties at a greatly increased rate, as opposed to MSHA issuing more violations." S. Mem., Gov't Ex. 1, at 3.

The judge not only rejected this conclusion, but he also refused to draw the inference requested by the Secretary that operators were acting in bad faith in filing an increased number of contests. *See* 33 FMSHRC at 1974. He instead concluded that MSHA and District 4 were essentially asleep at the switch if they did not expect an increase in penalty contests. *See id.* ("To suggest that the District 4 office did not see or expect an increase in contested penalties is simply beyond reasonable belief. It has been long known and common sense dictates that heightened enforcement and increases in the penalty structure would cause operators to contest more citations.").

The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence," emphasizing that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The inferences drawn by the judge are

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<sup>4</sup> *See* <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers.asp>.

inherently reasonable in this instance. It is only logical that changes in the “front end” of the mine safety enforcement process would eventually be felt in the “back end” of that process during the adjudication stage. Indeed, as the judge recognized, the history of this cause-and-effect relationship is reflected in the Commission’s Rule 28(a) decisions. 33 FMSHRC at 1974; *see also Rhone-Poulenc*, 57 F.3d at 985 (Commission could take its prior decisions that resulted in increased Secretarial caseload into account in reversing judge’s order of dismissal).

Consequently, the judge had ample grounds on which to reject the notion that the large influx of penalty assessment cases could not be foreseen by the Secretary.<sup>5</sup>

The Secretary also takes issue with findings the judge made in regard to how MSHA and District 4 staff reacted to the rise in the number of civil penalty proceedings for which they were responsible for preparing penalty petitions. S. Br. at 15-16. The judge stated that “Hosch’s deposition strongly suggests that the repeated late petition filings in District 4 resulted from continued inattention to filing deadlines and the absence of any pro-active steps toward solution.” 33 FMSHRC at 1972. The record evidence supports the judge’s conclusion on this issue.

The Secretary would have the Commission overturn the judge’s finding on the basis that Hosch’s secretary placed filing reminders on his calendar regarding case deadlines in the coming month. S. Br. at 15 (citing Hosch Dep. Tr. at 7-8). Because this appeared to be the extent of the system that Hosch used as a warning that Rule 28 (and Rule 9) filings were due under the 45-day period (and, perhaps even more importantly, *past* due for previous such periods), it is perfectly understandable that the judge was unimpressed.

It was Hosch’s secretary who was primarily responsible for preparing the penalty petitions, and at some point she started occasionally receiving part-time assistance in the task. Hosch Dep. Tr. 33. The Secretary takes the position that the judge thus erred in concluding that MSHA and District 4 were not being “pro-active” in addressing the problem. S. Br. at 16.

It is undisputed, however, that District 4 faced a significant increase in penalty contests, and it was quite reasonable for the judge, in determining whether the adequate cause standard of *Salt Lake* had been met, to look at the extent of the steps the District 4 office was taking in response. Substantial record evidence supports the judge’s implicit conclusion that those steps were “too little, too late,” given the nature of the problem. The judge correctly concluded that the District 4 office, with its three CLRs and 15 secretaries, could have done much more to address the problem of the mounting penalty petitions that were due, particularly after Hosch called District 4 management’s attention to the problem. *See* 33 FMSHRC at 1975; Hosch Dep. Tr. 32.

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<sup>5</sup> This aspect of the judge’s decision can also be read as an adverse credibility determination against the Secretary’s witnesses on the matter. A judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

The Secretary argues, in essence, that the solution to the problem was out of her control, because it is Congress, and not MSHA, that determines the level of investment with respect to such issues as the automation of penalty petition preparation. S. Reply Br. at 14. Without having to address in detail the issue of how MSHA may be able to more efficiently prepare penalty petitions, it is enough to find that the judge was correct in generally viewing the problem as one of a lack of proper MSHA and Secretarial oversight. *See* 33 FMSHRC at 1974-75.

Penalties are proposed and contests thereof are received at a central MSHA location. In addition, the Secretary presented evidence below that she tracks the caseload at each of the MSHA districts on a monthly basis. *See* S. Memorandum, Gov't Ex. 2. Moreover, her own web site presently details that multiple MSHA national offices are ultimately responsible for case tracking from cradle to grave and ensuring those cases are resolved:

The Civil Penalty Compliance Office (CPCO) is responsible for tracking all civil penalty cases, from the time they are generated through final payment or closure . . .

MSHA, *Civil Penalty Compliance Office*, <http://www.msha.gov/PROGRAMS/ASSESS2.HTM>

The Director's Office develops and updates assessment policy; maintains the MSHA Standardized Information System (MSIS); coordinates assessment activities among the Coal Mine Safety and Health and Metal/Nonmetal Mine Safety and Health Offices/Districts, Arlington Headquarters, and the Assessments Center in Wilkes-Barre, Pennsylvania; and coordinates MSHA's enhanced enforcement, special investigations, and accountability program activities among (sic) the Coal Mine Safety and Health and Metal/Nonmetal Mine Safety and Health districts and headquarters offices.

MSHA, *Director's Office*, <http://www.msha.gov/programs/AssessmentDirector.asp>

The Accountability Office is responsible for ensuring MSHA's enforcement policies and procedures are carried out effectively and appropriately.

MSHA, *Accountability Office*, <http://www.msha.gov/PROGRAMS/assess4.asp>

Despite the foregoing, the Secretary would have the Commission excuse her inability to file timely penalty petitions in District 4 due to the fact that she could do little more than assign one secretary to prepare the documents there. She argues that the reassignment of employees necessarily reorders an agency's priorities and ensures that other tasks will go undone. S. Reply Br. at 9-10. That argument implicitly downgrades the importance of mine safety enforcement that is accomplished through timely adjudication of proposed penalties. At some point it became

incumbent upon MSHA, acting through these national offices, to act upon the information that was clearly available and at least attempt to address all the contested assessments in District 4.

Moreover, I reject in the strongest terms the Secretary's argument, made both here and below, that the same circumstances that made it impossible for her to comply with Rule 28(a) should be viewed as also providing a sufficient excuse for failing to comply with Rule 9 until months later, when the overdue penalty petitions were eventually filed. S. Br. at 18. The Secretary is essentially stating that she considers compliance with Rule 9 as optional under *her* view of the circumstances. Given that Rule 9, working in conjunction with Rule 28(a), permits the Commission to manage its docket from the outset of a case, the Secretary's treatment of her Rule 9 obligations is unacceptable, and it is entirely understandable why the judge took his dissatisfaction with the Secretary's efforts at meeting those obligations into account. *See* 33 FMSHRC at 1973.

While one could appreciate the Secretary's inability to comply strictly with Rule 9(a) under the circumstances, I do not read the rule, taken as a whole, to grant the Secretary a pass that allows her to delay filing a motion for enlargement of time until she eventually gets around to filing the penalty petition months and months after it is due. The circumstances in these and other cases were clearly so drastic that the Commission and the contesting operators were owed, from the Secretary, an interim explanation and some projection of the amount of additional time it would take her to file overdue penalty petitions. As the judge here recognized, in *Salt Lake* the Commission admonished the Secretary that she is "to proceed by timely extension motion when additional time is legitimately needed." *Id.* (quoting 3 FMSHRC at 1717).

In short, the Commission, as the forum responsible for adjudicating rights under the Mine Act, should not accept the Secretary's attempt to cite one overtaxed secretary as the reason she could not use Rule 9 to inform the Commission and the operators what was occurring in the increasingly delinquent District 4 cases. As explained in the Secretary's brief, she eventually used a centralized approach to address the backlog of cases both in District 4 and elsewhere, and specifically allocated personnel from other offices to process delinquent District 4 penalty petitions. There was no reason why this could not have occurred earlier, at least with respect to the preparation of Rule 9 motions, which even in standardized form could have informed the Commission and operators of the status of these cases.<sup>6</sup>

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<sup>6</sup> The majority suggests that the judge may have misunderstood the timing of the supplemental appropriations that were enacted by Congress on July 29, 2010. Slip op. at 12 n.18. Be that as it may, it still took the Secretary three months to finally file the petitions (twice as long as Rule 28(a) prescribes), and it didn't require the infusion of additional funds to reallocate existing personnel from other offices to pick up the slack in District 4 or to split District 4 in two. Moreover, once the new appropriations – which did not fall as manna from heaven but were widely anticipated for several months – were available, there was no excuse for not instantly filing Rule 9 motions for extension of time that would have apprised the

(continued...)

The Secretary contends that the judge also abused his discretion by ignoring aspects of the legislative history which reads as follows:

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (“*Legis. Hist.*”).<sup>7</sup>

The Secretary maintains that the backlog of cases in District 4 constituted just such a rare circumstance, and that the judge further erred in failing to recognize that Congress made clear that Secretarial tardiness does not necessarily prevent a civil penalty proceeding from going forward. S. Br. at 18-21. Long Branch responds that the Secretary is confusing the issue, in that she is not confronting the reason for delay in filing penalty petitions – her inability to devote sufficient resources to the preparation of them – and then relies on the resultant backlog to excuse the delays in the petition filings. LB Br. at 23-25.

It needs to be stressed that the quoted legislative history addresses the issue of Secretarial tardiness in the context of the initial penalty proposal process of section 105(a), while the issue here is a separate one, having to do with the proceeding subsequent to the assessment governed by section 105(d). Furthermore, as the judge explained, section 105(a) affords the Secretary the relatively amorphous “reasonable time” to propose a penalty, which is a task that involves her

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<sup>6</sup> (...continued)

Commission and the operator of MSHA’s new procedures and a time line for processing petitions.

<sup>7</sup> The quote actually supports the view that the Secretary is not precluded from filing a late petition at all; rather, she may file the petition, but, if challenged, she must provide adequate cause for her failure to file within the regulatory deadline before the Commission can allow the case to proceed. At that point the operator can then interpose its argument that the delay has prejudiced its ability to defend against the enforcement actions in question.

taking into account a number of factors that provide support for the amount of civil penalty being sought. In contrast, Rule 28(a) requires her to act within 45 days to perform the relatively simpler task of preparing the penalty petition. *See* 33 FMSHRC at 1964-65 n.5.<sup>8</sup>

As explained in its legislative history, the Mine Act was intended to greatly improve upon the penalty assessment, adjudication, and collection procedures of the predecessor to the Mine Act, the Federal Coal Mine Health and Safety Act of 1969 (“Coal Act”). Those procedures were characterized as “lengthy, and often repetitive,” and ones which “encourage[d] delaying the ultimate payment of civil penalties. S. Rep. No. 95-181, at 44, *Legis. Hist.* at 632. “The small amount of penalty collections under the current Coal Act compared to the amount of penalties assessed, is the result of a number of deficiencies which have complicated the administration of the Act by the Department of the Interior and [the Mine Enforcement and Safety Administration].” *Id.*

In drafting its version of the Mine Act, the Senate Committee on Human Resources stated that “[t]o be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency. To achieve this objective S. 717 contains a number of significant departures from the present practice under the Coal Act.” S. Rep. No. 95-181, at 43, *Legis. Hist.* at 631. Included in those departures, which were described as “means by which the method of collecting penalties is streamlined,” is that “civil penalties are to be assessed by the [Federal] Mine Safety and Health Review Commission rather than by the Secretary as prevails under the Coal Act . . . . Where a penalty is contested the normal proceedings for the hearing of cases by the Commission controls.” S. Rep. No. 95-181, at 45-46, *Legis. Hist.* at 633-34. Moreover, in creating the Commission, the Committee stated that it “strongly believes that it is imperative that the Commission strenuously avoid unnecessary delay in acting upon cases.” S. Rep. No. 95-181, at 48, *Legis. Hist.* at 630.

Thus it falls to this Commission to ensure the swift and fair disposition of proceedings designed to effectuate the enforcement provisions of the Act. Indeed, the prerogatives of this Commission and the integrity of its processes are a valid consideration to be placed on the scale along with the deterrent effect of civil penalties and procedural fairness to the operator. For example, the independence and authority of the Commission are seriously undermined when a party fails to comply with our duly-promulgated procedural rules, and here I am specifically referring to the Secretary’s failure to comply with Rule 9 when she obviously knew she had a serious problem complying with Rule 28(a). That posture suggests a certain level of arrogance, particularly in light of the Secretary’s admission “that if the roles were reversed, and the operator had insufficient personnel or resources to file an answer in a timely manner, the Secretary would insist that the operator be held to the Commission’s filing deadlines.” 33 FMSHRC at 1962.

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<sup>8</sup> Attached to this opinion is a copy of one of the late-filed petitions in this case; it is as basic and generic as a pleading can get and its preparation is well within the capabilities of an entry level federal employee.

Moreover, as the neutral arbiter in disputes arising under the Act, the Commission is responsible for seeing that due process is served in its proceedings. Prompt adjudication not only underscores the deterrent purposes of the Act's enforcement scheme and the need to address systemic threats to miner safety, it also assures that the more severe sanctions available to the Secretary are administered in a context that is consonant with principles of due process.

For example, MSHA's current regulations governing the imposition of pattern of violations sanctions (POVs) for an excessive history of significant and substantial violations, 30 C.F.R. Part 104, specify that the agency will only consider citations and orders that have become final orders of this Commission. However, MSHA's pending revision to Part 104 would allow the agency to consider all citations and orders that have been issued by its inspectors whether or not they have become final.<sup>9</sup> Without addressing the merits of MSHA's position that it can issue a POV finding on the basis of non-final enforcement actions, the proposed regulation, if it becomes final, coupled with inordinate delays in the institution of proceedings for adjudicating the citations and orders underlying the POV notice, raises serious due process issues. The proposed rule states that MSHA will audit the compliance history of each mine at least twice per year. Under that scenario, the significant and substantial violations in these dockets (59 out of 75 violations) could supply the rationale for a POV notice without their ever having been submitted to the Commission for a determination of their validity. Such an outcome could not have been contemplated by a Congress intent on ensuring that contested enforcement actions would be adjudicated by an independent Commission with the responsibility to "avoid unnecessary delay in acting upon cases." S. Rep. No. 95-181, at 48, *Legis. Hist.* at 636.

Accordingly, on the basis of the forgoing conclusions relating to the principles adopted in *Salt Lake* and its progeny, their applicability to the facts of this case, the need for prompt and fair resolution of disputes under the Mine Act, and the vindication of the Commission's central role in the Mine Act's enforcement scheme, I would affirm the judge's decision. As I see it, his decision constitutes a judicious exercise of discretion that provides the necessary leverage to ensure that due process is rendered in Commission proceedings.

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

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<sup>9</sup> Pattern of Violations, 76 Fed. Reg. 5719, 5721-22 (2011).



# **ADMINISTRATIVE LAW JUDGE DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 1, 2012

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

ORDER GRANTING THE PARTIES' JOINT MOTION FOR ECONOMIC TEMPORARY REINSTATEMENT

Appearances: Matt S. Shepard, Esq., Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Tony Oppeward, Esq., Lexington, Kentucky, for Reuben Shemwell; Adam K. Spease, Esq., Miller Wells, PLLC, Louisville, Kentucky, for Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.; Daniel Z. Zaluski, Esq., Madisonville, Kentucky, for Armstrong Coal Company, Inc.

Before: Judge Feldman

The Commission vacated the initial Order of Temporary Reinstatement issued in this matter, and remanded for further proceedings. 33 FMSHRC \_\_\_ (May 2012) rev'g 33 FMSHRC \_\_\_ (Apr. 2012) (ALJ). Consistent with the Commission's directive, a hearing was held on May 23, 2012, in Owensboro, Kentucky. Following the hearing, the Secretary's reinstatement application filed pursuant to 30 U.S.C. § 815(c)(2) on behalf of Reuben Shemwell was granted,

and a decision was issued ordering Armstrong Coal Company, Inc. and/or Armstrong Fabricators, Inc., (“the Respondents”) to immediately reinstate Shemwell to the welder position he held immediately prior to his September 14, 2011, termination, or, to a similar position as a laborer at the same rate of pay and benefits, and with the same or equivalent duties assigned to him. 33 FMSHRC \_\_ (June 2012) (ALJ). In addition, Shemwell was awarded retroactive wage payment effective as of April 25, 2012. *Id.* The order requiring Shemwell’s retroactive wage payment and temporary reinstatement was affirmed by the Commission. 33 FMSHRC \_\_ (July 2012).

As an alternative to Shemwell’s temporary reinstatement, on July 20, 2012, the Respondents filed a joint motion to approve their agreement for the economic temporary reinstatement of Shemwell. As a general matter, under the agreement, Shemwell shall receive back pay as of April 25, 2012, until the Order of Reinstatement issued on June 21, 2012, is dissolved, or is otherwise no longer in effect. The terms of the agreement include the Respondents’ assurance that Shemwell will receive all benefits he would have received if he were physically working at the mine, including, but not limited to, health insurance, contributions to a §401k plan, and all relevant bonuses given to Armstrong’s welders during the temporary reinstatement period. The specific terms of the parties’ agreement are contained in the joint motion and are incorporated by reference.

Shemwell’s economic reinstatement shall not prejudice the Respondents’ right to contest Shemwell’s discrimination complaint that currently is being investigated by the Secretary. The Secretary is urged to complete her investigation, as soon as practicable, so that this matter may proceed, if necessary, to an evidentiary hearing on the merits. Shemwell’s economic reinstatement shall remain in effect until a final decision on the merits is issued.<sup>1</sup>

### **ORDER**

In view of the above, **IT IS ORDERED** that the parties’ motion to approve Shemwell’s economic reinstatement **IS GRANTED**.

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<sup>1</sup> On July 26, 2012, the Respondents filed a Motion to Dissolve Order of Temporary Reinstatement, based on the Secretary’s alleged failure to timely file a section 105(c)(2) discrimination complaint on behalf of Shemwell. 30 U.S.C. § 815(c)(2). The filing period under the Commission’s rules for opposing the Respondents’ motion has not expired. 29 C.F.R. § 2700.10. The filing of the Respondents’ motion to dissolve does not toll, or otherwise affect, the terms of Shemwell’s economic reinstatement.

**IT IS FURTHER ORDERED** that all retroactive payment and benefits shall be provided to Shemwell by Armstrong Coal Company, Inc. and/or Armstrong Fabricators, Inc., within seven days from the date of this Order.

**IT IS FURTHER ORDERED** that economic reinstatement shall remain in effect until final disposition of Shemwell's underlying discrimination complaint.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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/jel

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August 1, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 2011-206-M
Petitioner,	:	A.C. No. 20-00422-239358 Y173
	:	
v.	:	Mine: Tilden Mine
	:	
DAWES RIGGING & CRANE RENTAL,	:	
Respondent.	:	

**AMENDED DECISION<sup>1</sup>**

Appearances: Natalie E. Lien, Esq., U.S. Department of Labor, Denver, CO, on behalf of the Secretary

Tod T. Morrow, Esq., Morrow & Meyer, LLC, North Canton, OH, on behalf of Stansley Miner Resources, Inc.

Before: Judge David F. Barbour

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) acting through the Mine Safety and Health Administration (“MSHA”) against Dawes Rigging & Crane Rental (“Dawes” or “the company”) pursuant to sections 105 and 110, 30 U.S.C. §§ 815, 820, of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). 30 U.S.C. § 801, *et seq.* The Secretary seeks the assessment of a civil penalty of \$3,000 against Dawes for one violation of the Secretary’s mandatory safety standards for surface metal/nonmetal mines. Dawes was cited for the violation while performing contract work on the south side of the Tilden Mine pellet plant, which is owned and operated by Cliffs Natural Resources, and is located in Marquette County, Michigan. The violation is alleged in Citation No. 6502467, which was issued pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). The Secretary asserts that the operator violated 30 C.F.R. § 56.16009, that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation), and that the violation was caused by Dawes’s unwarrantable failure to comply with the cited standard. Section 56.16009 requires that “all persons . . . stay clear of suspended

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<sup>1</sup> This decision, originally dated July 26, 2012, has been amended to include an order modifying Citation No. 6502467 to increase the number of persons affected by the violation from “two” to “three.”

loads.” In answering the petition, the company argued that it did not violate section 56.16009 and that the Secretary wrongly characterized the violation as S&S and unwarrantable. The case was heard in Madison, Wisconsin.

### STIPULATIONS

The parties have stipulated as follows:

1. In May 2010, Dawes . . . was assembling a crane at the Tilden [M]ine . . . in Marquette County, Michigan.
2. [The] Tilden [M]ine is a surface metal/nonmetal mine.
3. On May 27, 2010, MSHA issued to Dawes . . . Citation Number 6502467, alleging a violation of 30 C.F.R. § 56.16009.
4. At the time the citation was issued, [Dawes] was engaged in operations in the United States, and its operations affected interstate commerce.
5. Dawes . . . is subject to the jurisdiction of the Mine Act.
6. The Administrative Law Judge has jurisdiction over these proceedings pursuant to Section 105 of the Mine Act.
7. A true copy of the citation at issue in this proceeding, Government Exhibit Number 1, was served on Dawes . . . , as required by the Act.
8. Dominic Vilona was an authorized representative of the . . . Secretary of Labor assigned to the Marquette, Michigan, field office of MSHA’s Metal/Nonmetal Division at the time the citation was issued, and was acting in his official capacity when the citation was issued.
9. The proposed penalty will not affect [Dawes]’s ability to remain in business.
10. The certified copies of the MSHA Assessed Violations History reflect the history of the mine for 15 months prior to the date of the issuance of the citation at issue, and may be admitted into evidence without objection by Respondent.
11. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

Jt. Ex. 1; Tr. 13-14.

## THE TESTIMONY

### SECRETARY'S WITNESS

Dominic Vilona

Dominic Vilona has worked for MSHA for 17 and a half years, first as an inspector in training, then as an inspector and as a supervisory inspector. Tr. 19-20. As an inspector, Vilona inspected about 45 metal/nonmetal mines a year, most of them surface mines. Tr. 21. As part of inspecting these mines, Vilona, under MSHA's direction, also inspected contractors operating at mine sites. Tr. 21. Vilona has no experience or training in actually operating or assembling a crane. Tr. 68-69, 70. However, Vilona has witnessed a few cranes being assembled. Tr. 85.

The citation in question was issued May 27, 2010. Inspector Vilona was dispatched to conduct an inspection at the Empire Mine, a sister mine to the Tilden Mine. Tr. 24. The two mines, owned by the same operator, abut each other. Tr. 24. Vilona knew that Cliffs Natural Resources was having a crane constructed at the Tilden mine and that Dawes had been hired to do the work. Tr. 25. Vilona was interested, and he had mine personnel take him in a company van to observe the crane assemblage. The van stopped at the top of a hill where the group could look down on the assembly site. Tr. 26-29. Vilona estimated that when he was in the van at the top of the hill, he was about 50 yards away from the crane assembly operation and that the hill was about 75 feet high.<sup>2</sup> Tr. 61.

At the crane assembly site, a Manitowoc 14,000 crane was suspending the boom of the much larger Manitowoc 21,000 crane that the Dawes crew was assembling. Tr. 26. The crew consisted of several men, one of whom was William "Bill" Rahmlow. Vilona later learned that Rahmlow was the crew foreman of the crane assembly. Vilona believed Rahmlow was standing under the suspended boom of the larger crane, signaling to the other men, and apparently directing the operation. Tr. 27, 33, 35. Vilona observed another man, whom he later learned was Jeffrey "Jeff" Eick, holding a tag line on the opposite side of Rahmlow. Tr. 27, 35. Vilona did not see any other tag lines. Tr. 73-74. He saw another man, whom he later learned was John Schlieve, a crane assembly foreman like Rahmlow, on the large crane body waiting to place a pin that would secure the crane boom to the crane body. Tr. 27.

Vilona sat in the van, observing the scene below him, for 15 to 20 seconds. Tr. 54. He testified that he could see clearly from his vantage point on the hill. Tr. 83. However, Vilona

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<sup>2</sup> William Rahmlow, testifying for the company, disagreed with these figures. He estimated that the hill was 150 yards away from the road and that it was 80 feet high. Tr. 170. I credit Rahmlow's estimation because while testifying, Vilona was not entirely clear on the layout of the area.

did not have binoculars to view the progress of the crane assembly from the top of the hill, and he did not get out of the vehicle. Tr. 60-61.

Vilona asked the van driver to proceed down the hill and to approach the crane. Tr. 31. By the time Vilona reached the crane assembly site a minute-and-a-half later, Rahmlow was slightly to the side of the boom, and Eick, who had been on the opposite side of the boom from Rahmlow, was now on the same side as Rahmlow, still holding the tag line. Eick had clearly walked under the suspended boom to change sides. Tr. 31-33.

Vilona introduced himself to Rahmlow and asked why he, Rahmlow, had been under the boom. Tr. 33. At the court hearing, Vilona recalled that Rahmlow replied, “[s]ometimes you have to get under the boom to . . . get the job done, or something to that effect, to get it lined up.” Tr. 33-34. Vilona also read from his contemporaneous field notes that Rahmlow claimed that “[h]e need[ed] to be under [the boom] to see everything.” Tr. 35. When Vilona asked Rahmlow why Eick had crossed under the suspended load, Rahmlow responded that Eick had crossed under “because he needed to hold [the load] steady.” Tr. 36. Vilona testified that Rahmlow never directly admitted to being under the boom, nor did he deny it. Tr. 66, 83.

In the citation, Vilona determined that the violation affected two people, that serious injuries were reasonably likely to result from the violation, that the violation was due to a high degree of negligence, that the violation was S&S, and that the violation was caused by Dawes’s unwarrantable failure to comply with section 56.16009. Gov’t Ex. 1. In designating the citation as affecting two people, Vilona had Rahmlow and Eick in mind. Tr. 45. Vilona determined that an injury was reasonably likely to result because of the frequency with which this violation seemed to occur with this crew given Rahmlow’s statement that “sometimes you have to get underneath the load.” Tr. 45. Vilona testified that “[i]f that’s a practice; then left uncorrected, through the continued mining process, making picks over and over again in conditions where there is wind, where there [are]not enough tag lines, then it’s reasonably likely that something is going to happen to injure that person.”<sup>3</sup> Tr. 45-46. Vilona testified that the injury that would result from the hazardous condition would be a crushing injury, and that the crushing injury would likely result in death.<sup>4</sup> Tr. 46. Vilona determined that the company’s negligence was high because “there was a foreman involved [who] had reason to know or had knowledge of the violation and . . . [placed] . . . another employee at risk, along with himself.” Tr. 55.

Vilona listed all the possible hazards that could occur because of the violative condition: rigging failure, operator error, a load getting hooked on something and then suddenly releasing, a swinging boom, inadvertent lowering of the machine, and wind. Any of these listed hazards

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<sup>3</sup> “Pick” is a commonly used word that describes the lifting of a load by a crane. The pick referred to in this case is the smaller crane lifting the boom of the larger crane.

<sup>4</sup> The Secretary presented multiple fatalgrams to illustrate the seriousness of injuries resulting from this type of violation. Tr. 46-48.

could result in the boom pinning, hitting, or crushing a person. Tr. 40. According to Vilona, relevant to this case in particular, is that there was wind that day, and wind can cause a boom to move while it is suspended. Tr. 40. In Vilona's opinion, the tag line used was not sufficient given the conditions and the load. Tr. 41. He believed that there should have been at least two tag lines on the boom, one on each side, and possibly two more on the "backside of the lattice, to hold it in position in that type of wind."<sup>5</sup> Tr. 41. According to Vilona, if the crew did not have enough tag lines for the conditions, the crane operator should not have made the pick. It was too dangerous. Tr. 41. Vilona explained that the problem with having only one tag line hooked on only one side is that "if the wind blows one way, you can hold it. If it blows the other way, you can't. There is nothing you can do." Tr. 41.

In Vilona's opinion, Dawes's violation of section 56.16009 rose to the level of unwarrantable failure for a number of reasons. Vilona reasoned that Rahmlow was a foreman and that he went under the load in front of the men he was directing. Tr. 53. Vilona also believed that Rahmlow instructed Eick to go underneath the suspended load. Tr. 53. Vilona testified that the violation created an extreme hazard because "of the unpredictability of the suspended loads and the multiple things that can happen; there is anything from sling failures[,] to wind[,] to operator failure . . . the seriousness of the injury that were to occur [sic] would be significant, fatal or permanently disabling, or something very serious." Tr. 53. As previously noted, based on Vilona's conversation with Rahmlow, it seemed to Vilona that this was not a one-time occurrence. Tr. 54. Vilona also understood that there are no exceptions to section 56.16009. Tr. 51-52. He stated that there are no "exigent or emergent situations where it would be okay to be under a suspended load."<sup>6</sup> Tr. 52, 86. Vilona noted that it is a widely recognized rule in the industry that traveling under a suspended load is prohibited. Tr. 52. In Vilona's opinion, the company did not provide him with any information that would mitigate the violation. Tr. 55.

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<sup>5</sup> Witnesses used the word "lattice" to refer to the boom for the Manitowoc 21,000 crane. The boom was constructed of metal rods in a diagonal or triangular pattern with open spaces between each of the rods.

<sup>6</sup> This is also an OSHA standard, which is the body of regulations that Dawes most often works under. Tr. 52.

## COMPANY'S WITNESSES

John Schlieve

John Schlieve has been employed by Dawes for 15 years. Tr. 88. As of May 27, 2010, the day the citation was issued, Schlieve had 22 years of crane assembly experience. Tr. 88. Like Rahmlow, Schlieve is an Assembly/Disassembly ("AD") Director for Dawes. Tr. 88. He

has worked in that position for 14 years. Tr. 88. On the day of the citation, Schlieve was on the crew of the Tilden mine crane assembly operation, but Rahmlow, not Schlieve, was acting as AD Director. Tr. 88.

On May 27, Rahmlow held a safety meeting first thing in the morning at the Tilden job site. Tr. 97. At this meeting, the crew members discussed "the task of the day . . . , any hazards that . . . may have come about as far as pinch points [and] overhead suspended loads." Tr. 97. Before beginning the project, Cliffs Natural Resources also conducted a site-specific orientation training session during which the group covered MSHA standards and regulations. Tr. 97.

Schlieve testified that on May 27, there were five Dawes employees working at the crane assembly site: Bill Rahmlow (the AD Director/foreman), John Schlieve (working on the crane body), Jeff Eick (part of the assembly crew), Randy Gilbertson (operating the Manitowoc 14,000 assist crane), and Cleve Mozley (operating the Manitowoc 21,000 crane). Tr. 95-96. Dawes had also hired two oilers through the local union to help with the assembly project. Tr. 96. At the time Vilona arrived, the crew was trying to connect the main boom to the body of the crane (also known as the "car body"), a process that is called the "boom-to-foot connection." Tr. 98. Schlieve explained that to make the boom-to-foot connection: "You properly rig [the boom] to the assist crane and . . . [o]nce we have it connected, we attach our tag lines on each end, so we can control it. And then when everybody is all on the same page, we lift it and swing it into place and pin it." Tr. 98. He explained that "[t]his particular pinning is done hydraulically. There is a remote control. You have to get the section close and hook up a few hydraulic lines and line up the holes and insert the pins." Tr. 99. Schlieve was in charge of making the final connection with the pins. Tr. 99. He was standing on the superstructure catwalk on the Manitowoc 21,000 crane that they were assembling. He was positioned just above the car body. Tr. 101. During the pinning process, Mozley was in the cab of the Manitowoc 21,000 crane. Tr. 99. Rahmlow was located directly below Schlieve, to the left of the assist crane. Tr. 99. Jeff Eick was on the opposite side of the boom from Rahmlow, with a tag line. Tr. 100. One of the oilers was at the other end of the boom and opposite Eick with another tag line, "[t]o control both ends to keep it secure." Tr. 100.

Explaining the events of the day, Schlieve testified that it was not a windy day. Tr. 106. However, a sudden gust of wind came, shifting the boom directly toward the cab of the Manitowoc 21,000 crane where Mozley was positioned. Tr. 106-07. To avert the danger to Mozley, Rahmlow told Eick to pull the tag line under the boom. Tr. 107-08. Eick did so by

moving to the other side of the boom. This was the only time that Eick moved under the boom throughout the entire operation. Tr. 111. When Vilona arrived at the site, Eick had already completed his move under the boom, and the crew had succeeded in getting the boom squared off. Tr. 109. Schlieve, who was only 15 feet away from Rahmlow, confirmed that he never saw Rahmlow positioned under the boom. Tr. 110.

The boom-to-foot connection process can be difficult because “you only have inches to work with to make this connection.” Tr. 112. The lattice boom weighs 93,000 pounds. Tr. 112. Schlieve thought that the rigging involved in hoisting and positioning the boom was sufficient.<sup>7</sup> Tr. 112. The crew followed the manufacturer’s instruction manual for how to assemble the Manitowoc 21,000 crane. Tr. 111. In Schlieve’s opinion, Eick needed to move under the boom in these circumstances, because “it would have been more of a hazard if that boom would have hit or bumped the cab where [Mozley] was.” Tr. 113. By Schlieve’s estimations, the car body was about 10 to 11 feet above the ground and the boom was about 12 to 15 feet above the ground at its lowest point. Tr. 112, 114. The boom was on a direct path to hit the cab. The oiler on the other tag line could not use his tag line to correct and control the lattice boom. Tr. 123. Eick had to come under the boom and to the other side for the crew to be able to direct the boom away from Mozley. Tr. 123. According to Schlieve, it takes two people on a tag line, if not more, to control the boom. Tr. 123. Rahmlow helped pull on the tag line with Eick once Eick came to his side. Tr. 123-24. There were no other tag lines other than Eick’s and the oiler’s. Tr. 124, 126. In Schlieve’s opinion, Vilona’s interruption of the operation in the middle of this critical phase, caused a dangerous situation. Tr. 115-16.

Jeffrey Eick

Jeff Eick has been employed by Dawes for 10 years. Tr. 129. His current job title is driver and crew member on crane jobs. Tr. 129. He has held these positions since he began at Dawes. Tr. 129.

On May 27, Eick was part of the crane assembly crew. Tr. 133. Eick’s job was to use the tag line to “steady the boom.” Tr. 137. Eick recounted what happened when the gust of wind came as follows: “[T]he [boom] started to [swing] a little bit. . . . And at that point, Bill said to me, get over here. And I was already on my way, because at the time the heel [of the boom] was going to . . . hit the cab [that Mozley was in].” Tr. 134. According to Eick, the decision to go under the boom was “a split decision.” Tr. 139. There was no time to reflect on whether it was wise. Tr. 139. As to the danger posed to him because he moved under a suspended load, Eick was convinced that if the rigging had failed and the boom had fallen while he was underneath it, the boom would not have hit him. Tr. 139-40. He explained that the boom would have fallen on the car body instead, which was 10 feet off the ground; he is just over six feet tall, so he would

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<sup>7</sup> Eick agreed with Schlieve that all the rigging was inspected before the crew began its task that morning. Tr. 151. He felt that the rigging was secure for the job. Tr. 151-52.

have had plenty of clearance. Tr. 140. Eick acknowledged, however, that loads fall unpredictably, implying that it is hard to argue that he would have definitely been safe if the boom had fallen while he was passing under it. Tr. 150.

Eick testified that he never saw Rahmlow go under the boom, although Rahmlow was close to the side of the boom. Tr. 138, 150. Eick saw being under the boom and close to the boom as “two different things.” Tr. 150.

Eick was in close proximity to Rahmlow when Vilona came down to the crane assembly site. Tr. 142. Eick described the exchange between Vilona and Rahmlow. As he recalled, Vilona said:

You’re working, standing under the boom. . . . And Bill said, no, I’m not. And [Vilona] said, well, your guy is. And Bill said, yes, he was; referring to myself because I had ran under the boom. And at that time [Vilona] wanted to kind of cease operation. And Bill became upset. And what [Bill’s] exact words were, I don’t recall. Something to the effect of: Just give me the ticket or whatever. I heard that part of it, because at that point, we had to make this [boom-to-foot] connection before we stopped.

Tr. 142. Eick maintained that it was dangerous to stop operations right at the moment that Vilona arrived because the boom-to-foot connection is a critical pick. Eick continued:

But not only that, but then if we were to stop in the middle of it, now we have a suspended load that is, you know, really not secured until it is pinned. So, I mean, we would have been open to a wind gust. It could have damaged parts on the crane, the cab. I mean, there is – there is a lot of things that can probably happen.

Tr. 142-43. It was five to ten minutes between the time that Vilona showed up and the crew completed the connection process. Tr. 143. In Eick’s opinion, stopping the operation immediately when Vilona arrived would have “been more of a hazard than finishing the job.” Tr. 145-46.

Bill Rahmlow

Bill Rahmlow worked for Dawes for 21 years. Tr. 153. He was an AD Director at the time he retired,<sup>8</sup> and he held that position on May 27, 2010, when the citation was issued. Tr. 153. An AD Director oversees the assembly of a crane. Tr. 153. Rahmlow had 10 years of

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<sup>8</sup> Rahmlow retired from Dawes three weeks before the hearing. Tr. 153.

experience assembling cranes. Tr. 158. Prior to that, he spent 10 years operating a crane. Tr. 158. Rahmlow had never before set up a Manitowoc 21,000, but he had assembled a great many cranes during his career. Tr. 165. He testified that setting up any type of crane is essentially the same process. Tr. 165. As AD Director, he was responsible for making sure that the job was set up properly, that employees were not in danger, that people were not under the suspended load, that people were not in the way of pinch points, that he had an adequate number of people, and that the proper number of tag lines were being used. He also had to consider all variables that could affect the assembly, such as wind, weather, and rigging failure. Tr. 179-80.

In assembling the crane on May 27, Rahmlow closely followed the manufacturer's crane assembly manual. Tr. 150. He began the Tilden Mine project in May, when he "set up the level pad for [the crane] . . . and [laid out] all [of its] pieces . . . in the proper order [to] make sure that everything [is] put together as the manual call[s] for." Tr. 160. For the boom-to-foot connection, Rahmlow positioned the two men with the tag lines on opposite sides and opposite ends of the boom from each other. Tr. 163. Eick and Rahmlow were close to the end of the boom by the crane body, standing across from each other. Rahmlow positioned the oiler with the tag line towards the other end of the 150-foot boom<sup>9</sup>, on the opposite side of the boom from Eick. Tr. 169-70. Rahmlow maintained that the reason for having the tag lines on opposite sides of the boom is:

To try to predict which way that boom is going to move. Remember, the boom is, like, taking a string. And whenever there is a reaction . . . – wind, gust of wind or movement of the other crane – that piece can swivel . . . . It's unpredictable . . . . And any reaction causes another reaction. The swing of the crane can cause it, today, to go to the left. Tomorrow it might go to the right.

Tr. 163.<sup>10</sup> Rahmlow reflected: "That day we should have had the tag line on the other two corners. Maybe we should have had four on. It didn't have enough people to have four on. It just – it's just the way it happened." Tr. 164. Rahmlow maintained that the day was not windy. Tr. 164. He could not have predicted that there would be a wind gust. Tr. 165. When the counsel for the Secretary asked why Rahmlow did not request Cliffs Natural Resources for more men to help with the crane assembly, Rahmlow replied that he could not because "they aren't familiar with it; and we never – we never ask for outside help . . . . It's a case of liability." Tr. 181.

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<sup>9</sup> According to Rahmlow, the boom was 150 feet long and 13 feet wide. Tr. 161, 198.

<sup>10</sup> The problem with Rahmlow's set-up was that given the positioning of the tag lines, if a wind gust blew west to east, which is the direction it blew, neither the northeast tag line (that Eick was operating) nor the southwest tag line (that the oiler was operating) would be able to prevent the boom from swinging. Tr. 191.

When the gust of wind blew, Rahmlow instructed Eick to come under the boom to his side with the tag line because Rahmlow saw that the gust was causing the boom to head towards the cab. “And I did not want that boom section to hit that glass because, number one, [Mozley] was sitting there.” Tr. 168-69. Rahmlow acknowledged that every manual, guidebook, and training session forbids going under a suspended load. Tr. 192-95. However, he chose to have Eick come under the boom instead of signaling to the oiler to try to adjust the boom’s movement with his tag line because Rahmlow had never worked with the oiler before. Tr. 169. He did not know if the oiler would understand what needed to happen. Tr. 169. Also, Eick was 15 feet away from Rahmlow, whereas the oiler was almost 150 feet away. Tr. 169. Rahmlow was not sure he could communicate effectively to the oiler. Tr. 169. Rahmlow testified that Eick coming under the boom with the tag line averted the hazard to Mozley. Tr. 170. He also felt that the hazard to Mozley was greater than the hazard to Eick. Tr. 173.

Rahmlow described the boom-to-foot connection as being a tedious, time-consuming process. Tr. 166. The boom has to be lined up perfectly for the pins to go in. Tr. 166. The process takes a lot of concentration. Tr. 166. It is necessary to be in close proximity of the suspended boom. Tr. 166. Rahmlow testified that he was right next to the suspended boom, but not under it. Tr. 166-67, 199. It was never necessary to stand under the boom during the process. Tr. 167. However, he would not be able to perform the boom-to-foot connection operation from a distance further away from the boom. Tr. 199-200.<sup>11</sup>

Rahmlow estimated that the road from which Vilona first observed the crane assembly process was 150 yards from the site. Tr. 177. He also estimated that the hill the road was on was 80 feet high. Tr. 177. In his experience, Vilona’s vantage point from the top of the hill was a bad one for observing what was actually going on at the assembly site, because Rahmlow was so close to the boom that anyone that far away could think he was actually under the boom. Tr. 177-78. According to Rahmlow, to see if he was under the boom or to the side of the boom, someone would have to be standing “[r]ight in line with the boom.” Tr. 178. Rahmlow understood section 56.16009’s command to “stay clear of suspended loads” to mean that if he was “alongside of it, [he was] not underneath it.” Tr. 189. He did not understand the standard to mean anything more than not being directly underneath a suspended load. Tr. 189.

When Vilona came down to the assembly site and said Rahmlow was under the boom, Rahmlow replied that he was not under the boom. Tr. 170. However, he agreed with Vilona when Vilona said that Eick had been under the boom. Tr. 170. According to Rahmlow, Vilona wanted to talk immediately, and Rahmlow wanted to secure the boom, in case something went wrong while they were talking. Tr. 171. Rahmlow could neither confirm nor deny whether he told Vilona that sometimes he had to go under the suspended load to make sure everything was

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<sup>11</sup> Schlieve agreed with Rahmlow. In his opinion, while it was possible to complete the boom-to-foot connection operation without working under the boom, it was not possible to complete the operation from a significant distance away. Tr. 113.

lining up correctly. Tr. 183-84. He explained that he could not remember what he said in the heat of the moment. Tr. 184. Rahmlow stated that when Vilona tried to discuss the violation with him, the crew was in the middle of a critical pick. Rahmlow was concentrating on the connection process to get everything lined up perfectly, to make sure the boom did not hit the cab that Mozley was in, and to make sure that Schlieve did not get pinched. Tr. 167-68. Rahmlow recalled telling Vilona, “write me the ticket out.”<sup>12</sup> Tr. 184.

#### Richard Peters

Richard Peters has been employed by Dawes for 31 years. Tr. 204. He has held the position of engineer and safety manager for 25 years. As safety manager, his safety duties include: “keeping up with the guys’ training, supervising that they comply with regulations, safety policies and practices . . . , everything [of] that nature.” Tr. 204-05.

Peters described the safety training the company provides its employees:

We have various sort of meetings, gatherings. The other fellows have mentioned the annual safety meeting, which we cover very large topics, somewhat intensely. We have toolbox meetings where we cover small bits specifically. They’re every week. That’s where the guys get their check[s]. . . . We have safety memos that also attach to checks. We do a lot of one-on-one. [O]ne of the ways I prefer, is to take a guy and work with him on a specific problem or area he needs work on. Just work with him, teach him, train him. We have many others . . . long, experienced supervisors that do the same. We are very strong on taking new employees and putting them with somebody to give them a hands-on training.

Tr. 207.

Peters also explained how the company ensures compliance with safety rules.

You watch the people constantly. . . . [Another safety department worker] and I will drop in on job sites . . . [and] watch them. In my case, after [the employees] see me, it’s too late because I’ve seen everything. I don’t show up until I have watched . . . [their] job [performance], see how everybody is doing; but I never leave without making myself known. And we . . . discuss what has happened, and why they’re doing a great job, [or why they] need to catch up on something. I might need to talk to a customer because we also train customers as well as our own people. And we do have our other supervisors that get out in the field.

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<sup>12</sup> Rahmlow also remembered Vilona suggesting that Rahmlow use mirrors so he would not have to work so close to the suspended load. Tr. 201-02. Rahmlow rejected that suggestion. He believed that mirrors would distort the image of the work zone, and he would not be able to be certain that he was directing the crane correctly. Tr. 202.

Equipment managers [and] branch managers, also look over job sites, and [what] the guys are doing when they're out on these jobs.

Tr. 208-09. Peters stated that the company takes these inspections, and the results of these inspections, very seriously, even going so far as to suspend or terminate an employee for violating safety rules.<sup>13</sup> Tr. 209.

Peters testified that Dawes conducted an investigation of Rahmlow's behavior and work practices after the citation was issued on May 27. Tr. 211. Dawes removed Rahmlow from the job site, "in case he had made an infraction that was a real bad move. We didn't want to jeopardize safety on the job site. So Rahmlow was removed while the investigation proceeded, until we found out what the real story [was]." Tr. 211.

Peters maintained the company investigation revealed that:

[E]verything was proceeding normally, according to plan; but that as things got close – and we're talking about putting the main boom into the crane – that somewhere a gust of wind had come swirling around the building, and . . . the main boom started to swing toward the cab of the [Manitowoc] 21,000, which was occupied. And steps had to be taken to stop that motion and [bring] that section of boom back online where it belonged before any damage or injury could occur.

Tr. 213. "We determined that . . . was the safest course of action considering the possibilities for injury and damage that were occurring at that time." Tr. 213. The weather that day was good for working. Tr. 215. There was no high wind. Tr. 215. Peters agreed that staying clear of a suspended load is both an OSHA and an MSHA rule. Tr. 208. He believed that the rule is essentially the same under both agencies' standards. Tr. 208. The company determined that Rahmlow understood the suspended load rule. Tr. 213.

In response to the suggestion made by the Secretary that Rahmlow should have been using four tag lines instead of two, Peters noted that it is not normal industry practice to use four tag lines on this kind of operation. Tr. 214-15. Furthermore, there is no MSHA or OSHA regulation requiring that four workers each be holding a tag line during the crane assembly process. Tr. 230.

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<sup>13</sup> Schlieve's, Eick's, and Rahmlow's testimony regarding safety and training at Dawes supports Peters's description of the Dawes safety and training regimen. See Tr. 79-94, 119, 130, 154, 156, 159.

## THE ISSUES

The issues are: (1) whether there was a violation, (2) if there was a violation, whether the violation was S&S, (3) if there was a violation, whether the violation was the result of an unwarrantable failure to comply with a mandatory safety standard, and (4) if there was a violation, the amount of the civil penalty that must be assessed for the violation, taking into consideration the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i).

## THE VIOLATION

As has been frequently noted, section 56.16009 requires that persons “stay clear of suspended loads.” 30 C.F.R. §56.16009. “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.” *Haines and Kibblehouse*, 30 FMSHRC 504, 517 (June 2008) (ALJ). Remaining “clear of suspended loads” has been widely understood to mean among other things remaining clear of the area under a load and the “area which the load would strike in falling, or after impact, in toppling over.” *Anaconda Co.*, 3 FMSHRC 859, 861 (Apr. 1981) (ALJ). In short, “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.” *CCC Group, Inc.*, 2012 WL 2175816, at \*6 (F.M.S.H.R.C.) (May 2012) (ALJ).

In this case, there was a violation. Most obviously, Eick walked under a suspended load, a blatant violation of the standard. The record also supports finding that Eick, Rahmlow, and Mozley were in violation of the standard when standing (Eick and Rahmlow) and sitting (Mozley) in their positions before and after Eick walked under the suspended load. Eick stood about 15 to 20 feet across from Rahmlow, Tr. 126, who stood just barely on the other side of the boom from him. Tr. 150, 166-67, 199. Thus, Eick stood only a couple feet from the boom, which was 13 feet wide. Tr. 198. This was undoubtedly within the swing/arc/fall path of the 150-foot boom. While it is true that the boom was 12-15 feet above the ground, Tr. 114, 169, and therefore would not have bumped into Eick or Rahmlow if the boom swung, if the rigging failed and the boom fell while swinging slightly, it could have fallen on Eick, given his position in relation to the boom. Tr. 142, 170.

Rahmlow also failed to remain clear of a suspended load. Rahmlow stood right beside the boom. Tr. 150, 166-67, 199. He stood so close to the boom that only someone within several feet of him and aligned properly with him and the boom could tell that he was not under the boom. Tr. 177-78. While the company’s argument that Vilona was too far away to be able

to be sure that Rahmlow was under the boom is persuasive,<sup>14</sup> and while I credit the company's witnesses that Rahmlow was standing right next to the boom, not under it, standing immediately adjacent to the boom still put Rahmlow within the suspended load's possible arc or swing, and therefore in danger, and in violation of the standard. Eick, once he moved to stand by Rahmlow, remained in violation of the standard. Eick also stood directly adjacent to the boom at that point, Tr. 141, when both Rahmlow and Eick were pulling on the tag line to steady the boom. Tr. 123-24.

Mozley also failed to remain clear of a suspended load, although his positioning was not discussed by the inspector or the Secretary. Mozley's position was the reason why Eick and Rahmlow felt they needed to violate the standard – given the way the tag lines were arranged, Mozley was in the direct swing path of the boom as the boom adjusted to the gust of wind. Tr. 106-07. Both Eick and Rahmlow testified that had they not acted, the cab where Mozley was sitting would have been hit by the swinging boom. Tr. 134-35, 168-69.

The company contends that Rahmlow, Mozley, Eick, and the oiler were complying with industry practice where they were standing, and Rahmlow testified that he could not have completed the boom-to-foot connection from further away from the boom, and therefore there was no violation. The company suggests that industry custom holds enough weight that the boom-to-foot connection should be an exception to the rule of staying clear of the swing and fall path of a suspended load. Given the intent of the regulation, to “prevent persons from being hit” by suspended loads, *Haines*, 30 FMSHRC at 517, Respondent's argument fails. If the company could not complete the connection without violating the standard, it could have petitioned the Secretary for a modification to the standard under Section 101(c), which provides that MSHA may grant a modification so long as there is an alternative method for achieving the goal of the standard (i.e., protecting miners from suspended loads) that will guarantee no less than the same measure of protection to the miners as the existing standard.<sup>15</sup> 30 C.F.R. § 811(c). Without an

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<sup>14</sup> Vilona watched the operation from the top of an 80-foot hill, about 150 yards away from the assembly site, Tr. 170, with his bare eyes (no binoculars or camera), Tr. 60-61, and from inside the company vehicle, Tr. 60-61. Also, Vilona is not familiar with crane assembly, having only watched a crane being assembled a few times. Tr. 68-69, 70, 85.

<sup>15</sup> Section 101(c) states in relevant part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

30 U.S.C. §811(c)

authorized modification, there is no exception to the standard, and non-compliance is a violation. Rahmlow should have had more tag lines. He should have set up the tag lines such that the team would be able to control the boom no matter which direction the wind came from. Eick's and the oiler's tag lines should have been longer so that they could stand completely out of the swing path of the boom. Where Rahmlow and Mozley should have been positioned so that they still could have performed their jobs effectively while in compliance with the safety standard is a question that the crane assembly industry may have to address, perhaps with the Secretary.

### **S&S AND GRAVITY**

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon the particular facts surrounding 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). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984) accord *Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 19 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

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

I have found a violation of the cited safety standard. I further find that the employees' positioning with respect to the suspended boom constituted a discrete safety hazard. As already discussed, there were a number of ways in which Dawes's employees were endangered. The

rigging could have failed and the boom fallen on Eick, or if it swung before it fell, on Rahmlow. The boom could have swung and hit Mozley in the cab. Eick claimed that if the boom fell as he was walking under it, the boom would have hit the cab and been propped up such that Eick, who is over six feet tall, would not have been hit. However, as Eick admitted, the boom could have fallen unpredictably. Tr. 150. It could have missed the cab, particularly given that there had just been a gust of wind, in which case the boom could have swung and fallen on Eick.

As discussed earlier and as evident by the instant discussion, Eick, Rahmlow, and Mozley were all in violation of the safety standard, and that violation put each of them in discrete danger. Vilona found that two persons (Eick and Rahmlow) were endangered by the violation. Citation No. 6502467. Generally, deference is given to the inspector's findings. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (ALJ did not abuse discretion in crediting expert opinion of experienced inspector); and *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984). However, in this case, I find that three, not two, persons were affected by the violation, thus making the discrete safety hazard more serious.

I also find that there was a reasonable likelihood that the hazard contributed to would result in an injury. I credit Inspector Vilona's testimony that any time a suspended load is involved, there is a reasonable likelihood that the rigging could fail, causing the suspended load to swing or fall, pinning, hitting, or crushing anyone who has failed to remain clear of the suspended load. Tr. 40. Likewise, when working outdoors with a suspended load, the possibility of wind is always a factor that could reasonably result in a swinging load, as it did here, which could result in a hitting or pinning injury, or a crushing injury. *See* Tr. 40. Further, there was a reasonable likelihood that Mozley could have been hit by the swinging boom because of the onset of wind and his position in the cab of the Manitowoc 21,000 crane. In fact, as everyone agreed, in the instant situation, the boom was headed Mozley's way, and Eick had to move, putting himself in danger and in direct violation of the safety standard, in order to prevent the boom from hitting the cab that Mozley was in. Tr. 139-40.

Dawes maintains that the rigging was secure and unlikely to fail. Rahmlow examined the rigging before the crew began assembling the crane that morning. Tr. 151. He put together the rigging as the assembly manual instructed. Tr. 150, 160. Eick felt that the rigging was sufficient. He believed that it was completely secure given the load and the demands on it, Tr. 151-52, as did Schlieve, Tr. 112. Therefore, in the minds of Rahmlow and the crew, there was very little chance that the rigging would fail. However, rigging does fail. *See* Tr. 40. One reason for the safety standard to stay clear of suspended loads is because suspended loads are apt to fall. As the Secretary pointed out, under the company's work policy, its AD Director is responsible for setting up the work site to be a safe environment. As AD Director, Rahmlow had to consider all circumstances that could affect work site safety, such as wind or failed rigging. Tr. 179-80. The day was beautiful and was not windy. Tr. 164. Nevertheless, a gust of wind blew up that Rahmlow had not predicted, putting Mozley, Eick, and himself in danger. Tr. 106-07, 134, 165. As the events of the day showed, injuries reasonably could have occurred.

Finally, I find that there was a reasonable likelihood that the injuries would be of a reasonably serious nature. If the boom, which was 93,000 pounds, had fallen or swung and hit one or more of Dawes's employees, the resulting injury or injuries would have been extremely serious, if not fatal. Therefore, the violation was S&S in nature.

I also find that given the likely injuries if the feared hazard occurred, the violation was very serious.

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

A citation is issued under section 104(d)(1) of the Mine Act if a violation is both S&S and caused by the unwarrantable failure of the operator. 30 U.S.C. § 814(d)(1). I have found that the violation of section 56.16009 was S&S. I also find the violation was the result of the company's unwarrantable failure.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2203-04. Whether conduct is "aggravated" is determined by analyzing the facts and circumstances of the case and identifying whether any aggravating factors exist. Such factors include the length of time the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious and posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006).

The length of time the violation existed can be analyzed in two respects in this case. In both respects, I find that the length of time was excessive. One measurement of the length of time that the condition existed is the amount of time the men were in violation of the standard during the crane assembly operation that morning. Eick crossing beneath the 13-foot-wide boom probably amounted to several seconds. However, it is so dangerous to cross beneath a suspended load that any amount of time of being directly beneath a suspended load is excessive. Further, Eick and Rahmlow presumably stood alongside the boom all morning. Mozley also was probably in the cab much of the morning. At any time that morning, a gust of wind could have come, swinging the boom out of control. Or, at any time the rigging could have failed. Therefore, at any time the boom could have hit, pinned, or crushed the men who were in its swing and fall path.

Another measurement of the length of time the condition existed is gained through viewing the positioning of the men as a continuing practice. Tr. 45-46. Rahmlow had been assembling cranes for 10 years. Tr. 158. Schlieve had been assembling cranes for at least 14 years. Tr. 88. Eick had been working with cranes for 10 years. Tr. 129. Peters had been safety

manager at Dawes for 25 years. The record reveals that none of these men thought “stay clear of a suspended load” meant anything more than not to position oneself beneath a suspended load. Tr. 113, 150, 189, 208. No one at Dawes understood that Rahmlow standing immediately adjacent to the inadequately tethered boom was a violation of the standard. It is clear that Dawes’s widely held and flawed belief as to what constituted compliance with section 56.16009 existed for some time, making it an extensive violation.

The company has a good safety record. In the previous 15 months, the company had never been cited by MSHA for violating the suspended load standard. Gov’t Ex. 14. Therefore, the company was not directly put on notice. However, the standard and its intent are clear and straightforward. The Secretary did not change her definition or her interpretation of the standard. A fundamental misunderstanding of the law is not an excuse for a violation.

The violation was open and obvious and posed a high degree of danger. That Eick violated the standard in crossing beneath the suspended boom was obvious. Further, had the men properly understood the safety precautions they were supposed to take under the standard, the fact that they were positioned in violation of the standard would also have been obvious. Further, as concluded in the S&S discussion above, the violation posed a high degree of danger. Should the boom have swung into or fallen on one or more of the men, a fatal injury was reasonably likely to result. (The boom weighed 93,000 pounds. Tr. 112.)

Finally, the violation occurred under the immediate and direct supervision of Rahmlow, a company supervisor. Given all of these factors, I find that the violation was the result of the company’s unwarrantable failure.

This violation was also the result of the company’s high negligence. The potentially grave danger to its employees meant that Dawes’s management was called to a commensurately high standard of care. It is clearly a standard the company did not meet.

In making unwarrantable failure and high negligence findings, I recognize that Dawes provided some mitigating information. Rahmlow quickly had Eick cross under the boom to prevent Mozley from being hit. Rahmlow tried to avert a greater danger by encouraging a lesser one. Tr. 113, 173. Rahmlow and the crew also made sure to abide by the standard as best they understood it. They did not, except for Eick, position themselves directly below the suspended load. Tr. 189, 208. The record also confirms that Dawes went to great lengths to train its employees and have refresher training sessions. The company reinforced the importance of safety and compliance with safety regulations, going so far as to conduct its own internal safety inspections. *See* Tr. 89-94, 97, 130, 154, 156, 159, 207-09. While the mitigating factors do not negate the violation or its S&S and unwarrantable natures, they will to some extent impact the penalty that must be assessed.

**REMAINING CIVIL PENALTY CRITERIA**

**HISTORY OF PREVIOUS VIOLATIONS**

The Secretary conceded that Dawes has a small history of previous violations. Tr. 15.

**SIZE**

The parties agreed that the operator is of a medium size. Tr. 15.

**ABILITY TO CONTINUE IN BUSINESS**

The parties stipulated that the proposed penalty will not adversely affect the company's ability to continue in business. Jt. Ex. 1; Tr. 13-14

**GOOD FAITH ABATEMENT**

No abatement requirements were made because by the time the inspector arrived at the assembly site, no one was positioned beneath the boom anymore. Tr. 31-33. The crew took five to ten minutes to complete the critical boom-to-foot connection before quitting activity and talking with Inspector Vilona. Tr. 143, 167-68, 171. It was necessary to complete the connection because if the crew had left the job half done, a 93,000-pound, 150-foot-long boom would have remained suspended in the air at the mercy of the wind and possible rigging failure, creating an even greater hazard. Tr. 115-16, 142-46.

**CIVIL PENALTY ASSESSMENT**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6502467	5/27/10	56.16009	\$3,000

I have found that the violation existed, that it was serious, and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I would normally assess the penalty as proposed. However, the company's small history of previous violations, which reflect its admirable internal procedures to enhance compliance and work-site safety warrant a lesser assessment.

**ORDER**

It is **ORDERED** that Citation No. 6502467 be **MODIFIED** to increase the number of persons affected by the violation from “two” to “three.”

Within 40 days of the date of this decision, Dawes Rigging & Crane Rental **IS ORDERED** to pay a civil penalty totaling \$2,500 for the violation of section 56.16009 set forth in Citation No. 6502467. Payment **SHALL** be sent to the: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, S1. Louis, MO 63197-0390. Upon payment of the penalty, this proceeding **IS DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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August 1, 2012

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA), on	:	
behalf of CLINTON RAY WARD,	:	Docket No. WEVA 2012-1448-D
Complainant,	:	MSHA Case No. PINE-CD-2012-02
	:	
v.	:	
	:	
ARGUS ENERGY WV, LLC,	:	Mine ID: 46-08994
Respondent.	:	Mine: Deep Mine No. 8

**DECISION AND ORDER**  
**REINSTATING CLINTON RAY WARD**

Appearances: Virginia Fritchey, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd, 22<sup>nd</sup> Floor West, Arlington, VA on behalf of Complainant Clinton Ray Ward

Mark E. Heath, Esq., and Dennise R. Smith, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd, East, P.O. Box 273, Charleston, WV for the Respondent

Before: Judge Steele

Pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on June 9, 2012, filed an Application for Temporary Reinstatement of miner Clinton Ray Ward (“Ward” or “Complainant”) to his former position with Argus Energy WV, LLC, (“Argus” or “Respondent”) at its Deep Mine No. 8 (“the Mine”) pending final hearing and disposition of the case.

On June 5, 2012, Mr. Ward filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.<sup>1</sup> In the Secretary's Application, she represents that the complaint was not frivolously brought and requests that an Order directing Respondent to reinstate Ward to his former position as the Third Shift Chief Electrician at the Mine.

Respondent filed a request for hearing on July 16, 2012. An expedited hearing was held in Charleston, West Virginia on July 27, 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. 29 C.F.R. § 2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Clinton Ray Ward.

## LAW AND REGULATIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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 the 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 Res., 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. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The

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<sup>1</sup> 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)

substantial evidence standard applies.<sup>2</sup> *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 (April 1981).

However, in the instant matter, Complainant 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 acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that there is reasonable cause to believe that Ward’s dismissal was motivated by his exercise of protected activities as described in Section 105(c)(1) of the Mine Act. She identifies Ward’s safety complaints to Respondent’s agents as the actual reason that Ward was terminated and as evidence that the instant complaint is not frivolously brought. She further argues that the temporary reinstatement should be granted based on the standard the limited purpose of the hearings.

Respondent contends the Application for Temporary Reinstatement was frivolously brought. It argues that Ward was fired because there were numerous problems with his work performance, including his inability to wire a pump. It states that even if Ward complained about hooking up the P70 pump to the P40 float box, it was not a hazard because the pump simply would not work. It contends that Ward’s claims of significant amounts of water were

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<sup>2</sup> “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 U.S. 197, 229 (1938)).

impossible because both state and MSHA inspectors were in the area and no citations were written. Finally, it argues that the Secretary has not met her standard because no protected activity occurred in the instant case.

## **JOINT STIPULATIONS**

The parties stipulate to the following:

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. Argus Energy WV, LLC (“Argus Energy”), was a “Limited Liability Company” at the time the relevant events took place.
3. Clinton Ray Ward was a “miner” as defined in Section 3(g) of the Act at the time the relevant events took place.
4. Clinton Ray Ward was employed by Argus Energy as a third shift chief electrician beginning on or about October 2011, and was discharged by Argus Energy WV, LLC on June 1, 2012.
5. The parties do not dispute that water was present behind the D set of seals on April 24, 2012.
6. The parties do not dispute that water was present in the return air course adjacent to the D set of seals on April 24, 2012.
7. On April 24, 2012, MSHA conducted an impact inspection at Argus Energy’s Deep Mine No. 8.
8. During the April 24, 2012 inspection, MSHA Coal Mine Inspector Dave Thompson issued Citation No. 8143298, a § 104(a) citation for a violation of § 75.364(f)(2), to Argus Energy because the examination record stated the return entry had not been traveled as part of the weekly examination.
9. The parties agree that Secretary’s Exhibit 1 (see attached) is a true and correct copy of Citation No. 8143298.
10. Citation No. 8143298 was terminated by MSHA Coal Mine Inspector Roger Workman on May 19, 2012.
11. The parties agree that Secretary’s Exhibit 1 shall be admitted into the record for the following limited purposes: 1) to establish that MSHA allegedly found an entry in the weekly examination record that water was present in the return air

course adjacent to the D Set of seals and could not be traveled by the weekly examiner examining the return air course, 2) to establish the date upon which Citation No. 8143298 was issued, and 3) to establish the date upon which Citation No. 8143298 was terminated.

12. The parties make no representations about the correctness of MSHA's finding with regard to Citation No. 8143298.
13. On May 19, 2012, MSHA released the No. 2 section for production.
14. Between April 24, 2012 and May 19, 2012, Argus Energy was unable to engage in coal mine productions activity at Deep Mine No. 8.

## **TESTIMONY AND EVIDENCE AT HEARING**

### **A. Prehearing Submissions**

On June 5, 2012, Ward executed a Summary of Discriminatory Action, filed with his Discrimination Complaint. In his statement, he wrote, " In May I made complaints about water behind seals to Safety Director and was terminated on June 1, 2012. I want my job back, back pay, health insurance back and expenses back while seeking employment."

Submitted with the Secretary's Application for Temporary Reinstatement was the June 6, 2012, Affidavit of Kelly S. Acord, a Special Investigator employed by MSHA. Under oath, the Special Investigator made the following statement:

1. I am employed as a special investigator by the Mine Safety and Health Administration, United States Department of Labor, in Pineville, 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 Clinton Ray Ward on June 5, 2012. My investigation to date has revealed the following facts:
  - a. At all times relevant, Argus Energy WV, LLC (the "Operator") was a corporation and is a "person" as defined in § 3(f) of the Mine Act.
  - b. The applicant, Clinton Ray Ward, was employed by the Operator as the third shift chief electrician at the Deep Mine No. 8 (the "mine"), and, therefore, was a "miner" within the meaning of § 3(g) of the Mine Act.
  - c. Ward's employment with the Operator at the mine began on or about October 2011.

- d. On June 5, 2012, Ward filed a discrimination complaint for being terminated on June 1, 2012 after making safety complaints to agents of the Operator. In Ward's complaint and his June 23, 2012 statement, he contends that he was being discriminated for engaging in the protected activity of making repeated safety complaints to agents of the Operator in April and May of 2012. The Operator was made aware of those protected activities.
- e. Specifically, Ward alleges that he became aware in March 2012 that water was impounded behind the seal outby the No. 3 section and water was present in the return entry adjacent to the affected seals and in active workings for 8 breaks.
- f. Ward contends that the weekly examiner, John Dingess, told him that the Operator refused to provide pumps adequate to remove the water from the return entry from January to April 24, 2012.
- g. On or about April 17, 2012, Ward maintains that he made a safety complaint to third shift mine foreman, Elza Maynard, about the danger posed by the water behind the seals.
- h. Ward alleges that Maynard communicated this safety complaint to Mine Superintendent Grover Meade.
- i. On April 24, 2012, MSHA conducted an impact inspection at the mine during which it issued 96 violations. Inspector Dave Thompson issued Citation No. 8143298, a § 104(a) citation for a violation of § 75.364(f)(2), because there was an excessive amount of water in the return entry which prevented it from being traveled as part of a weekly examination. Because the weekly examination could not be performed until the water was removed from the entry, miners were not allowed to enter the mine, except for the limited purpose of pumping water out of the cited area, until the violation was terminated 25 days later on May 19, 2012.
- j. Ward asserts that, due to the fact he made a safety complaint to the Operator approximately one week before the April 24<sup>th</sup> inspection, Meade suspected him of making a safety complaint to MSHA which led to the impact inspection and the resulting 25-day-long shutdown of the mine.
- k. On May, 21, 2012, MSHA released the No. 2 section for production.
- l. On or about May 21, 2012, Ward contends that he told Safety Director Roger Slone that he had recently observed water spraying out of the bolts of the one of the affected seals' water traps, which indicated to him that there was still a significant amount of water behind the seals. Ward

alleges that Slone informed him that the mine had been released for production and he should not worry about problems at the seals.

- m. Around the same time that Ward made the safety complaint to Slone, Ward states Meade ordered him to connect a P40 pump to a P20 pump box. Ward says he told Meade that it was unsafe to connect these two pieces of pump equipment. Ward alleges, when he refused to connect these pieces of equipment, Meade ordered Dingess to connect the P40 pump to the P20 pump box, which he did. Still believing this practice was unsafe, Ward unhooked the P20 pump box and replaced it with a P70 pump box.
  - n. A little more than a week later, on June 1, 2012, Ward avers that Meade fired him.
3. Based on my investigation to this date, I have concluded that there is reasonable cause to believe that Ward was discharged because he engaged in protected activities as a miner's representative and made complaints about safety hazards. I have concluded that the complaint filed by Ward was not frivolous.

## **B. Testimony of Clinton Ray Ward**

Ward began working at the Mine in October 2011, where he was hired as the third shift chief electrician. Tr. 18-19. Prior to working for Argus, Ward had worked in various mines and in various positions since 1993. Tr. 17-18. Importantly, he began working as an apprentice electrician sometime in 2004 while he was employed by Rock Springs Development and actually received his electrical card in 2007. Tr. 17, 42. As the third shift chief electrician, Ward was salaried and considered a member of Argus management. Tr. 19. His duties included overseeing his crew, checking the permissibility of the equipment, ensuring that equipment was running and conducting weekly and monthly examinations. Tr. 19, 43-44.

Ward testified that he was terminated from Argus on June 1, 2012 for discussing a safety concern about the water behind the seals<sup>3</sup> with Roger Slone ("Slone"), the Safety Director. Tr. 20-21. While Ward was conducting his weekly electrical examination and checking the KVA's<sup>4</sup> in January 2012, he noticed that there was a lot of water that, at the time, was five bricks outby the seals into the working section. Tr. 22-23. He also stated that, at this time, the water was approximately waist deep, and the seals could not be seen because the water spanned about 350

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<sup>3</sup> Seals are usually twenty foot concrete seals put in between blocks. Tr. 21. Their purpose is to seal off old works so that the operator no longer has to enter them to do gas checks, etc. Tr. 21-22. Instead, these checks can simply be done at the seal. Tr. 22.

<sup>4</sup> A KVA is a power center from which the mine, pumps, equipment, etc., receives its power. Tr. 24. It is rated according to amperage. Tr. 25.

to 400 feet in distance. Tr. 23. Ward admitted, however, that the box had no power, it was out of service and was located approximately twelve bricks outby the seals. Tr. 45-46.

Later, in February, Ward accompanied an MSHA electrical inspector who was checking the KVA's back to the seals, and the water was six bricks, or approximately 600 feet, out and nearly knee deep at the KVA. Tr. 24-25. The inspector, however, did not note a water problem from January to March; although, a first quarter inspection would have been conducted during this time. Tr. 48. Ward admitted that he did not have the inspector accompany him back to the second power box where he observed the water. Tr. 49. After this inspection, Ward testified that he observed the water about six or eight more times. Tr. 26. He observed that "[i]t was dry all the way up to the seals." Tr. 26. From this observation, Ward opined that this meant that the water was coming from behind the seals. Tr. 26. During these last six to eight trips to the seals, Ward testified that the water was eight bricks, 850-900 feet, past the seals outby. Tr. 26-27. He could not get to the seals because he estimated that the water was ten or eleven feet deep at that point and, from where he observed it, the water was boot deep. Tr. 27.

Based on this amount of water, Ward became worried that someone would become trapped or would be killed if the seal blew out.<sup>5</sup> Tr. 27-28. He stated that the seals blow out when the pressure behind them becomes too great. Tr. 28. Ward expressed these concerns to Elza Maynard ("Maynard"), the Third Shift Mine Foreman, who told him that Superintendent Grover Meade<sup>6</sup> ("Meade") had been informed that the area needed pumped. Tr. 19-20, 28-29. Ward testified that Maynard continued to express his concern nearly once a week that the problem with the water was getting worse. Tr. 29.

Ward stated that the water inundation was finally corrected when MSHA shut the mine down on April 24, 2012, because weekly examinations could not be conducted, as reported by Examiner Johnny Dingess in the examination book. Tr. 20, 30; Stip. 8. Citation No. 8143298 was written as a § 104(a) citation as follows:

The weekly exam of the 003-0 MMU return entry was not traveled in its entirety on 04-23-2012 due to the return entry being flooded out and men were allowed to enter the mine without the weekly exam being completed.

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<sup>5</sup> Ward testified that this already occurred in Pennsylvania and miners were trapped due to a seal blow out. Tr. 28. On cross-examination, Respondent asserted that this was the result of the miners mining into old works. Tr. 77.

<sup>6</sup> Ward testified that Meade was referred to as "Cap Wedge" by the miners and Ward refers to him as "Wedge" throughout the testimony. Tr. 19.

Exhibit S-1.

It took the mine approximately twenty-one days to pump all the water out of the section and Ward and Maynard were tasked with ensuring that the pumps continued to run during the third shift. Tr. 30, 32. The citation was terminated on May 19, 2012 when the water had been removed from the return air course at the D set of seals and the area could be traveled. Stip. 10; Ex. S-1.

After the water was removed, Ward testified that he continued to work as usual, but production could not restart until MSHA inspector released the section. Tr. 31. Once production resumed, Ward and Maynard were called into Meade's office. Tr. 33. At this time, Meade explained that Maynard was being demoted to section boss and that Ward would have to "ride in and ride out with the crew,"<sup>7</sup> although, no other members of management were subject to this requirement. Tr. 33-34.

Although Meade told Maynard and Ward that the inspection was not their fault, Ward believed that Meade was concerned for his own job and wanted to make sure that someone else received blame for the inspection and the 197 violations<sup>8</sup> found by MSHA. Tr. 34-35. Ward suspected that Meade blamed him for the inspection. Tr. 36. In a meeting with the third shift, Meade threatened to fire the whole crew if "things didn't change." Tr. 35. When Ward jokingly asked if Waylon, a third shift electrician who had moved to another mine had been the one to call MSHA, Meade replied, "No. I know who called in." Tr. 36. While he made this comment, his eyes never left Ward. Tr. 36.

The Saturday before the mine was released for production, Ward testified that he and Maynard were pumping water from a jon boat and realized that a current under the boat was the result of water spraying out from around the S-trap, which is a valve behind the seals that lets the water out. Tr. 37. This indicated to Ward that the seal was leaking and there was a lot of water behind it. Tr. 37. Another employee was informed of the condition and, on Monday, Ward informed Slone, who replied, "they'll be fine. Feds released us to run." Tr. 37-38.

The seemingly final straw for Ward occurred when he expressed concerns about hooking up a P70 pump to a P20 starter box. Tr. 38. Ward testified that he initially tried to hook the configuration up, but it did not work. Tr. 38. However, he stated that the configuration is not permissible because the P20 starter box can not handle the amperage of the P70 pump. Tr. 38-39. He testified if the pump bridged out, it could electrocute a person handling it; however, he admitted under cross-examination that the P40 float box would simply not be able to handle the load from the pump and the power to the pump would kick immediately. Tr. 39, 70. Ward complained to Benton Harless, the maintenance supervisor, and Jake Bowen, Ward's immediate

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<sup>7</sup> Ward explained that the start time is 11:00 and he was then forced to get on the bus with the other men. Tr. 33. Then, when day shift between 6:30 and 7:00 in the morning, the third shift was taken back out of the mine on the bus. Tr. 33.

<sup>8</sup> The Affidavit of Kelly Acord states that the Mine was issued 96 citations as a result of the inspection. See Affidavit of Kelly S. Acord, 2(i).

supervisor, about the condition. Tr. 38, 57. He explained that both were electricians and knew that the configuration was a hazard. Tr. 38. Prior to any action taking place, however, Meade informed all the men that Dingess started the pumps. Tr. 38. Within two weeks of the demotion announcement and the incident with the pumps, Ward was terminated. Tr. 34.

During cross-examination, Ward admitted that the Mine contains as many as sixty-four pumps working all the time because the mine is basically a wet mine. Tr. 46-47. He further acknowledged that the seals are required to have a drain pipe in the lowest seal in elevation, referred to as the S-trap. Tr. 50. The testimony explained that the S-trap is designed to regularly drain out any water that occurs behind the seal and the water present on April 23, 2012 was water that would have drained those pipes and filled the area. Tr. 51. However, Ward reiterated that the valve was off while he was in the jon boat, causing the current underneath the boat and indicating that the seals were leaking.<sup>9</sup> Tr. 52-53. Ward further admitted that he did not attempt to fix the valve, but stated that “you could hardly get to it.” Tr. 54. Although Ward stated that there was still two and a half to three feet of water in the area at the end of his shift that morning, MSHA Inspector Roger Workman released that area for production at 2:00 the same day. Tr. 56.

Ward also testified during cross-examination that Meade explained to him during his termination meeting that this was the second time that there had been problems with the section being ready to run.<sup>10</sup> Tr. 82. He had previously been counseled by Meade in February concerning the same problem, and Ward was warned at that time that he would be terminated if the problems continued. Tr. 82. However, he stated that the night prior to the termination meeting, the state electrical inspector was in the Mine and Ward had to accompany him. Tr. 84. He stated that Meade and Bowen were both aware of this fact. Tr. 84.

### **C. Testimony of Johnny H. Dingess**

Johnny Dingess is an airway traveler or examiner who has worked for Argus in this capacity for approximately four years, but has about six years of total experience in this particular position. Tr. 99. As an airway traveler, Dingess generally travels different areas of the mine in order to travel all of the air courses in seven days time. Tr. 99. He also has his mine foreman’s certification and has been a certified electrician since 2003. Tr. 100.

Dingess testified that there are two power boxes near the seals. Tr. 104-105. The one closer to the seals is approximately four bricks outby and it does not have power. Tr. 105. Because of this, the power box should not be examined under any type of weekly check. Tr. 105. He also agreed with Ward’s testimony that the box that received power was approximately twelve bricks outby the seals and is subject to weekly examinations as well as MSHA inspections. Tr. 105-106.

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<sup>9</sup> Ward testified that he didn’t have his feet in the water, so he did not know exactly where the current was coming from. Tr. 55.

<sup>10</sup> There is some confusion in this testimony as to exactly what was said. For the purposes of a temporary reinstatement hearing, however, it is largely irrelevant.

Dingess conducted the airway examinations during the relevant time period and is familiar with the area that was shut down due to water around the seals. Tr. 100. He testified that on April 28, 2012, Examiner Kay Atkins (“Atkins”) found water at the D seals, which were new, and he could not travel the airway. Tr. 101-102; Ex. R-1. Dingess explained that he had never previously experienced problems with water at these seals because the seals are designed with an S-trap that allows water to flow through a drain pipe if the area overfills. Tr. 102-104. He testified that he had never seen water all the way out to the old power box and was surprised by Atkins’s findings. Tr. 106.

Although Dingess was not present when MSHA cited the Mine and was not aware of how much water existed at that particular moment, he testified that he traveled to the area that evening and stated that the water was about knee deep and extended out about six or seven bricks. Tr. 119, 121. To resolve this problem, Dingess testified that he set some pumps in the area. Tr. 106. His best guess for the cause of the water accumulation was a fall on the back side of the seal, busting it out and forcing the water down. Tr. 123. He could not guess at when the fall may have occurred. Tr. 123-124.

Upon reviewing the record created by Atkins, MSHA pulled everyone out of the mine and shut the valves off at the seals. Tr. 106-107; Ex. S-1. MSHA issued a citation to the Mine later that day, but allowed the Mine to run its belts until the next morning. Tr. 107; Ex. S-1. At that time, the belts were again shut off and MSHA personnel remained underground to continue its inspection; after which, they allowed the pumping process to begin. Tr. 107-108.

Dingess testified that the two pumps were in the area testified to by Ward. Tr. 108. He stated that there was a P40 and a P70, but, contrary to Ward’s testimony, Dingess stated that he had never seen a P20 pump. Tr. 69, 108-109. When Dingess entered the area, he stated that he discovered that someone had attempted to install the P70 pump cable into the P40 float box. Tr. 109. He stated that because there is not enough power going to the pump, it simply cannot run in this configuration. Tr. 109-110. He did not, however, believe that there was any particular hazard associated with it; rather, the pump simply cannot start. Tr. 109-110. To correct the problem, Dingess simply moved the P70 cable to the P70 float box, which had the correct breaker. Tr. 110. He worked day shift, but to his knowledge, he did not recall anyone being told to hook the P70 pump up to the P40 float box. Tr. 110.

Dingess stated that the seals in question were inspected twice between January and April by both state and federal officials. Tr. 112. No citations were issued to the Mine during this time period and Dingess testified that if the water had existed as Ward claims at that time, the Mine would have been shut down. Tr. 112. He further testified that Ward had not made any safety complaints to him concerning the seals or any other matter. Tr. 113.

#### **D. Testimony of Elza Maynard, Jr.**

Elza Maynard has worked for Argus for a little more than a year, but has twelve years total experience in the industry and is certified as a mine foreman and a dust sampler.<sup>11</sup> Tr. 126. He began working at the Mine in September 2011 as the third shift mine foreman, but, since May 2012, is currently in the position of section boss. Tr. 127. As mine foreman, his duties were to ensure that the miners were doing their jobs and the stations were ready to run in the morning. Tr. 127. Ward worked with Maynard in this capacity as both under Maynard's supervision and as head of maintenance. Tr. 127.

Maynard testified that during the period of January to April 2012, he was only down at the new seals one time to get a motor. Tr. 128. He asserted that he did not see any water around the seals at that time, but he stated that he would have seen it if it had been out by four or five bricks as Ward testified. Tr. 128. He further stated that he had never had any conversations with Ward concerning the seals or any other safety complaints from January until the time that MSHA issued the citation shutting down the mine. Tr. 131, 133. He denied that MSHA Investigator Charlie Bigley's account stating that Maynard told him that Ward had complained about water behind the seals had ever taken place.<sup>12</sup> Tr. 135. In his written statement to Special Investigator Kelly Acord, Maynard wrote that he had never heard Ward make safety complaints and was not aware that he was in any way vocal about safety issues. Tr. 141. In his statement, he also wrote that Ward had not said anything about the seals until the mine was shut down. Tr. 141.

On April 24, 2012, after MSHA shut the Mine down, Maynard worked to pump the water out of the area of the seals for "[j]ust a couple of nights." Tr. 128-129. He testified that the water was leaking around the cutoff valve of the S-trap at the flange.<sup>13</sup> Tr. 129. Dingess and Atkins actually fixed the problem. Tr. 130. He stated that the cutoff valve generally controls the flow of the water, but he was not sure if it is typically left open because he is not around the seals often. Tr. 130. He further testified that Ward would not have been assigned to work around the seals other than during the pumping process. Tr. 130-131.

On May 11-12, 2012, Maynard was informed that there was water across the track where the men were going to run some discharge line. Tr. 131. Maynard told Ward that the pump was down, but Ward was unable to repair it because he said the pump was "bad." Tr. 131-132. Maynard reported the problem to Atkins who then sent Dingess in to repair the pump, which he was able to do. Tr. 133.

Maynard admitted to being demoted in mid-May, a couple of weeks prior to Ward's termination. Tr. 137. He was demoted after the Mine resumed production and he testified that no reason was given for either his or Ward's demotions. Tr. 137-138. Maynard believed that he

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<sup>11</sup> He was also certified as an EMT, but it lapsed due to a lack of retraining. Tr. 126.

<sup>12</sup> MSHA Investigator Charlie Bigley interviewed Maynard for roughly an hour on June 18, 2012. Tr. 134. This interview was recorded. Tr. 135.

<sup>13</sup> The flange is where two pipes come together and are bolted. Tr. 129.

was demoted because he was blamed for the some of the citations written to Respondent during the impact inspection. Tr. 139. However, he did not recall a conversation in which Meade commented that he knew who had called MSHA. Tr. 140. Maynard did not believe that he deserved the demotion. Tr. 139.

### **E. Testimony of Grover T. Meade**

Grover T. Meade has been with Argus since June 2011 and has been the superintendent since he was hired. Tr. 145. His job duties are to oversee all three shifts at the Mine. Tr. 145. He testified that it was he, Harless and Bowen made the decision to terminate Ward's employment due to his poor work performance. Tr. 145-146. He stated that the decision became final on the day prior to June 1, 2012 when they went to the section to run dust pumps, and none of the equipment was ready to be operated. Tr. 146. It took the miners several hours to be able to run coal. Tr. 146.

Meade also testified that this was not the first problem that the Mine experienced with Ward. Tr. 146. Roughly the same incident took place in February when MSHA arrived at the 003 Section to run dust samples. Tr. 147. The equipment was not ready and could not be run until approximately 1:00 that afternoon and the miners could not get enough footage in the coal to obtain accurate dust samples. Tr. 147. MSHA had to return at a later date to redo the samples. Tr. 147. Further, Meade testified that management would leave him lists of work to do overnight and it would not be done in the morning; and, when it was done, it was often incorrect. Tr. 147-148.

Meade stated that he was not involved in assigning Ward to fix the pumps or in giving him instructions of how to wire it. Tr. 149. He does know, however, that the pumps were not repaired the next morning and Dingess had to be sent to the area to fix the problem. Tr. 149. As for the seals, Meade testified that he had been to the area to look at panels where the Mine was to mine coal, but he did not notice any water prior to April 23, 2012 and has never seen it since. Tr. 150, 153-154. In fact, he had never seen flooding at seals in his fifteen years of experience in the mining industry. Tr. 164. He does not know how much water was pumped from the Mine in order to terminate the citation. Tr. 158.

Meade stated that he does not remember the conversation taking place in which he stared at Ward to let him know that he believed Ward had contacted MSHA. Tr. 156, 161. He asserts that he only discussed a "messed up" belt move with the third shift. Tr. 161. He further stated that Ward had never complained to him or anyone else in management either about water in the area at any time in 12012 or any other safety complaint. Tr. 150-151, 156-157.

Meade acknowledges that approximately two to three weeks before Ward was fired, a meeting was held with Ward and Maynard in which Maynard was demoted and Ward was told to ride in and ride out with the crew. Tr. 160-161. He stated, however, that he did explain to Ward and Maynard the reasons for the decisions that were made. Tr. 161.

## 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 any other mine subject 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 C.F.R. § 815(c)(1)(Emphasis added).

The record indicates that Ward engaged in protected activity. Ward indicates that he raised the issue of water near the seals several times with Maynard. Tr. 19-20. Water accumulations in mines are considered a hazard and, in fact, the employees were withdrawn and the Mine was shut down for twenty-five days so that the water could be pumped. Ex. S-1. Alerting management to a hazardous water condition is an activity protected under section 105(c) of the Act, thus, the undersigned finds that the Complainant engaged in protected activity.

Ward also alleges that he was terminated for complaining about the safety hazards of connecting the P70 pump to the P20 float box. However, the weight of the testimony indicates that this configuration would not be a hazard of any kind; rather, the equipment simply would not work. Tr. 109-110. Under cross-examination, Ward admitted that the P70 pump will not work when hooked up to the P40 float box because the power immediately kicks when it is turned on. Tr. 70. Based on the foregoing, the undersigned finds that no hazard existed and, therefore, Ward's complaints about the pump configuration were not protected activity.

### B. Nexus between 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. *Phelps Dodge*, 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 (8<sup>th</sup> 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).

Ward testified that, after the water was pumped, he returned to his regular duties. Tr. 31. However, once the section was released for production, Ward and Maynard were called to Meade's office where they both received demotions. Tr. 33-34. This indicated to Ward that

Meade wanted someone to blame for the citations issued to Respondent during the impact inspection. Tr. 34-35. Subsequently, in a meeting with the third shift, Meade stated the entire shift was going to be fired if “things didn’t change.” Tr. 35. After a joke was made about whether someone who was no longer with the shift had been the one to call MSHA, Ward testified that Meade stared directly at him when he responded that he knew who had called. Tr. 36. Considering the testimony in the light most favorable to the Complainant, the undersigned finds sufficient evidence of hostility or animus toward the protected activity.

In his closing argument, Respondent urges the Court to look to *the Sec’y of Labor on behalf of Bussanich v. Centralia Mining Company* for guidance. *Id.*, 22 FMSHRC 107 (Jan. 2000)(ALJ). The undersigned is not persuaded by this case. While it is true that ALJ Manning found that there was no reason to believe that Bussanich was terminated as a result of his protected activity, the ALJ found that the complainant in that case had quit, and, therefore, suffered no adverse action. *Id.* at 113. The undersigned fails to find the relationship in the instant case.

## **2. Knowledge of the Protected Activity**

Ward testified to several instances in which Respondent was alerted to his concern with the water accumulation near the seals. First, he testified that he discussed the issue with Maynard at length. Tr. 19-20. He also testified that Maynard had informed Meade, who replied that the area would have to be pumped. Tr. 28-29. He further states that Maynard expressed a growing concern with the water as well. Tr. 29.

Respondent argues that its agents have stated that they had no knowledge of Ward’s complaints. However, the Commission had repeatedly instructed that it is not the judge’s duty nor is it appropriate to resolve conflicts in testimony or to make credibility determinations at this preliminary stage of the proceedings. *Proppant Specialist, LLC*, 33 FMSHRC at 2385; *CAM Mining, LLC*, 31 FMSHRC at 1088; *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. According to the case law, it is more appropriate for credibility issues to be addressed during the discrimination proceedings. For the foregoing reasons, the undersigned finds that Respondent had knowledge of the Complainant’s protected activity.

## **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 the subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. *All American Asphalt*, 21 FMSHRC at 47 (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.

Ward stated that he began expressing his concerns about the water and continued to discuss these concerns with Maynard and Slone until April 2012. Tr. 22-25, 28-29. The Mine was evacuated and idled by MSHA on April 24, 2012. Respondent was not able to sufficiently pump the water to a level safe for production until May 17, 2012. Tr. 158. MSHA then released the Mine for production on May 19, 2012. Tr. 158; Stip. 10; Ex. S-1. Ward was subsequently terminated less than two weeks later. In light of this, the undersigned finds that there is a coincidence in time between the protected activity and the adverse action.

## **CONCLUSION**

I have reviewed the entire record in this case and have carefully considered the contentions of the parties. In any subsequent proceeding, the Complainant may not prevail on the merits. However, based on the foregoing testimony and available case law, I am constrained to find that Complainant's Application for Temporary Reinstatement was not frivolously brought.

## **ORDER**

Based on the foregoing, it is hereby **ORDERED** that Complainant's Application for Temporary Reinstatement is **GRANTED**. Accordingly, Argus Energy WV, LLC is **ORDERED** to **REINSTATE** Complainant Clinton Ray Ward to his former position as Third Shift Chief Electrician at the same rate of pay and with the same benefits that he received prior to his discharge.

/s/ William S. Steele  
William S. Steele  
Administrative Law Judge

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/kmb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 2, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2008-393
Petitioner	:	A.C. No. 44-06864-156132
v.	:	
	:	
	:	
DICKENSON-RUSSELL COAL CO., LLC,	:	Cherokee Mine
Respondent	:	

**DECISION GRANTING SECRETARY’S  
MOTION FOR SUMMARY DECISION  
AND  
ORDER TO PAY**

Before: Judge Feldman

In this matter, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“the Act”), the Secretary of Labor (“ the Secretary”) seeks to impose a total civil penalty of \$9,429.00 on Dickenson-Russell Coal Co., LLC (“DRC”), consisting of \$3,143.00 for each of three similar violations of section 75.1403-6(b)(3) of the Secretary’s mandatory safety standards. This mandatory standard requires each self propelled personnel carrier to:

Be equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not more than 5 men, need not be equipped with such sanding device.

30 C.F.R. § 75.1403-6(b)(3). Each of the violations cited in Citation Nos. 6639886, 6639887 and 6639888 issued on April 15, 2008, are for wet and inoperable sanders on each of three, nine passenger, diesel mantrips. The violations were designated as significant and substantial (S&S)<sup>1</sup> and attributed to a moderate degree of negligence.

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<sup>1</sup> Generally, a violation is properly designated as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, Nat’l. Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

On April 26, 2012, the Secretary filed a Motion in Limine, relying on *Eagle Nest, Inc.*, 14 FMSHRC 1119 (July 1992), arguing that it is well settled that the exercise of caution is neither a mitigating factor, nor a defense, to an S&S designation. *Sec'y mot.* at 4-6. DRC responded to the Secretary's Motion in Limine on May 10, 2012, stipulating that the undisputed facts support technical violations of Safeguard No. 73336598 referenced in Citation Nos. 6639886, 6639887 and 6639888.<sup>2</sup> *Resp. opp.* at 2. Safeguard No. 73336598 repeats, in essence, the provisions of 30 C.F.R. § 75.1403-6(b)(3) that require nine passenger personnel carriers to have well maintained sanders. However, DRC challenged the S&S designation because:

(1) the mine was idle because it was inundated with water, and, the mantrips, that had been brought to the surface, would have been serviced and replaced with dry sand prior to the resumption of mining operations; and (2) there are several alternative methods of mantrip control and braking such as operation at slow speeds, normal service brakes, emergency brakes and operation in low gear.

*Resp. opp.* at 2, 9.

Safeguards are issued by MSHA inspectors to provide guidelines to minimize hazards with respect to transportation of men and materials. 30 C.F.R. § 75.1403 (repeating section 314(b) of the Mine Act, 30 U.S.C. § 874(b)). 30 C.F.R. § 75.1403-1 sets forth general provisions regarding "criteria" by which authorized representatives are guided in requiring safeguards. Section 75.1403-1(a) provides:

Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards *on a mine-by-mine basis* under § 75.1403.

30 C.F.R. § 75.1403-1. (Emphasis added).

Although Citation Nos. 6639886, 6639887 and 6639888 referenced Safeguard No. 73336598, the citations also cited violations of 30 C.F.R. § 75.1403-6(b)(3). As the language in Safeguard No. 73336598 substantively repeats the provisions of 30 C.F.R. § 75.1403-6(b)(3) that apply to all underground coal mines rather than to particular conditions at DRC's Cherokee Mine, Citation Nos. 6639886, 6639887 and 6639888 concern violations of a mandatory safety standard rather than violations of a safeguard. Consequently, DRC's stipulation to violations of Safeguard No. 73336598 is, in effect, a stipulation to violations of the mandatory standard in 30 C.F.R. § 75.1403-6(b)(3).

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<sup>2</sup> This matter had been stayed since October 5, 2009, pending resolution of the appeal in *Wolf Run Mining*, 31 FMSHRC 306 (Feb. 2009) (ALJ), *aff'd* at 32 FMSHRC 1669 (Dec. 2010) (holding that a safeguard violation can be designated as S&S).

In view of DRC's stipulation, there is no dispute as to any issue of material fact with regard to the fact of the cited violations. With respect to the S&S issue, there are no unresolved issues of material fact although DRC argues that mitigating factors preclude an S&S designation. While DRC's reliance on mitigating factors presents a question of law, it does not concern unresolved questions of fact.

Disposition by summary decision is appropriate in instances where (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). See *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). As the essential facts in this matter are undisputed, and, the fact of the violations is not contested, the parties were informed during a telephone conference conducted following the receipt of DRC's opposition, that I construed the Secretary's Motion in Limine as a Motion for Summary Decision on the S&S issue. The parties were further advised that I considered DRC's May 10, 2012, opposition as a cross motion for summary decision on the question of S&S. The Secretary replied to DRC's opposition on May 21, 2012.

### I. Findings of Fact

As noted, the essential facts are undisputed and set forth in the Secretary's May 21, 2012, reply:

On the morning of April 15, 2008, MSHA Certified Mine Inspector (CMI) Keith Cline, accompanied by CMI trainee Ed Smith, arrived at the Cherokee Mine for a regular underground inspection. The inspectors were told that the primary escapeway was inundated with water, so they decided to inspect several pieces of mining machinery on the surface. Among the machines they inspected were three steel-wheeled track-mounted personnel carriers, known as mantrips. All three mantrips were located on the track rails in the motor barn. None of the mantrips was tagged out of service or dangered-off. All three were in the standard ready-for-use position and any of them could have been used by any miner at any time.

*Sec'y reply* at 1. (Citations omitted).

### II. S&S

Resolution of the S&S issue has been thoroughly addressed by the Commission. As previously noted, as a general proposition, a violation is properly designated as significant and substantial ("S&S") in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is [S&S] 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Id.* at 3-4; *see also Austin Power Inc., v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 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 Company Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984).

(Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any S&S finding, the Secretary *must prove* the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996). The likelihood of a particular violation resulting in serious injury must be viewed in the context of the continuance of normal mining operations in the presence of an unabated hazard. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Consistent with *Mathies* and its progeny, the focus is on the hazard posed by the cited braking violations. DRC seeks to diminish the likelihood of injury on several grounds. Namely, DRC relies on considerations such as the future timely maintenance of the sanders, the exercise of caution, and the redundant methods of braking available to mantrip operators.

a. Intended Maintenance Prior  
To Resumption of Operation

With respect to DRC's assertion that the wet sand on the mantrips would have been replaced with dry sand prior to the resumption of normal mining operations, it is significant that the three cited mantrips were not tagged out of service. The purpose of the cited mandatory standard in 30 C.F.R. § 75.1403-6(b)(3) is to protect miners from hazards caused by the operation of defective equipment. In this regard, Judge Zielinski addressed the materiality, with respect to the issue of S&S, of a mine operator's claim that cited stationary defective mobile equipment would have been repaired prior to its operation. *Bilbrough Marble Division*, 24 FMSHRC 285, 288 (Mar. 2002) (ALJ). Judge Zielinski stated:

In general, such standards [requiring the maintenance of equipment] must be complied with even though the equipment is not actually being used or is not intended to be used during a particular shift. *Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1990). In *Mountain Parkway*, the term "used" was interpreted broadly to include equipment that was "parked in the mine in turn-key condition and had not been removed from service." *Id.* at 963. The Commission relied on *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843 (April 1981), which held that "the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service" meant that it had been "used" within the meaning of the standard there at issue [footnote omitted]. In *Good*, the Commission reiterated that "[a]s long as the cited equipment is not tagged out of operation and parked for repairs" a standard requiring that braking systems be maintained in functional condition was fully applicable. These cases make clear that the operator could properly be cited for any defective conditions unless the loader had been effectively taken out of service.

24 FMSHRC at 288.

In *Bilbrough*, Judge Zielinski determined that a loader with a defective windshield had effectively been taken out of service, despite not being "tagged-out," because the loader was parked in a "dead zone" that was known by employees to be an area where equipment needing service was stored. Unlike *Bilbrough*, in this case the mantrips were parked in the motor barn on track rails that led directly underground. The assumption that defective mobile equipment routinely parked in a working area of the mine will be serviced prior to operation of the equipment is contrary to Commission case law and does not defeat an S&S designation. Here, it is reasonably likely that continued operation of mantrips with compromised sanders on grades entering and exiting the mine will result in a loss of control, collision, or derailment resulting in serious injury.

b. Exercise of Caution

Turning to the issue of exercising caution, DRC asserts that mantrip operators use the transmission to maintain the mantrips at safe, slow operational speeds. *Resp. opp.* at 4. In addition, mantrips in operation must maintain a separation distance of at least 300 feet. *Id.* However, as the Secretary suggests, the Commission has determined that cautious behavior cannot be relied upon to prevent the potential serious consequences of a hazardous condition. *Eagle Nest*, 14 FMSHRC at 1123. The Commission stated:

We reject the judge's conclusion that the "exercise of caution" may mitigate the hazard. In effect, the judge seeks to add another element to the Mathies test, *i.e.*, that the exercise of substantial additional caution can be presumed and then considered in determining whether there is a likelihood of injury. Consistent with Commission precedent, it is the likelihood of injury that must be evaluated in considering whether a violation is S&S. The hazard continues to exist regardless of whether caution is exercised. The judge therefore erred when he concluded the hazard could be mitigated by caution. We assume that the judge meant that the likelihood of injury could be mitigated by caution. While miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions.

*Id.*

c. Redundant Safety Measures

Finally, DRC alleges the sanding violations are not S&S because of redundant methods of braking that are available to mantrip operators. Specifically, DRC relies on the mantrips' transmissions, brakes, and emergency brakes to slow the machines. *Resp. opp.* at 9. In addition, DRC states that there is a derail system aligned to direct traffic coming down the slope to the side of the portal. *Id.* at 4.

DRC's reliance on redundant safety measures to mitigate an S&S characterization is misplaced. The presence of redundant braking measures does not diminish the seriousness of a defect in the braking system. In fact, the presence of redundant safety measures is in recognition of the significant dangers associated with a mobile equipment brake failure. *See Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (holding that an operator's assertion that redundant safety measures eliminate a serious risk to miners "defies common sense" because such measures are in place "precisely because of the significant dangers.") *See also AMAX Coal Company*, 19 FMSHRC 846, 850 (May 1997) (holding that the presence of fire detection equipment and fire fighting equipment does not negate the serious safety risk posed by fires). Thus, alternative methods of braking and precautions taken with regard to derailments do not provide an adequate basis for precluding an S&S determination.

In the final analysis, the S&S question must be resolved by considering the hazard posed by the continuing use of mantrips with defective sanders during the course of normal continued mining operations. Given the fact that these mantrips operate on significant grade, it is reasonably likely their continued operation without the benefit of functioning sanders will result in a loss of control accident causing serious injury to the mantrip occupants. Consequently, the sanding device violations cited in Citation Nos. 6639886, 6639887 and 6639888 are properly designated as S&S.

### III. Negligence

The cited violations have been attributed to a moderate degree of negligence on the part of DRC. The Commission has consistently construed regulations requiring the maintenance of equipment as an “ongoing responsibility on the part of the operator” to ensure that such equipment always remains in “continuing functioning condition.” *Nally & Hamilton Enterprises*, 33 FMSHRC 1759, 1763 (Aug. 2011) *citing Lopke Quarries*, 23 FMSHRC at 707-08. The Mine Act is a strict liability statute. Thus an operator is liable for a violation of a mandatory safety standard regardless of the level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989).

However, the duration of the violation is a relevant consideration with respect to the degree of negligence. *Peabody Coal*, 14 FMSHRC 1258, 1261 (Aug. 1992). In the instant case, it is undisputed that the underground mine had recently been inundated with water. Thus, the Secretary does not contend that the inoperable condition of the sanders existed for a significant period of time. In fact, it is apparent that the wet condition of the sanders had recently occurred. Under these circumstances, although the claimed intention to service the sanders after the efforts to remove the underground water were completed does not defeat the fact of the violation, it is a reasonable mitigating factor as a prerequisite to the resumption of operations. Consequently, Citation Nos. 6639886, 6639887 and 6639888 shall be modified to reflect that the underlying degree of negligence attributable to DRC was no more than low.

### IV. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission’s authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when

an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

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

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

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294, *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

It has neither been contended, nor shown, that there are any aggravating circumstances in this case. Nor is it contended that the proposed penalties in this matter are disproportionate to the size of DRC, or, that the penalties would interfere with DRC’s ability to continue in business. Although the cited violations are serious in gravity, in that they are properly characterized as S&S, the most significant element in reaching the appropriate civil penalty in this matter is the degree of negligence.

It is significant that the non-operational sanders were caused by an acute exposure to wet underground mine conditions rather than a progressive maintenance failure. Thus, it is apparent that there are mitigating circumstances that support a reduction in the degree of negligence warranting a reduction in the proposed penalty.

With respect to the appropriate civil penalty, I recognize that a pattern of inadequate maintenance of mobile equipment may give rise to an enhanced civil penalty. However, I question the propriety of multiplying a civil penalty by a factor of three simply because of the involvement of three mantrips that were all exposed to the identical wet conditions. In other

words, the penalty in this case should not be high simply because multiple mantrips were cited for the same malfunction. Consequently, I will consider the cited violations collectively. Given the low negligence, the short duration of the cited violative conditions, and the undisputed fact that DRC was in the process of alleviating the disruption caused by the inundation, a total civil penalty of \$750.00 shall be assessed for the cited violations.

### **ORDER**

In view of the above, **IT IS ORDERED** that the significant and substantial designations in Citation Nos. 6639886, 6639887 and 6639888 **ARE AFFIRMED**.

**IT IS FURTHER ORDERED** that Citation Nos. 6639886, 6639887 and 6639888 **ARE MODIFIED** to reflect the degree of negligence attributable for the cited violations as low.

**IT IS FURTHER ORDERED** that Dickenson-Russell Coal Co., LLC pay a civil penalty of \$750.00 within 40 days of the date of this Decision in satisfaction of Citation Nos. 6639886, 6639887 and 6639888.<sup>3</sup> Upon receipt of timely payment, **IT IS ORDERED** that the captioned civil penalty case **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

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/jel

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<sup>3</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2500  
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August 7, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-138
Petitioner,	:	A.C. No. 11-02752-136300-01
	:	
	:	Docket No. LAKE 2008-526
v.	:	A.C. No. 11-02752-153962-02
	:	
	:	Galatia Mine
THE AMERICAN COAL COMPANY,	:	
Respondent,	:	

**DECISION**

Appearances: Karen E. Wilczynski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Jason W. Hardin, Esq., and Mark E. Kittrell, Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against The American Coal Company (“AmCoal”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

AmCoal operates the Galatia Mine, an underground coal mine in Saline County, Illinois. At the time the citations and orders in this case were issued, the mine was very large. It had three portals: the Main Portal, Galatia North Portal, and the Millennium Portal, which is now known as the New Future Portal. Miners would often rotate between portals and equipment would sometimes be moved to different portals. The Main Portal and Galatia Portal were connected underground but, due to a fault line, the Millennium Portal was separate. All three portals had one identification number issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). This mine employed a little over 1,000 people in 2007 and produced 7,009,160 tons of coal in 2007. In 2007, the mine liberated a little over four million cubic feet of methane a year and it was on a five-day spot inspection cycle.

## I. BASIC LEGAL PRINCIPLES

### A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial nature (“S&S”). An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the most difficult to apply. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Musser Engineering, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(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.*, 6 FMSHRC 1573, 1575 (July 1984). With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-971 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-503.

### B. Negligence and Unwarrantable failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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. Under the Mine Act, an operator is held to a high standard of care. 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. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d) (2011). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d. 133, 136 (7th Cir. 1995). Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

## II. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

### A. Order No. 6666983; LAKE 2008-526

On November 17, 2007, MSHA Inspector Dean Cripps issued Order No. 6666983 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary’s safety standards.<sup>1</sup> The citation alleges:

Combustible material in the form of hydraulic and gear oil was allowed to accumulate on the RC25 Jeffrey diesel ram car located at the Millennium Portal bottom. Oil was pooled approximately one inch in depth on the floor of the front differential compartment. All four service brake disks were coated with oil. The engine and engine compartment was also coated with oil.

(Ex. G-A). The inspector determined that an injury or illness was reasonably likely to occur and result in lost workdays or restricted duty, the violation was S&S, 20 people would be affected, and the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$60,000.00.

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<sup>1</sup> Section 75.400 provides, in part, that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings . . . .”

1. Background Summary of Testimony

a. Testimony of Inspector Dean Cripps

Dean Cripps is an inspector and an electrical engineer for MSHA. At the time of his testimony, Cripps had worked for MSHA for over 19 years. (Tr. 8). Cripps has inspected the Galatia Mine since he started with MSHA. (Tr. 10). Prior to his work with MSHA, Cripps worked in the coal mining industry as an electrical engineer, maintenance boss, underground maintenance foreman, and long wall maintenance foreman for a total of about eight years.

On November 17, 2007, Cripps inspected the Galatia mine. (Tr.12). He got into the cage, went down the shaft, and was near the bottom when he observed an RC Jeffrey diesel ram car (the “ram car”). (Tr. 15). He observed that hydraulic oil and gear oil had accumulated on it. (Tr. 14). He then issued the order citing a violation of 30 C.F.R. § 75.400. Cripps testified that hydraulic oil and gear oil are combustible. (Tr. 15).

The accumulations he observed were in active workings where people work or travel during the course of their duties. (Tr. 15). The location of the ram car was at the bottom of the shaft where all employees enter and exit the mine. *Id.* At the Millennium Portal, a ram car may travel from the bottom through the intake, through the entire primary escapeway used by the active sections, to the long wall face, a distance Cripps estimated to be around two to three miles. (Tr. 16, 18-19).

Cripps designated the violation as S&S and reasonably likely to cause lost work days or restricted duty. (Tr. 20, 27-28). He based his assessment on the fact that combustible hydraulic oil was in contact with the heat source, the friction from the brake caliper, so that it was reasonably likely for a fire to occur on the ram car. (Tr. 20-21, 28). Because the ram car was operating in the intake and the primary escapeway, the smoke, gases, and carbon monoxide (“CO”) from a fire would travel into the mine to the sections where the men would be working, and everyone working inby the ram car would be affected. (Tr. 20-22).

If the ram car caught fire, the primary escapeway would be filled with smoke and people would have to exit through the alternate escapeway. (Tr. 23). But the air that ventilates the primary escapeway also ventilates the alternate escapeway. *Id.* Therefore, if smoke contaminates the air in the primary escapeway, it will eventually make its way into the alternate escapeway. When the ram car is operated in the primary escapeway, the mine operator has a heightened responsibility to see that the equipment is maintained free from fire hazards. (Tr. 100). Cripps testified that for that reason, the condition he observed exposed the miners to a high degree of danger. (Tr. 28). Cripps testified that 20 people would be affected because there were two units inby, and each unit had approximately 10 to 12 people, and at least that number of people that were working inby at the time. (Tr. 21, 70, 76).

Cripps designated AmCoal’s negligence as high and the result of its unwarrantable failure. (Tr. 30). One factor he considered in making those designations was that when he

observed the condition of the ram car, the amount of oil that was present led him to believe it had been there for an extended period of time and that it should have been found by the equipment operators doing their preoperative inspections as well as by someone doing the weekly exam. *Id.* Another factor was that several MSHA inspectors had observed multiple violations at the Galatia Mine for accumulations in general and on diesel equipment in particular. *Id.*

Cripps testified that the accumulations appeared to have existed for at least several shifts based on the amount of oil present. (Tr. 24). He testified that an inch of gear oil requires considerable time to accumulate. *Id.* Hydraulic oil is under pressure, so if a hydraulic hose leaked or blew, oil would spew everywhere and, in a matter of seconds, large amounts of oil could be covering the components of the machine. (Tr. 101). However, the gear oil in the gear box in the ram car is not under pressure, so if there is a problem with the seal, it will drip and leak out and it will take a much longer period of time for the oil to accumulate. *Id.*

Cripps stated that the service brakes on the ram cars are notorious for leaking because the caliper seals go bad. (Tr. 24). Once a seal starts leaking, hydraulic oil can accumulate and coat the disc in a short time. (Tr. 25). But each service brake caliper is an individual part, so the seals on all four calipers do not start leaking at the same time. *Id.* Cripps testified that because all four calipers were leaking, the condition must have developed over time. *Id.*

Cripps agreed that the flash point of hydraulic oil and gear oil is about 400 degrees Fahrenheit. (Tr. 43). He did not find any ignition sources other than the friction from the brakes. *Id.* The oil pooled on the floor of the differential compartment was under the brake pads by about a foot and a half. (Tr. 43-44). Cripps did not note any other conditions that would lead to a fire. (Tr. 44-45).

Cripps testified that if someone walked by the ram car without opening the cover, they would not see the accumulations on the engine or in the differential compartment. (Tr. 49-50). The maximum allowable surface temperature for the engine is approximately 302 degrees Fahrenheit. If the engine coolant gets too hot, above approximately 170 degrees, a valve shuts off the engine. (Tr. 53-54).

Cripps testified that hydraulic oil leaking from defective seals was on the brake calipers. (Tr. 55-57). The speed of a ram car is about three to four miles per hour, and rarely above five. (Tr. 61). The terrain at the New Future Mine is relatively flat. (Tr. 62). Cripps did not know precisely how hot the brakes would get on the ram car, nor did he do any tests to find out, nor could he think of any instances of where ram car brakes have ignited hydraulic oil, but he did think the brakes were an ignition source. (Tr. 62-63, 67-68).

The ram car has a fire suppression system that uses a dry chemical that automatically activates in the event of a fire. (Tr. 72-73). There are nozzles that provide coverage for the brake discs and other parts of the ram car. (Tr. 73).

Cripps testified and his notes show that when he checked the weekly examination records for the diesel equipment, the ram car had been checked on November 14<sup>th</sup>, three days before he issued the order. (Tr. 29). That record indicated that the ram car needed to be washed and

tagged out. *Id.* Based on Cripps' almost 20 years of experience as a coal mine inspector and on the appearance of the ram car, his opinion was that the ram car was put back into service after being tagged out without being washed. (Tr. 30, 100).

Cripps testified that the brakes on the ram cars sometimes lock up and malfunction, with the pad staying in contact with the discs even after the pedal is released. (Tr. 97). If that friction caused a fire and the fire suppression system did not extinguish it, then the ram car could become a "raging inferno." (Tr. 99).

Inspector Cripps saw in the examination records that the car had been tagged out for washing three days prior to the inspection, but there was no indication in the records or by a visual inspection of the ram car that anyone had taken corrective action, although he did not inspect the ram car on the intervening days (Tr. 78-79, 81-82).

Cripps testified that there had been numerous 75.400 violations issued at the mine, about 38 citations and 7 104(d)(2) orders in the two months prior to the inspection. (Tr. 92-93). Cripps issued the present 104(d)(2) order, in part, because of the number of violations he had issued for dirty equipment at the mine and, in particular, the number he had issued for oil on brake discs. (Tr. 93-94). The mine operator was on heightened notice because, Cripps said, he had issued perhaps a hundred such citations in a four or five year time period. (Tr. 94).

#### b. Testimony of Scott Webb

Scott Webb is the compliance manager at AmCoal who met with Inspector Cripps on November 17, 2007. (Tr. 107, 109). AmCoal has employed Webb for 19 years in various positions. (Tr. 106-07). His responsibilities in the Safety Department include performing safety checks underground and escorting MSHA inspectors. (Tr. 107).

One of Webb's primary responsibilities was to check the underground equipment that had been tagged out. (Tr. 119). The entry in the record book of November 14, 2007 showed that the subject ram car had been examined. (Tr. 117). The visual fire suppression system had been inspected and marked as okay. (Tr. 121). There were no problems with the engine. *Id.* However, a notation under "dangerous condition" said "needs washed." *Id.* The car was tagged out for service. (Tr. 118). Under normal practices, a tag is placed in the cab of the equipment so that anyone entering would see the tag. Webb testified that anyone operating tagged-out equipment would have been discharged, as would any manager directing an operator to remove the tag and operate the equipment. (Tr. 119).

Webb stated that hydraulic leaks occur often in ram cars. (Tr. 129). The weekly checks are intended to detect and fix them. *Id.* Webb testified that under the brakes and differential, the floor of the ram car is beveled and contains perhaps 15 to 20 hoses and cables that carry hydraulic fluid. (Tr. 125, 129). If a hose blew off, everything would be covered in oil. (Tr. 130). If one came loose, it would leak. (Tr. 130). Hoses sometimes loosen or detach in normal mine conditions. *Id.* Webb testified that the floors at the mine are relatively flat but there are potholes and ruts and bumps in places and areas where bridge boards are necessary. (Tr. 129).

Webb testified that all four service brakes would not usually start leaking simultaneously. (Tr. 139). The possible sources of oil on the discs could have been oil from the differential, oil from the braking unit, oil from a blown hose, or spilled oil from a can stored on top of the ram car. (Tr. 142). Webb did not have any personal knowledge about the condition of the ram car at the time Cripps cited the condition or what may have caused the accumulations. (Tr. 143). He did not see the ram car until after it was washed.

Preoperational checks happen at the beginning of a shift before ram cars are put into service. (Tr. 130-131). The employee handbook, a copy of which every employee receives, contains standards for performing preoperational checks. (Tr. 131). In it, employees are directed to perform a “walk around inspection of the machine.” (Tr. 132). If employees observe a condition that creates a hazard, they are required to have it corrected. *Id.* If they were not qualified, they would call someone that was. Employees were directed to wash the radiator and engine compartment each shift. *Id.* Part of the weekly inspection involves checking for leaks. (Tr. 134). Equipment operators were also directed to clean their equipment during periods of delay, based on the projected length of the delay. (Tr. 134).

On the day of the inspection, Delane Winters was the designated ram car operator. (Tr. 135). If she had done a preoperational check, she would have washed the ram car if necessary. *Id.* However, she had no personal knowledge that it had been cleaned on November 17, or whether a preoperational check had occurred. (Tr. 140). Webb testified that he thought that Ms. Winters had not yet arrived underground on the day of the inspection and, thus, the preoperational check had not yet been performed. (Tr. 141).

Webb admitted that a dirty ram car is considered a “dangerous condition” because accumulations of combustible materials can start a fire. (Tr. 139). However, in his 19 years at the mine, Webb had never seen or heard of a fire being caused or started by brake friction in a ram car or other pieces of equipment. (Tr. 121).

Webb testified that the flashpoint of the hydraulic oil used in AmCoal’s ram cars in November 2007 was 400 degrees Fahrenheit. (Tr. 111-13). If the surface temperature of the engine reaches 302 degrees Fahrenheit, the engine automatically shuts down. (Tr. 115). There are three automatic shut downs related to the engine if it overheats: a low engine oil pressure shut down, an “exhaust over temp,” and a “water coolant over temp.” *Id.*

Webb testified that a governor limits ram car speeds to about three miles per hour. (Tr. 122). The ram car has a fire suppression system with “check fire” wires that loop through the machine, including around the fuel tank, over the motor, into the scrubber department, and through the center section where it provides coverage for the brakes. (Tr. 123). A nozzle is directed at each disc brake. (Tr. 122). When activated, the system discharges a dry chemical that extinguishes the fire. (Tr. 124).

In the case of a fire, personnel were trained to position themselves with the air to their backs. Operators would not go downwind of a fire. (Tr. 126). Webb testified that the two crews working in the mine were approximately two miles from the bottom. (Tr. 128). There

were two escapeways in the mine separated by block stoppings. (Tr. 128). The air in the alternate escapeway was return air. *Id.*

c. Testimony of Joe Manning

Joe Manning has been an underground miner for 30 years. (Tr. 144). At the time of the inspection, he was the Superintendent at New Future Portal, in charge of all day-to-day activities there. (Tr. 145).

Manning testified that on November 19, two days after the inspection, he conducted an investigation and wrote an email to Safety Director Paul Kraus and safety department members Scott Webb and Bill Crittendon. (Tr. 147; Ex. R-92). Manning explained that he went below to look at the ram car, which had been moved to the wash bay but had not yet been washed. (Tr. 148). He noted that the ram car looked like it needed to be cleaned. He noted accumulations on the calipers. (Tr. 148). He did not think the accumulations looked severe and he did not find an ignition source. (Tr. 149).

Manning admitted that several MSHA inspectors had discussed accumulations with him prior to the November 17<sup>th</sup> inspection and had put him on notice that there had been excessive accumulations of combustible material on diesel equipment. (Tr. 166). Manning said that to address this concern, AmCoal implemented the preoperational check system so that every operator would check their equipment for accumulations of oil before they operated it.

Manning did not know whether Delane Winters had done a preoperational check prior to the order being issued. (Tr. 161). He testified that the ram car was not hot at the time he first observed it on the day of the inspection. (Tr. 149). It did not appear to have been operated on that shift. *Id.*

Manning's email further said that three people operated the ram car on November 14, 15, and 16, and all three said there was no tag on it when they operated it. (Tr. 157). He found nothing to indicate that someone removed the tag without washing it. (Tr. 158). The policy at the time of the inspection was that a person who removed a tag without correcting the hazard would be terminated. *Id.* Manning admitted that because of that policy, there was incentive for people to not confess to having removed a tag. (Tr. 167).

Manning testified that the oil could have accumulated in two days, or even within one or two shifts. (Tr. 160). In three days of ram car usage, the hydraulic parts and components with hoses may leak. *Id.* Dust from coal, rocks, oil leaks, and normal movement and operation may accumulate. *Id.* Preoperational checks, permissibility checks, and weekly checks are all procedures for detecting and remedying accumulations.

Manning testified that it was not a common practice to allow all four service brake discs to become coated with oil before the condition was corrected. (Tr. 164). In his 30 years of mining experience, Manning had never heard of a fire starting on any piece of equipment because of brake friction. (Tr. 162).

## 2. Brief Summary of the Parties' Arguments

### a. Secretary of Labor

The Secretary argues that there was a clear S&S violation of section 75.400. The Secretary stresses that under the third element of *Mathies*, an evaluation of the reasonable likelihood of injury should be made assuming normal mining conditions. When evaluating the reasonable likelihood of a fire, the Commission examines whether a confluence of factors was present. The factors considered include the extent of the accumulations, the length of time the cited accumulations were present, and the presence of possible ignition sources. *Amax Coal co.*, 19 FMSHRC 846, 848 (May 1997). The fact that a mine has measures in place to suppress a fire does not mean that fires do not pose a safety risk to miners. *Buck Creek Coal Co.*, 53 F.3d 133, 136 (7<sup>th</sup> Cir. 1995). Because the mine is a gassy mine on a five-day spot inspection schedule, there is an inherent hazard that requires extreme caution and due diligence to assure the safety of its miners. The evidence presented in the case establishes that there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an event in which there was a serious injury.

The Secretary also maintains that the violation was the result of the operator's high negligence and its unwarrantable failure to comply with the safety standard. The Commission analyzes several key factors in determining whether a violation is the result of an operator's unwarrantable failure, as discussed earlier in this decision. The Secretary contends that she established that AmCoal met these factors.

### b. AmCoal

AmCoal does not dispute that there was a violation of section 75.400. It argues that the testimony of Inspector Cripps should receive little or no deference because his testimony and conclusions differed significantly from what he recorded in his notes and what he actually investigated when he issued the order.

AmCoal also argues that the violation was not S&S because there was no ignition source that could have ignited the oil accumulations. The only potential ignition source was the possibility of friction creating heat on the brake pads, but the inspector admitted that he was just speculating that brake friction could start a fire at the mine. AmCoal maintains that only one person would have been affected if a fire were to start. The ram car had a built-in fire suppression system that covered all the potentially affected areas of the ram car and there was a portable fire extinguisher on the ram car. The inby crews were over a mile away. There was absolutely no evidence that a fire would have progressed into a conflagration that would bellow thick smoke into the mine atmosphere.

AmCoal also argues that its negligence was moderate and the violation was not the result of its unwarrantable failure. The violation occurred at shift change and there was no proof that the ram car had been operated that shift. The company argues that the operator would have noticed the accumulations and would have made sure that the ram car was cleaned before it was operated. There is also no evidence that management knew of the cited condition. The engine

and differential compartments had covers over them so the accumulations would not necessarily be noticed by someone walking by. The company's weekly examination records show that the ram car was being inspected and serviced on a regular basis. The ram car could have easily been washed on November 14, put back into service, and then could have developed oil leaks and spills.

### 3. Discussion and Analysis

The Secretary established the first two elements of the *Mathies* S&S formula. A violation was established that created a discrete safety hazard. The hazard was a fire starting on the ram car with the result that smoke and CO would enter the mine atmosphere. I also find that the Secretary established the fourth element. If an injury were to occur as a result of this violation, the injury in question would be of a reasonably serious nature. As in many cases, the issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury to a miner.

The Commission has provided the following guidance for accumulation violations:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

I find that, in examining all of the factors that can contribute to a fire, the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would have resulted in an event in which there was an injury.<sup>2</sup>

I find that there was no ignition source that was reasonably likely to ignite the oil. The oil at the bottom of the differential compartment was not near any ignition source. There were no loose wires or other parts that could get hot in this compartment. It was also unlikely that heat from the engine could ignite the oil. Because the ram car was a permissible piece of equipment, the maximum surface temperature of the engine would not be any higher than 300

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<sup>2</sup> I do not agree with AmCoal's argument that Inspector Cripps' testimony should not be credited because of any discrepancies between his notes and his testimony. Inspectors are not required to notate every detail of an inspection and I do not find his notes to be significantly inconsistent with his testimony. I reach the same conclusion with respect to the testimony of Inspectors Ramsey and Miller.

degrees, which was well below the ignition temperature of the hydraulic oil. (Tr. 53). The ram car was equipped with shut-down devices that automatically shut the engine down if the exhaust or coolant temperature gets high enough to ignite the oil.

The only potential heat source that could possibly ignite the oil was heat generated by the brake discs. The ram cars travel at an extremely slow speed, about five miles per hour or less, and are unlikely to generate enough heat in normal usage to ignite oil. Inspector Cripps was concerned that a brake pad could malfunction and stay compressed during normal operations. The inspector did not observe any problems with the brakes or the discs during his inspection. Although it was possible that the brakes could ignite the oil, such an event was quite unlikely. At most, the brakes would start to smoke and a “distinctive smell” would become evident. (Tr. 98). Inspector Cripps has observed stuck brake pads at mines but there was no evidence that such an event has ever started a fire on a piece of equipment. I find that it was unlikely that friction from the brake pads would start a fire.<sup>3</sup> In addition, it is not clear whether the ram car was ever operated in the condition that it was found by the inspector. Some of the accumulations could have appeared at the end of the previous shift. Finally, it is not clear whether the ram car operator on the ongoing shift had performed her preoperational check at the time of Cripps inspection. Given that fact, I cannot presume that she would have operated the vehicle in the condition it was at the time of the inspection.

I recognize that the test for S&S is not that there must be a reasonable likelihood that the *violation* will cause injury, but whether there is a reasonable likelihood that the *hazard contributed to* by the violation will cause injury. *Musser Engineering Inc., and PBS Coals Inc.*, 32 FMSHRC 1257 (Oct. 2010); *Black Beauty Coal Co.*, 34 FMSHRC \_\_\_\_ slip op. at 9-10, No. LAKE 2008-477 (Aug. 2, 2012). The potential hazard in this case is that the oil on the vehicle will catch on fire creating smoke. As stated above, such an event was not likely.<sup>4</sup>

The violation was very serious, however. The gravity of this violation does not depend on the reasonable likelihood of a fire but rather the focus is on what effect a fire could have on the health and safety of miners. For the reasons the inspector provided to justify his S&S determination, I find that the gravity was high. It is the gravity I must take into consideration when assessing a civil penalty. 30 U.S.C. § 820(i). Because the ram car would travel around into inby areas, I find that 20 miners could have been affected if a fire started when the ram car was in an inby area.

I find that the violation was the result of AmCoal’s negligence but that the Secretary did not establish the violation was the result of AmCoal’s aggravated conduct constituting more than ordinary negligence.

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<sup>3</sup> I reached a similar conclusion in *Mach Mining*, 33 FMSHRC 763, 766-67 (Mar. 2011) (ALJ). That case involved loose coal saturated with oil and grease on a roof bolting machine.

<sup>4</sup> I have not considered the presence of a fire suppression system on the ram car in reaching this conclusion.

The ram car was parked at the portal bottom and would have been observed by many people including management personnel. The violation was extensive and, if someone carefully looked at the ram car, it was obvious. Although it is not entirely clear how long the condition existed, at least some of the oil must have been present for some length of time. It is unlikely that all four brake calipers would have started leaking at the same time. Thus, the conditions observed on November 17 did not happen all at once, but built up over at least one or two shifts. The conditions created a serious safety hazard, as discussed above. It is not clear if the ram car operator had conducted her preoperational examination of the vehicle. It is also not clear when the ram car had been previously operated. Thus, it is just as likely as not that the ram car had not been operated with all of the accumulations present and that it would have been cleaned before it was operated again.

On the other hand, Inspector Cripps credibly testified that he had numerous discussions with AmCoal officials regarding accumulation violations. The mine had been issued 38 citations and 7 orders for violations of section 75.400 in the two months prior to November 17. (Tr. 93). It received in excess of 200 violations of this standard in the 15 months preceding November 17. (Tr. 361-62; Ex. G-Z). Most importantly, MSHA inspectors had cited AmCoal on numerous occasions for accumulations on diesel equipment at the mine and for accumulations on brakes of such equipment. (Tr. 32, 92-93). The inspector testified that the service brakes on ram cars at the Galatia Mine were “notorious for leaking.” (Tr. 24). Inspector Cripps testified that he had discussed this problem with mine management and had written many citations for equipment being coated with oil. *Id.* Manning admitted as much. (Tr. 166). Thus, the operator was put on notice that greater efforts were necessary for compliance with section 75.400, especially with respect to accumulations of oil, grease, and coal dust on mobile equipment. *See e.g. Big Ridge, Inc.* 33 FMSHRC 689, 705-06 (Mar. 2011) (ALJ). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC at 11.

Given the particular facts in this case, I find that there is insufficient evidence to establish an unwarrantable failure finding. Because of the uncertainties concerning the length of time the condition existed and the time it would have continued to exist assuming normal mine operations, I find that it was not established that management exhibited aggravated conduct with respect to this order. The order is hereby **MODIFIED** to a section 104(a) citation with moderate negligence. Given the above, I find that a penalty of \$30,000.00 is appropriate for this violation.

**B. Order No. 6668417; LAKE 2008-526**

On November 13, 2007, MSHA Inspector Danny Ramsey issued Order No.6668417 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.351(b)(2) of the Secretary's safety standards.<sup>5</sup> The citation alleges:

The designated AMS operator, responsible for monitoring the AMS signals, did not promptly respond to defective CO sensors indicated on the Finnigan #1 conveyor belt. The defective sensors, located at the head roller, the conveyor tail piece and at the 4200' mark were not reported.

(Ex. G-G). The inspector determined that an injury or illness was reasonably likely to occur and result in a fatal accident, the violation was S&S, 25 people would be affected, and the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$53,858.00.

1. Background Summary of Testimony

a. Testimony of Inspector Danny Ramsey

Danny Ramsey is a ventilation specialist and an inspector for MSHA. (Tr. 172). He had been an inspector with MSHA for about seven and a half years. (Tr. 172). Prior to working with MSHA, Ramsey worked in the mining industry for approximately 31 years. (Tr. 173-74).

AmCoal installed carbon monoxide ("CO") monitors along the belts at the mine as part of its approved ventilation plan. MSHA refers to these monitors as an atmospheric monitoring system ("AMS").<sup>6</sup> Ramsey testified that he issued Order Number 6668417 after checking the

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<sup>5</sup> Section 75.351(b)(2) provides, in part, that when an atmospheric monitoring system ("AMS") is used at a mine:

The mine operator must designate an AMS operator to monitor and promptly respond to all AMS signals. The AMS operator must have as a primary duty the responsibility to monitor the malfunction, alert and alarm signals of the AMS, and to notify appropriate personnel of these signals. In the event of an emergency, the sole responsibility of the AMS operator shall be to respond to the emergency.

<sup>6</sup> AmCoal disputes this characterization because mines with an AMS usually monitor for a wide range of conditions including the presence of methane. As a consequence, it contends that MSHA should have cited it for a violation of its ventilation plan rather than a violation of section 75.351(b)(2). Recognizing that the Secretary could seek to modify the citation to reflect its position, AmCoal does not argue that the order should be vacated on this basis. (Tr. 300; AmCoal Br. 23-24). It does, however, use this argument to support its position that the person on the surface who is responsible for operating the monitors is not its agent.

examiner's books on November 13<sup>th</sup> and noticing that the CO systems were still reported as being down and not operating. (Tr. 177, 179-80). The previous day, he had asked about the CO systems and had been told they were down, but that the affected belts that convey coal were not running and were idle. (Tr. 177). However, on the 13<sup>th</sup> when he asked about production, he was told that they had run coal the night before even though some of the sensors on the CO system were shown as not operating at that time. *Id.* The sensors on the belt were placed 2000 feet apart, the distance the regulations require. (Tr. 180, 201). Three sensors were not working: one at the head roller, one at the 4200 foot mark, and one at the tail piece of the belt. (Tr. 180). If a fire started along the area where a sensor was out, another monitor might have detected the CO. (Tr. 203). The inoperable sensors were at the ends and in the middle of the belt. (Tr. 206).

The belt that was down was the Flannigan #1 belt at the Galatia mine. (Tr. 177). It is the main belt that transfers coal out of the mine. (Tr. 178). The standard requires an AMS operator to monitor the system and, if the system goes into alert, fails, or alarms, he is to notify a responsible supervisor immediately. *Id.* The AMS only monitors the presence of CO along the belt lines. CO is created during a fire. (Tr. 178, 179). In order to comply with the mine's ventilation plan, if the sensors are not working, someone is required to physically monitor the affected area. (Tr. 182). The AMS operator, who works in a surface office at the portal known as "mine control" receives signals from and maintains communication with the AMS. (Tr. 178, 179).

Inspector Ramsey discussed the problem with Steve Willis, the safety manager at that portal. (Tr. 181). Willis called mine control and spoke to the AMS operator about the belts. The AMS operator said that the belts had been run that night with the sensors not working.

Ramsey designated the violation as reasonably likely and fatal, S&S, with 25 people affected. (Tr. 184, 189). The specific hazard of concern to the inspector was that the moving parts on the belt line would start a frictional fire and, without functioning CO sensors, the fire would spread and become a large fire. (Tr. 184-85). There is usually only one examiner in the actual vicinity of the belts during each shift. (Tr. 185). Another miner may be present cleaning up accumulations. Ramsey testified that at least 25 people were working inby this area. He recalled the airflow that day moving inby, although that was not recorded in his notes or on the order. (Tr. 199). The miners who were working inby were approximately two-and-a-half to three miles away from the cited area. The belt entry was separated from the main travel road by stoppings and man doors every 600 feet. (Tr. 198). The air that was traveling inby would not have traveled all the way to the face; rather, it would have traveled to a regulator. (Tr. 199-200). Ramsey did not know where the regulators were on the day he issued the citation.

With regard to the "reasonably likely" designation, Ramsey testified that when there is machinery with moving parts in an area that is not well traveled without operating sensors to alert the presence of a fire, the smoke from a fire could travel inby along the belt line and pose a high degree of danger to the miners. (Tr. 186-87). There would be no way for the miners to escape the mine. (Tr. 190). The risk associated with exposure to CO in high concentrations is death. On cross-examination, Ramsey testified that if someone were in the belt entry when a fire broke out, they possibly could go through one of the man doors to cleaner air.

The person monitoring the AMS system at mine control did not properly respond to the defective sensors. (Tr. 188). The fact that the sensors were not working was recorded in the examiner's books when Ramsey was at the mine. (Tr. 188-89). The AMS operator also said the same thing to Ramsey. (Tr. 188). The midnight shift mine manager made a statement that he was not contacted by the AMS operator regarding the defective sensors. (Tr. 191).

In designating the violation as an unwarrantable failure and high negligence, Ramsey took into account the fact that the AMS operator was an agent of AmCoal. The AMS operator knew of the problem but did not react to it or report it. (Tr. 190, 208). Ramsey testified that the operator was an agent of the mine because he was solely responsible for monitoring the AMS system and other systems in mine control. (Tr. 190-191). Another reason he thought the AMS operator was an agent was because it was his belief that the operator was a salaried employee. (Tr. 209). AmCoal had notice that there were problems with the AMS system because they had been working on the sensors the day before. (Tr. 192). Anyone in management should have known that the sensors were not working because it was in the books and the books are countersigned by mine management each shift. Ramsey testified that, when an AMS system is not functioning, he presumes the existence of an emergency because conditions along a belt create a potential for a fire or other hazard. (Tr. 193).

Ramsey further testified that, after issuing the order, he went underground and traveled approximately seven miles to the Flannigan longwall area. (Tr. 194). He did not stop to check the status of the belts or CO monitors at that time. He did not issue citations or orders for accumulations along that area of the Flannigan #1 belt. *Id.* He did not note any potential ignition sources along the entries or along the Flannigan belt. (Tr. 194-95). He did not inspect the belt. He did not know the status of the rollers on the belt or of any of the equipment or machinery on the belt. (Tr. 195). His designation of gravity as reasonably likely was based on a presumption of a potential hazard. (Tr. 196).

Ramsey testified that he listed the violation as potentially fatal because of the possibility of smoke or CO inhalation. (Tr. 196). Ramsey testified that whether the injury would result in lost work days or a fatal accident would depend on the size of the fire. Ramsey presumed that, because there was no alert system protecting miners and the AMS operator failed to notify anyone that the sensors were not working, a fire could become very big before it was discovered. Ramsey testified that a large area was not protected by CO sensors and this area had a history of problems with coal spillage and friction sources were often present. (Tr. 197).

b. Testimony of Stephen Willis

Stephen Willis was the Manager of Health and Safety at AmCoal in February, 2007. (Tr. 264). His duties were monitoring the safety program and compliance program, reviewing accidents, and conducting investigations. (Tr. 264). Willis began mining coal in 1972. (Tr. 265). He has worked mining coal, in management, and in health and safety. (Tr. 265-66). At the time of the hearing, Willis had been at Galatia for approximately 20 years. (Tr. 266).

Willis met with Inspector Ramsey on November 13. (Tr. 266). Willis first learned about the condition cited in Order 6668417 when Ramsey informed him that the order would be issued. (Tr. 267). With Ramsey present, Willis called Carl Shurtz, putting him on speaker phone.

Shurtz works in mine control and monitored all the functions that control the belts. (Tr. 268). If there was an alarm on a CO monitor, Shurtz' job was to call the shift manager so the shift manager could investigate and call an electrician if necessary. Willis asked Shurtz if there was a problem with the monitors and Shurtz replied that there was. (Tr. 269).

After the order was issued, Willis conducted his own investigation. (Tr. 267; Ex. R-81). Mr. Shurtz was the AMS operator between 7:00 a.m. and 7:00 p.m. while Jim Hood was AMS operator between 7:00 p.m. and 7:00 a.m. The belts had not been running for several shifts due to a roof fall in the Flannigan longwall. (Tr. 273). The day before the order was issued, November 12, the belts were not working and Shurtz told the electricians that there was a problem. Shurtz worked with the electricians to troubleshoot the problem, but when the system was reset, some of the CO sensors still were not working. (Tr. 277). This problem had not been fixed when Shurtz left the mine at the end of his shift at 7:00 p.m. on November 12.

After Mr. Hood started his shift as the AMS operator, he informed Shift Manager Randy Robinson of the problems with the CO monitors along the belt. Robinson was the shift manager of the shift that ended at midnight that evening. (Tr. 271-81; Ex. R-81). After more troubleshooting, most of the CO sensors along the Flannigan #1 came online at about 11:30 p.m. on November 12. The CO monitor at the 4200 foot location along this belt still would not come online. Hood told the electrician about this failure. Don Cotter, the shift manager for the shift that started at 12:01 a.m. on November 13, was not advised that all of the CO monitors were not working. (Tr. 262-63). The shift manager for the previous shift knew that all the CO monitors were not working and that the electricians were working on the problem. The oncoming shift manager was not informed of the situation, so he apparently assumed that all systems were working, and coal was transported on the belt on the midnight shift. Willis attributes the problem to a breakdown in communications between the AMS operators and the two shift managers.

Willis testified that he did not believe that AmCoal was negligent because the electricians knew about the problem and they were working to correct it. (Tr. 282-83). The change of shift probably contributed to the communication breakdown with the midnight shift manager. (Tr. 283). The AMS operators had been communicating with the electricians. Based on Willis' investigation, the electricians continued to work on the problems and they kept management apprised of the situation. (Tr. 283-84).

Willis testified that there was absolutely no question in his mind that the air along the whole Flannigan belt was moving in an outby direction in November of 2007. (Tr. 290-91). Willis testified that the monitor at the Northwest 3 tail and the monitor at the Flannigan 1 head were close together, approximately 100 feet apart. (Tr. 289, 292). Willis believed that the monitor at the Northwest 3 tail was working. (Tr. 292).

Because the air was moving outby, if a fire were to start, the smoke and CO would travel in an outby direction. (Tr. 296). Stoppings separated the primary escapeway/travelway from the belt entry. Willis testified that if a fire were to occur, he did not believe that it would affect inby miners. He testified that outby there may have been examiners and other employees working, but if a fire were to start they would go through a man door into the clean air in the primary

escapeway. (Tr. 297, 299). Willis testified that a fatal injury was highly unlikely. (Tr. 299). If someone were injured, Willis thought that the most likely injury would be lost days or restricted duty from smoke inhalation. (Tr. 300). Willis said there was a fire deluge system at all the belt drives.

The only responsibility and authority of the person monitoring the AMS system was to notify the shift manager when necessary. (Tr. 307). The AMS operators had no management responsibilities. (Tr. 308). They also did not train people, hire or fire people, coordinate the location of personnel within the mine, and were not given any responsibilities in respect to allocating work to individuals. They are in charge of the communication center for all three portals, underground and on the surface. (Tr. 316-17). If there is an emergency, they must be on alert and aware. (Tr. 311-12). They are responsible for generating a log book that records CO alarms, failures, and computer reports. To be a mine controller, technical skills and computer skills are required.

## 2. Brief Summary of the Parties' Arguments

### a. Secretary of Labor

AmCoal's designated AMS operator failed to promptly respond to several defective CO sensors on the Flannigan #1 conveyor belt. The violation was S&S because, assuming continued mining operations, the malfunctioning sensors posed a hazard to the two mining units working inby. In the event of an emergency, it was reasonably likely that fatal injuries would occur. The Secretary argues that she is not required to establish that it was reasonably likely that the violation itself would result in an injury but the test is whether there was a reasonable likelihood that the identified hazard would result in an injury. The hazard in this instance consists of miners being unable to escape quickly in an emergency situation. With the sensors not working it was reasonably likely that, if a fire were to start in the cited area of the belt, there would be a delay in its being detected. This delay would make it reasonably likely that miners would not be able to escape in a timely manner.

The Secretary also maintains that the violation was the result of AmCoal's high negligence and its unwarrantable failure to comply with the standard. The AMS operator was the agent of AmCoal and his negligence is imputable to the operator.

### b. AmCoal

AmCoal does not dispute the violation but contends that the violation was not S&S, that its negligence was not high, and that the violation was not the result of its unwarrantable failure to comply with the safety standard. The evidence demonstrates that an injury was unlikely to occur, that any injury would have resulted in no more than lost workdays, and that only one person would have been affected. There is no proof that there were any conditions along the belt that could have started a fire. Inspector Ramsey did not even inspect the belt for hazardous conditions. A large fire would never have occurred because there were only three malfunctioning CO detectors and there were other detectors in close proximity. If a fire had started, it would have been detected by the other CO monitors. The air was traveling in an outby

direction so it was highly unlikely that the inby miners would have been injured in the event of a fire. Any smoke and fumes would have traveled out of the mine via the belt entry and any miners in that entry could have entered the primary escapeway to exit the mine.

The evidence demonstrates that AmCoal's negligence was moderate and the violation was not the result of its unwarrantable failure. Mine management was aware of the problem with the CO monitors, corrective work was ongoing, the cited conditions had not existed for a long period of time, and the hazard created was not great. AmCoal also argues that the mine control employees responsible for monitoring the AMS should not be considered to be agents of the company.

### 3. Discussion and Analysis

I find that the Secretary established that the violation was S&S. In analyzing the S&S issue, I have considered the likelihood that the hazard contributed to by the violation would cause injury, not the likelihood that an emergency would occur. *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365-68 (Oct. 2011) *appeal docketed*, No. 11-1464 (D.C. Cir. Nov. 29, 2011). In this case, I find that an injury was reasonably likely.

There were only three malfunctioning CO monitors cited. Within 100 feet outby of the CO monitor at the Flannigan #1 head was a functioning CO monitor at the NW 3# belt tail piece, and two others were also located outby. (Tr. 292; Exs. R-70, R-74). There was also a CO monitor within a few hundred feet inby of the CO monitor at the Flannigan #1 head, at the belt drive. *Id.* Thus, if a fire were to start, the functioning CO monitors would likely alert the person monitoring the system on the surface, but there could be a delay. Moreover, the air current along the beltline traveled in an outby direction, not in an inby direction as the inspector assumed. Thus if a fire were to start, any smoke produced would probably not enter the working sections of the mine.

On the other hand, the ventilation plan requires that CO monitors be installed at specified locations along belt lines. These monitors are crucial along belt lines because the belts at the mine are very long and miners do not generally work along the belt. Having three adjoining monitors not working while coal is being carried on the belts out of the mine creates a serious safety hazard. If a fire were to start along the belt, it is unlikely that a miner would promptly discover the fire. As a consequence, functioning CO monitors were crucial for the safety of miners. The AMS operator knew that the monitors were not working and steps were not taken by management to ensure that the belt was not operated until the condition was corrected.

I find that the Secretary established all four elements of the *Mathies* S&S test. The hazard in this instance was that a fire would start, the fire would not be immediately detected, and smoke and CO would enter the mine atmosphere. It was reasonably likely that the hazard contributed to by the violation would have resulted in an event in which there was a serious injury. The most likely injury would have been smoke inhalation. I agree with AmCoal that 25 miners were not affected by the violation. I credit the testimony of Willis that the air was flowing in an outby direction. Outby miners would have been in the zone of danger. I find that

one or two miners could reasonably have been expected to suffer smoke inhalation. A fatal accident was unlikely. The gravity of the violation was serious.

I find that the Secretary did not establish that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. I credit the testimony of Willis on this issue. His investigation revealed that the belt was run as a result of a simple miscommunication. (Ex. R-81). Mine management was aware that the CO monitors were not functioning. The AMS operator communicated this fact to management. The belts were not operating when the CO monitors stopped working and they did not run for several shifts. There was no coal production between November 10 and 12. A mine control technician reported the problems with the CO sensors on each of those days but he was told the belts were not going to be operating on his shift. The belt only ran on the midnight shift before Ramsey's inspection. Apparently, the fact that the monitors were still not online was not communicated to the midnight shift manager. (Tr. 282-82). The electricians were working on the problem and were in communication with mine control. The shift manager for the previous shift had been notified, but the information was not communicated to the manager of the oncoming shift.

I find that AmCoal was negligent. It is clear that AmCoal needs to develop a better system of communicating malfunctioning CO monitors from one shift to the next. Either the AMS operator needs to be given specific instruction with respect to this responsibility or there needs to be better communication between shift managers. The AMS operators knew that AmCoal's electricians were working to fix the problem and the belt had been down for several shifts. On that basis, the AMS operator assumed that everyone was aware of the situation and there was no risk to the safety and health of miners. I find that AmCoal's negligence was moderate.<sup>7</sup> The order is hereby **MODIFIED** to a section 104(a) citation with moderate negligence. A penalty of \$35,000.00 is appropriate for this violation.

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<sup>7</sup> As a general matter, I agree with the Secretary that the AMS operator is the agent of the operator and his negligence should be attributed to the mine operator. The AMS operator is crucial to the mine's operation and the safety and health of miners with the result that the position involves a level of responsibility normally delegated to mine management. Given that I have reduced AmCoal's negligence to moderate, I do not need to analyze this issue in detail. *See generally, Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189 (Feb. 1991); *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991).

**C. Citation No. 6668304; LAKE 2008-138**

On September 6, 2007, MSHA Inspector Ramsey issued Order No. 6668304 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.363(b) of the Secretary's safety standards.<sup>8</sup> The citation alleges:

Inadequate on-shift examinations have been performed on the #1 North West conveyor belt at the bunker. Obvious hazards were not recorded in a book maintained for this purpose on the surface of the mine.

(Ex. G-I). The inspector determined that an injury or illness was reasonably likely to occur and result in lost workdays or restricted duty, the violation was S&S, one miner would be affected, and the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$20,300.00.

On February 4, 2008, AmCoal participated in a safety and health conference with MSHA pursuant to 30 C.F.R. § 100.6. At the conclusion of this conference, Edward B. Ritchie, MSHA's conference and litigation representative ("CLR"), removed the unwarrantable failure determination and modified the order to a section 104(a) citation. The modification states, in part:

It was determined that there were mitigating circumstances that would not support the determination of aggravated conduct and unwarrantable failure as cited. It was determined that the bunker area cited was being examined, but not in its entirety. The new examiner was not aware that he was required to examine the lower area of the bunker. Therefore, it was determined that the violation was due to a lack of proper communication or instruction by mine management and not the result of aggravated conduct.

(Citation/Order No. 6668304-02). The modification did not change the "high" negligence designation.

At the hearing, Inspector Ramsey strenuously disagreed with the modification made by CLR Ritchie. (Tr. 231). This modification was made without Inspector Ramsey's knowledge or consent. (Tr. 210-11). Counsel for the Secretary asked that I carefully consider the evidence she presented at the hearing and enter a finding of aggravated conduct if I find that the evidence supports such a finding. AmCoal objected on the basis that it did not come prepared to defend against an unwarrantable failure finding. (Tr. 2011-12).

I hereby **DENY** the Secretary's request. Although the issuing inspector disagreed with the modification of the order, the CLR acted in his official capacity and modified it to a section 104(a) citation. When AmCoal filed its prehearing submission, it stated that it was contesting

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<sup>8</sup> Section 75.363(b) provides, in part, that "[a] record shall be made of any hazardous conditions found" during on-shift examinations.

*Citation* No. 6668304. (AmCoal Responses to Notice of Hearing at 4) (emphasis added). Moreover, AmCoal noted in its answer to the Secretary's petition for assessment of penalty that the order had been modified to a section 104(a) citation. (AmCoal Answer at 1). Exhibit A to the Secretary's petition for assessment of penalty lists the citation as a section 104(d)(2) order, however, and the Secretary's proposed penalty was calculated on this basis. That discrepancy is one of the reasons why AmCoal chose to contest the citation.

Until the middle of the first day of the hearing, AmCoal was unaware that the Secretary wanted to revoke MSHA's prior modification of the citation. AmCoal prepared for the hearing with the understanding that it was contesting the citation as modified in 2008 and it is seeking a reduction of the penalty because the citation was mistakenly specially assessed as if it were still a section 104(d)(2) order. I hold that it would undermine fundamental notions of due process to revoke MSHA's modification of the order to a citation at this time.

1. Background Summary of Testimony

a. Testimony of Inspector Ramsey

Ramsey testified that at the time he observed the cited conditions, he was at the north portal at the bunker area. (Tr. 214). The bunker area is a large metal storage facility that stores coal temporarily when the conveyer gets overloaded with coal. Examiners, belt cleaners, and mechanics who service the bunker area travel in and around the bunker.

The citation was issued because Inspector Ramsey observed several hazards that were not recorded in the on-shift examination book. He issued seven citations for these hazards that day in the bunker area. (Tr. 215, 218). The citations were Nos. 6669797-800 and 6668301-303. (Tr. 216; Ex. G-DD). Those citations were issued contemporaneously with Citation No. 6668304 and are not in dispute. (Tr. 216, 218-19). MSHA's Mine Data Retrieval System at its website shows that AmCoal paid the Secretary's proposed penalty for each underlying citation.

The first unrecorded hazard was that personnel doors at the bunker were left in the open position. (Tr. 218). The purpose of the doors is to isolate the primary escapeway from the belt entry. As result of this violation, the primary air course was not isolated from the belt air course. It created a hazard of fire, smoke, or gases from the belt line reaching the primary escapeway. (Tr. 218, 219).

The second hazard resulted from the presence of oil on the floor in the pump station for the bunker. The floor, hosing, and drainage were saturated with raw oil, creating a fuel source. The pumps generated heat, and oil was present on the electrical components of the pump station. (Tr. 219). Ramsey did not measure the temperature of the pumps, did not see any open electrical leads near the pumps, and did not think that the pumps were malfunctioning. (Tr. 219, 244). There was a large fan blowing on the pump station for cooling purposes, which is not typical. (Tr. 219, 243). The fan itself was not a hazard, but Ramsey believed that the pump was too hot to touch. (Tr. 219-20, 243, 245). At the time Ramsey observed the hot pumps, they were not sufficiently hot to ignite the oil right at that moment. (Tr. 245). The oil on the floor also created a slip, trip, and fall hazard. (Tr. 220-21).

The third hazard Ramsey observed was that the Number One North West Belt was not maintained in safe operating condition. (Tr. 221, 246). A defective bottom roller was observed at the number three crosscut. The location is toward the end of the bunker on the inby side. (Tr. 246). The roller was broken, allowing the belt to contact the roller shaft, creating a friction source that could ignite combustible materials. (Tr. 221). Because the roller was not in contact with combustible materials, Ramsey designated the violation as unlikely and non S&S. He noted that there were “no sparks and no fuel.” (Tr. 247).

Ramsey observed another hazard in the same area. (Tr. 221-22). The inby material door located at the number three crosscut off the Main West travelway was open. (Tr. 222). When not in use, both doors must be closed. This created another opening between the belt and primary escapeway. Without isolation, there is a possibility of smoke from a fire contaminating the primary escapeway. Ramsey also determined that an injury was unlikely.

Next, Ramsey observed that a suitable facility for traveling under the moving belt conveyer was not provided on the North West Number 1 belt. (Tr. 223, 247). Ramsey noted footprints and tire tracks under the belt where miners had been traveling under the belt. (Tr. 223). Ramsey designated the citation as non-S&S because there was ample clearance of about six feet under the belt. (Tr. 223, 248). Ramsey estimated that the condition had existed for quite some time. (Tr. 223). The citation was remedied when AmCoal added metal guarding. (Tr. 248).

Ramsey also observed that two guards for the Galatia North bunker chain located on the south side were not secured in place while machinery was in operation. (Tr. 223-24, 248). An opening of about 12 inches in width by 14 feet in length on the bunker was observed, exposing the chain. (Tr. 224, 249). Ramsey designated the citation as “reasonably likely” because there were unguarded moving parts creating a hazard. (Tr. 224). The hazard was in an area regularly traveled by mine personnel to conduct examinations and to service equipment. (Tr. 249). Ramsey could not determine how long these conditions had existed. (Tr. 250).

Next, Ramsey observed that loose float coal dust, oil, oil-soaked coal, and coal dust had been allowed to accumulate along and under the bunker. (Tr. 225). The accumulations ranged from between 2 inches to 30 inches in depth along and under the bunker. The accumulations were in an area approximately 18 to 20 feet in width and 300 feet in length, along the entire length of both sides of the bunker. (Tr. 225, 252). This created a slip, trip, and fall hazard. (Tr. 225). Additionally, Ramsey testified that because maintenance is routinely performed on the bunker and torch work is required when repairing chains and sprockets, there is a danger of a fire or smoldering coal. He did not find an ignition source. (Tr. 251).

The accumulations and missing guards were very obvious and had been there a significant amount of time. (Tr. 226). The crossing facility had been there for “a while”. However, the two door violations could have occurred 30 minutes before Ramsey arrived. The others should have been recorded at the end of the midnight shift examination. (Tr. 226, 227). Ramsey looked at the records on the surface, but found no record of the hazards. (Tr. 226-27).

Ramsey testified that he only issues section 75.363(b) citations for failure to do an on-shift examination when there are several violations or hazards. (Tr. 227, 242). In this case, there were seven. (Tr. 227-28). Ramsey testified that either the examination was so poor that the examiner did not see any of the violations or, if he saw them, he did not record them. (Tr. 228). These violations were substantial enough to warrant writing a section 104(d)(2) order for the violation.

Ramsey testified that a miner could be injured by any one of these cited conditions. The most likely injuries would be lost workdays from smoke inhalation, strains, sprains, broken bones, or contusions. (Tr. 230, 248). Ramsey testified that the failure to record these hazards exposed miners to a high degree of danger. (Tr. 230). He found no mitigating circumstances, even after discussion with the mine superintendent. (Tr. 230, 235). Ramsey testified that the conditions were obvious and were on both sides of the bunker. (Tr. 232). The bunker has different levels but there is a catwalk above it.

b. Testimony of Stephen Willis

Stephen Willis testified that the bunker is a containment area that makes it possible to keep the belts running continuously. (Tr. 322-23). Willis had a vague recollection of the order at issue in this case. (Tr. 323). Willis testified that a newly-trained examiner performed the on-shift examination that day. Although he was an experienced miner, it was his first time doing an examination. (Tr. 324). Willis did not recall any problems with the examiner other than he failed to examine the lower part of the bunker. Another examiner had left him at the door leading to the bunker and told him to “just go straight and down, keep on the belt, your Northwest belts.” The examiner said that he went through the door, stayed on the top catwalk across the bunker and he did not travel down to the bottom of the bunker. (Tr. 324-25). Willis agreed the examiner failed to perform a thorough examination. (Tr. 342-43). Willis admitted that the examiner who showed him the bunker should have given him more specific instructions for examining that area. (Tr. 344). Willis explained that because the examiner had 20 years of mining experience, he knew how to perform a competent examination, but he was not made aware of all the sections of the bunker that needed to be examined. (Tr. 326).

Willis testified that he would not expect to see an open door noted in an on-shift exam book. (Tr. 327). The examiner would simply close the door. (Tr. 328, 329). If there was a fire in the area, smoke would have been not been drawn into the primary escapeway. (Tr. 328). Willis did not agree with Ramsey’s determination that the violation was reasonably likely to cause an injury. However, Willis admitted that the ventilation plan requires that personnel doors remain closed to keep the belt isolated from the primary escapeway. (Tr. 346).

Willis testified that because oil frequently accumulated in the pump station in the bunker area, it is cleaned on a regular basis. (Tr. 330). Willis said that the broken conveyer belt roller shaft was unlikely to have started a fire. Such conditions are fairly common and a roller can break very quickly. (Tr. 333). The condition may not have existed at the time of the previous examination.

Willis testified that there are two sets of inby material doors at the number three crosscut because it is an airlock. (Tr. 334). One of the sets of doors was closed and one was open. (Tr. 334-35). If an on-shift examiner found the condition, Willis would expect him to close the doors. (Tr. 335).

Willis testified that there was about 10 feet of clearance where the roadway passed under the belt. (Tr. 335). There had never been a guard at this location. (Tr. 336). Willis testified that many inspectors had walked through the area but had never cited AmCoal for failure to have a guard. Willis would not expect an on-shift examiner to record it in the on-shift exam book. (Tr. 337).

He testified that the Galatia North bunker chain on the south side moved very slowly, so the absence of a guard did not create a hazard to miners. (Tr. 337-38). Finally, Willis testified that loose coal, coal dust, oil, and oil soaked coal frequently accumulated along and under the bunker. (Tr. 339). This area required continuous cleaning which included hosing down the area under and behind the bunker. (Tr. 339-40). The walls and floor surrounding the bunker are concrete and the bunker is made out of steel. (Tr. 340). The condition could have occurred very quickly.

## 2. Brief Summary of the Parties' Arguments

### a. Secretary of Labor

Inspector Ramsey discovered seven serious hazards in the mine bunker area. He issued the order after seeing that none of these hazards was recorded in the on-shift record book. The failure to record these conditions is a clear violation of section 75.363(b). The violation was S&S because, taken together, the conditions described in the underlying citations created a reasonable likelihood that the hazard contributed to by the instant violation would result in an event in which there is a reasonably serious injury. Finally, the Secretary maintains that the failure of the examiner to record the hazards discovered by Inspector Ramsey constituted high negligence and an unwarrantable failure to comply with the requirements of the safety standard. The high negligence of certified mine examiners is attributed to the mine operator.

### b. AmCoal

AmCoal maintains that Inspector Ramsey's testimony should be accorded very little deference because it is inconsistent with his notes and with the language of the citation. AmCoal also argues that an injury was unlikely to occur as a result of the violation. It argues that, when viewed individually, the underlying citations that Inspector Ramsey issued did not create safety hazards that were required to be recorded in the on-shift record book. For example, the open doors that were cited may have been recently opened and they did not create safety hazards for the reasons explained by Willis. An on-shift examiner could discharge his duties by simply closing the doors as he walked through the area without recording them. Finally, the violation was the result of AmCoal's moderate, rather than high, negligence. The examiner was new to the bunker area and he examined the area from the catwalk along the belt. The examiner knew

that he had to examine the bunker but he did not know what was involved in performing this function. Because the penalty proposed by the Secretary was based on the mistaken belief that the order had not been modified to a section 104(a) citation, the penalty should be lowered to \$243.00 using the regular assessment formula.

### 3. Discussion and Analysis

I find that the Secretary established that there was a violation of section 75.363(b) and that the violation was S&S. There can be no doubt that the on-shift examiner failed to examine a large part of the bunker. He simply walked across a catwalk on top of the bunker and did not examine the lower levels. When the inspector examined the entire bunker area he discovered a number of safety hazards, as described in his testimony summarized above. In their briefs, the parties analyzed each of the underlying citations. The Secretary contends that these citations were issued because the inspector observed hazardous conditions that should have been recorded in the record book. AmCoal argues that the cited conditions did not create immediate hazards that needed to be recorded. For example, one of the citations was issued for failure to provide a suitable crossing facility where miners and equipment had been traveling under the moving North West #1 belt. Due to the height of the belt, the inspector determined that an injury was unlikely. This condition had likely existed for years and was unlikely to cause an injury. AmCoal contends that such a condition cannot be the basis for an S&S finding in the citation at issue in this case.

I find that, taken together, the conditions documented in the underlying citations created a discrete safety hazard. The hazard was that the failure to do an adequate on-shift examination would make it more likely that at least one of the cited conditions would come to fruition and injure a miner. Assuming continued normal mining operations, I find that it was reasonably likely that at least one of these conditions would have contributed to the cause and effect of a mine safety or health hazard. Miners work in the area performing maintenance and cleaning. There was a reasonable likelihood that at least one of these hazards would have resulted in an event in which there was an injury of a reasonably serious nature. The failure of a certified mine examiner to thoroughly inspect his assigned area of a mine and record hazardous conditions contributes to the hazard. In *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995), the Commission described preshift examinations as one “of fundamental importance in assuring a safe working environment underground.” The same is true of on-shift examinations. Recording the hazardous conditions discovered in the examination is crucial to the safety and health of miners. While I agree with AmCoal that some of these conditions did not require recording in the on-shift book, several others should have been recorded because they created “hazardous conditions” that are required to be recorded.

The degree of negligence that should be attributed to AmCoal is a closer question. An on-shift examiner is deemed to be an agent of the mine operator and his negligence can be attributed to the operator. *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189 (Feb. 1991). In this case, the examiner was negligent in not examining the entire bunker area and recording hazardous conditions. In addition, AmCoal was directly negligent in not properly training the examiner on how to examine the bunker area.

There is no question that the bunker area is unusual and a miner who did not normally work in the area might be confused as to how to examine the area. Given that fact, it was incumbent on AmCoal to ensure that the new examiner was properly trained on how to conduct an examination of the bunker. I find that this failure to show the examiner the areas of the bunker that needed to be inspected contributed to the violation and constituted high negligence. AmCoal should have known that a miner without experience working in the bunker would not know how to examine the area. In reaching this conclusion, I have taken into consideration the fundamental importance of on-shift examinations. I find that a penalty of \$15,000.00 is appropriate for this violation.

**D. Order No. 6668510; LAKE 2008-526**

On October 28, 2007, MSHA Inspector Steven Miller issued Order No. 6668510 under section 104(d)(2) of the Mine Act for an alleged violation of section 75.400 of the Secretary's safety standards. The citation alleges, in part:

Float coal dust, a distinct black in color, loose coal, coal saturated with oil, and plastic were allowed to accumulate on the 1<sup>st</sup> West Headgate Lube Center, . . . The accumulations measured approximately 1/8 inch to 6 inches in depth. Accumulations were located on the frame, electrical conduits and electrical leads, fire suppression system, and on the tanks. The saturated coal and coal float dust were packed under and around the hose reels, conduits and hoses. The accumulations have been here for several shifts and there was no entry in the weekly book of these accumulations.

(Ex. G-K). The inspector determined that an injury or illness was unlikely to occur, but if an injury did occur it would likely be fatal. He determined that the violation was not S&S and that 10 miners would be affected by the violation. The operator's negligence was high. The Secretary has proposed a civil penalty in the amount of \$45,000.00.

1. Background Summary of Testimony

a. Testimony of Inspector Miller

At the time of the hearing, Steven Miller was a field supervisor with MSHA in Benton, Illinois. (Tr. 352). Miller has been employed with MSHA for twenty years. (Tr. 353). Miller has run every piece of equipment in a conventional mine. (Tr. 353). Prior to working with MSHA, Miller worked for two different coal companies, holding positions as general laborer, mine examiner, and group leader. (Tr. 354). He has inspected 50 to 100 mines as part of his duties with MSHA and is familiar with Galatia Mine. (Tr. 354-55).

Miller was at Galatia for an inspection in November and December of 2007. When Miller noted the conditions cited, he was in the First West head gate, near the Flannigan end of the mine, toward Galatia North. (Tr. 356). His escort was Joe Myers. (Tr. 356). The location is a lube center, which is near an active face. (Tr. 357). The lube center is a low-boy trailer made

of steel that measures about 18 feet by 6 feet. (Tr. 365). Regulations require that lube centers be within 500 feet of a loading point. (Tr. 357). Miners refueling shuttle cars, scoops, or any mobile equipment requiring diesel fuel, as well as miners operating other active pieces of equipment on the unit or delivering materials to the unit, may travel in the area. (Tr. 357).

When Miller entered the area, he inspected the lube center and issued two citations in addition to the order at issue in this case. (Tr. 358-60). Miller testified that the lube center was in poor condition. (Tr. 359). It was covered in oil, and fuel and oil leaks were also present. (Tr. 359). Miller recorded in his notes that the mine had a history of accumulation violations. Miller testified that these conditions had been an ongoing problem at the mine with over 375 similar violations in the previous 15 months. (Tr. 361). Inspectors had cited the lube centers on a regular basis. (Tr. 362). Prior to this order being issued, there had been ongoing meetings regarding the frequent section 75.400 violations. (Tr. 370). Therefore, AmCoal should have been on heightened awareness that it needed to take more affirmative steps to promptly clean up these conditions. (Tr. 387).

Inspector Miller was concerned that a small fire in the lube center could ignite trash, oil, and fuel in the area which could then propagate a major mine fire. (Tr. 365). The area is not monitored from the surface and there is no fire detection system in the lube center. (Tr. 365). To detect a fire, someone would have to see it or smell it. (Tr. 365).

Miller testified that he determined that an injury was unlikely because he did not find an ignition source. (Tr. 363). The order was also marked as non-S&S. (Tr. 362-63). He marked the gravity as fatal because, in the event of a fire, there was a likelihood that someone would be overcome by smoke or not able to get out of the area. (Tr. 363). The negligence was high because of the history of similar conditions and the failure to correct them. (Tr. 363). He testified that ten people who were in the area could be affected. (Tr. 364). Miller said that the number of miners who would be affected would depend on which way the belt air was flowing but he could not recall the airflow at the hearing. (Tr. 364). However, if there were a fire, Miller said the air could travel to the primary escapeway quickly. (Tr. 371). The secondary escapeway was also nearby. (Tr. 371). He acknowledged that there were stoppings between the lube center and those entries. (Tr. 373). It was unlikely that the air was flowing toward the face. (Tr. 374). If the miners at the face had detected a fire, they would have been trained to go to the primary escapeway. (Tr. 374).

Miller indicated that there may have been a CO monitor along the belt nearby, but he did not travel to that area nor did he cite the mine for an inoperable CO monitor. (Tr. 375-76). If there were a fire near the face or the belt and the CO monitor were working, there would have been an alarm for the mine controller to see. (Tr. 376). The lube center was in a crosscut rather than in a main travelway. (Tr. 376).

Miller determined that miners were exposed to the conditions for several shifts. Because the lube center had been repaired 10 or 12 days earlier, he concluded that the accumulations occurred since that time. (Tr. 366). Miller testified that the accumulations must have existed during the previous weekly examination. (Tr. 383). In Miller's opinion, based on his 35 years in the field, the conditions existed for a lot longer than one week. (Tr. 367). Miller said the section

foreman, anyone fueling the equipment, or the person making the weekly examination should have observed, reported, and corrected the conditions. (Tr. 367). The conditions were extensive and not a result of normal mining operations. (Tr. 369).

b. Testimony of Joseph Myers

Myers is a safety compliance manager with AmCoal, where he has worked for 29 years. (Tr. 387-88). He had also served as the safety director. (Tr. 388). He accompanied Miller on the day of the inspection. (Tr. 388). Myers saw the accumulations and created a report about the order for the safety manager. (Tr. 390-91). Myers did not disagree with the characteristics of the accumulations that were observed. (Tr. 405).

Myers was with Miller when he checked the permissibility books. (Tr. 393). There were no entries of accumulation hazards. (Tr. 393). Myers' report said that the area was subject to a weekly examination and the next one was to have been completed by November 3. (Tr. 395). Myer's report also recorded that the lube center had been taken out of service on October 18. (Tr. 397). The lube center would have been cleaned when it was tagged out on October 18th. (Tr. 408-09, 411). The lube center was also repaired again on October 22 for a bad breaker, then put back into service. (Tr. 411, 412).

He did not believe that the cited conditions would have contributed to an injury because several safety measures were in place and operating. (Tr. 398). Myers said there were manual and automatic fire suppression in the area and rock dust was applied in the surrounding area. (Tr. 398).

Myers testified that the lube center vented to the belt line or directly to the return. (Tr. 399). This vent is present to prevent miners from being affected by smoke or other chemicals. (Tr. 399). If there were a fire, the smoke would go to the belt line or to the return. (Tr. 400). In the event of an emergency, miners would travel directly to the primary escapeway, where there is fresh air. (Tr. 400). If it were blocked, they would go to a secondary escapeway. (Tr. 400).

Lube centers are subject to weekly electrical permissibility inspections. (Tr. 400). The checks are completed by a qualified person who has had training to accurately examine the equipment. (Tr. 401). Myers admitted that section 75.400 prohibits accumulations of combustible material, even between weekly examinations. (Tr. 402-03).

Heavy-duty ram cars, road graders, and other equipment may be near the lube center or using it to fuel up. (Tr. 401). Hourly employees operate this equipment. (Tr. 402). The mobile lube truck, which carries fuel, is typically driven by a manager and it usually stops at the lube center. (Tr. 402).

Myers testified that MSHA inspectors had previously discussed the problem of excessive accumulations. (Tr. 410). Myers said that it was incumbent on foremen and examiners to inspect the lube center and to remove any accumulations. (Tr. 410-11).

2. Brief Summary of the Parties' Arguments  
a. Secretary of Labor

The Secretary argues that AmCoal violated section 75.400 because Inspector Miller found accumulations of coal dust, float coal dust, and loose coal in an active working of the mine. An active working is “[a]ny place in a coal mine where miners are normally required to work or travel.” 30 C.F.R. § 75.2. Miners worked and traveled by the lube center. The violation was the result of AmCoal unwarrantable failure for a number of reasons including the gravity of

the violation, the length of time the accumulations had been present, the obviousness of the violation, and the fact that AmCoal had been put on notice that it needed to make greater efforts to comply with the safety standard.

c. AmCoal

AmCoal contends that the degree of gravity should be reduced from “fatal” to “lost workdays” and the number of people affected from 10 to 1. The evidence establishes that, in the event of a fire, miners would have been able to quickly enter the fresh air course. The air passing in the vicinity of the lube center flowed to the returns, not to the face. The lube center was in a crosscut that was close to the primary escapeway so any affected miners near the lube center would have been able to walk into fresh air. Ten people would not have been affected because smoke in the lube center would not have traveled to the face. AmCoal also argues that the evidence demonstrates that the violation was the result of its moderate negligence rather than high negligence and unwarrantable failure. The lube center was required to be examined weekly. Inspector Miller admitted that he issued the order between these examinations. AmCoal contends that the accumulations could have easily built up since the previous examination. The unwarrantable failure designation was also inappropriate because the inspector determined that an injury was unlikely.

3. Discussion and Analysis

I find that the order should be affirmed in all respects, except that the “fatal” designation should be reduced to “permanently disabling.” There was a clear violation of section 75.400. The violation was serious. The evidence establishes, however, that a fatal accident was not likely. Given the location of the lube center, the direction of the airflow, the fire suppression system, and the other firefighting equipment in the lube center, a major conflagration was unlikely and any smoke and fumes produced by a fire would travel out the returns. I recognize that a fatality is always possible, but I find that the evidence shows that lost workdays or a permanently disabling injury is a much more likely outcome. Determining the number of miners who could be affected is always a matter of making an estimate. I find that 10 miners could be affected depending on the number of miners in the area. If a major fire were to develop, it is reasonably likely that up to 10 people could suffer lost workdays or more permanent injuries from the effects of smoke inhalation or from burns while either fighting the fire or trying to exit the area. As a consequence, the inspector’s estimate that 10 miners could be affected is reasonable.

I find that AmCoal's negligence was high and was the result of its unwarrantable failure to comply with the safety standard for the reasons set forth in the Secretary's brief and her reply brief. The violation was both obvious and very serious. I credit the testimony of Inspector Miller that the conditions must have existed for a considerable length of time. The accumulations were packed under and around equipment in the lube center. The accumulations were extensive and no efforts had been made by AmCoal to clean them up. AmCoal had been put on notice that it needed to make greater efforts to comply with the requirements of section 75.400 at the mine. Any examiner, foreman or member of management doing a routine check of the area should have readily identified that hazard and ordered that it be corrected. It is not clear whether management knew of the conditions, but I find that management should have known that the conditions existed. I find that the evidence establishes that AmCoal was highly negligent and the violation was the result of its unwarrantable failure to comply with the safety standard. AmCoal demonstrated aggravated conduct with respect to this violation. A penalty of \$45,000.00 is appropriate.

### **III. SETTLED CITATIONS**

A number of the citations at issue in these cases settled, either prior to the hearing or during the hearing. The proposed settlements were approved by my orders dated April 19, 2012. The total assessed penalty for the settled citations and orders in LAKE 2008-138 was \$48,511.00. Citation No. 6668425, which alleged a violation of a notice to provide safeguard, has also been settled, but it was not included in my order approving partial settlement. The proposed settlement amount for that citation is \$902.00, which I hereby approve. The total assessed penalty for the settled citations and orders in LAKE 2008-526 was \$121,945.00. I ordered AmCoal to pay these penalties within 30 days of my orders approving partial settlement.

### **IV. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which are not disputed by AmCoal. (Ex. G-Z). At all pertinent times, AmCoal was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on AmCoal's ability to continue in business. The gravity and negligence findings are set forth above. AmCoal's large size and its significant history of previous violations were a major factor in the penalties I assessed in these cases.

**V. ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2008-138		
6668304	75.363(b)	\$15,000.00
6668425 (settled)	75.1403-7(k)	902.00
LAKE 2008-526		
6666983	75.400	30,000.00
6668417	75.351(b)(2)	35,000.00
6668510	75.400	45,000.00
	<b>TOTAL PENALTY</b>	<b>\$125,902.00</b>

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED**, as set forth in this decision. The American Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$125,902.00 within 30 days of the date of this decision.<sup>9</sup>

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

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<sup>9</sup> 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.

Distribution:

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 7, 2012

MILL BRANCH COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 2012-435-R
	:	Order No. 8178569; 05/22/2012
	:	
	:	Docket No. VA 2012-436-R
	:	Citation No. 8178574; 05/22/2012
v.	:	
	:	Docket No. VA 2012-437-R
	:	Order No. 8178571; 05/22/2012
	:	
	:	Docket No. VA 2012-438-R
	:	Order No. 8178572; 05/22/2012
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. VA 2012-439-R
Respondent	:	Order No. 8178573; 05/22/2012
	:	
	:	Docket No. VA 2012-440-R
	:	Order No. 8178574; 05/22/2012
	:	
	:	Docket No. VA 2012-441-R
	:	Order No. 8178575; 05/22/2012
	:	
	:	Docket No. VA 2012-442-R
	:	Order No. 8178576; 05/22/2012
	:	
	:	Docket No. VA 2012-443-R
	:	Order No. 8178577; 05/22/2012
	:	
	:	Low Splint A Mine
	:	Mine ID 44-07189

## **AMENDED\* DECISION**

Appearances: R. Henry Moore, Esq., and Arthur Wolfson, Esq., Jackson Kelly PLLC on behalf of Contestant

Robert Alan Kelly, Esq., and John M. McCracken, Esq., Office of the Solicitor,  
U.S. Department of Labor on behalf of Respondent

Before: Judge Lewis

### **Statement of the Case**

This case is before me pursuant to the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. §801 *et. seq.* This case has proceeded on an expedited basis.

### **Procedural History**

On May 22, 2012, Order No. 8178569 was issued by an Mine Safety and Health Administration (“MSHA”) inspector pursuant to §107(a) of the Act, 30 U.S.C. §814(a). Associated with the §107(a) imminent danger order, Citation No. 8178570, and Order Nos. 8178571, 8178572, 8178573, 8178574, 8178575, 8178576, and 8178577 were also issued on May 22, 2012, pursuant to section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1).

On May 24, 2012 the Contestant, Mill Branch Coal Corporation, filed notices of contest as to said citation and orders. Also on May 24, the Contestant filed a motion to consolidate and expedite the above referenced matters. After a pre-hearing conference held on May 25, 2012, and without objection from the Secretary-Respondent, I granted Contestant’s Motion to Consolidate and Expedite proceedings. On May 29, 2012, Contestant filed a motion for an order compelling compliance with §104(c) of the Act.

On May 31, 2012, after a pre-hearing conference, I verbally<sup>1</sup> granted Contestant’s motion to the following extent: consultants retained by Contestant would be permitted to enter areas subject to the §107(a) order during the time period of June 1, 2012 to June 4, 2012, provided such consultants were accompanied by authorized MSHA representatives.

On June 5, 2012, a hearing was commenced in Grundy, Virginia. At the outset both parties agreed to withdraw the request to expedite proceedings as to Order Nos. 8178571,

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\* This Decision has been amended to reflect corrected exhibit cites.

<sup>1</sup> The written order memorializing such incorrectly referred to “contestant” as “respondent.” In any event, Contestant’s consultant(s) together with MSHA representatives did enter the Low Splint A mine area at issue on June 1, 2012.

8178572, 8178576, and 8178577. The Orders Nos. 8178569, 8178573, 8178574, and Citation No. 8178570 remained at issue. On June 6, 2012, the hearing concluded. The parties filed post-hearing briefs on July 17, 2012.<sup>2</sup>

### **Issues**

The general issue before me is whether Order Nos. 8178569 (imminent danger order) and associated Citation No. 8178570 and Order Nos. 8178573 and 8155874 were properly issued pursuant to Section 107(a) and 104(d) of the Act, 30 U.S.C. 801 *et. seq.*

Specific issues include: (1) whether the MSHA inspector abused his discretion when he issued his imminent danger order on May 22, 2012; (2) whether the mine operator engaged in conduct which would have violated 30 C.F.R. §§75.380(d)(1), 75.364(b)(1) and 75.364(b)(2); (3) and, if so, whether said violations were significant and substantial in nature and/or constituted an unwarrantable failure.

### **Stipulations of Fact**

1. Mill Branch Coal Corporation, the Contestant, is the operator of the Low Splint A Mine (Mine I.D. No. 44-07189).
2. The Low Splint A Mine produces coal that enters “commerce” as defined by Section 3(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.*, and is therefore subject to the jurisdiction of the Act pursuant to Section 4 of the Act, 30 U.S.C. §804.
3. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this proceeding pursuant to Section 105 of the Act, 30 U.S.C. §805.
4. MSHA Inspectors Chris Cain and Gary Hall were acting in their official capacities as authorized representatives of the Secretary of Labor when they issued the citations or orders at issue in this proceeding.
5. True copies of the citations and orders at issue in this proceeding were served on Mill Branch Coal Corp., or its agents as required by the Act.<sup>3</sup>

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<sup>2</sup> Due to the expedited nature of the proceedings, I originally set, at conclusion of the hearing, a brief filing date of July 16, 2012. However, due to various problems with transcript production, I granted a short extension for briefing.

<sup>3</sup> See also Joint Stipulations of fact presented at commencement of June 5, 2012 hearing.

## Summary of the Testimony

### Christopher Cain

At hearing Christopher Cain appeared and testified. Cain was currently a roof control specialist who had been working for MSHA since October 2006. (*See* Transcript at p. 17).<sup>4</sup> Cain's educational background included high school graduation and three semesters at the University of Pittsburgh. (5 Tr. 18). He began working in coal mines in 1998. Over the years his job duties included: outby work, roof control, stopping maintenance, ventilation installation and repair, scoop operation, and longwall work. (5 Tr. 18-19). Cain reported he had been involved in numerous roof fall operations and belt reinstallation/maintenance. (5 Tr. 19).

At MSHA he had received twenty-one weeks training at the Academy for Journeymen Training. He also had received training as a roof control specialist and special investigator in §110 cases as well as §105(c) cases. (5 Tr. 20). As well as being an accident investigator, he had been a certified mine inspector since August 2008. (5 Tr. 20). Cain estimated he had conducted 100-200 underground inspections. He had past experience with heaving floor instances and squeezes.<sup>5</sup> (5 Tr. 21-22). He had issued four (4) imminent danger orders in the previous two years. (5 Tr. 22).

Cain had conducted the inspection of the Low Splint A mine on May 22, 2012 and had been accompanied throughout the inspection by his supervisor Gary Hall. (5 Tr. 23). Cain's duties on the day of inspection included: a six month review of the roof control plan, a monthly pillar review, and an E01 inspection coverage. (5 Tr. 24-25).

Cain had been at Contestant's mine in the past, first as an inspector trainee in 2007 and later as an actual inspector conducting a roof control review in December 2011. (5 Tr. 26).

On January 25, 2012, Cain once more went to Low Splint A. He conferred with a mine inspector who had concerns regarding floor heaval issues in the same general area that was the subject of Cain's §107(a) order. (5 Tr. 26-27).

On May 22, 2012, Cain met with Randy Hensely, the mine acting superintendent. Cain stated that he was going to conduct an E01 six-month review of the roof control plan. He and his

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<sup>4</sup> Hereinafter, the transcript from the proceedings of June 5, 2012 are referred to as "5 Tr." and the proceedings of June 6, 2012 at "6 Tr."

<sup>5</sup> Cain described "squeeze" as it particularly applied to Contestant's mine area at issue in the following manner: "A squeeze or ride is when you retreat mine and as you pull that back, the pressure doesn't get released in the gob area where it should, it's not in front of it. And actually in this instance, it didn't go behind the miners per se, directly behind, rather it came across the Southeast Mains and tried to connect with the other gob. So ultimately, it was outby them but quite a ways outby them. So it kind of took a shortcut across the Southeast Mains." (Tr. 22).

supervisor, Gary Hall, would also be conducting a monthly pillar review and field activity review. (5 Tr. 28).

Cain disclosed to Hensley that he had driven past the mine the day before and had observed coal being produced. (5 Tr. 28). Hensley stated, however, that coal was no longer being produced because floor heaval had interfered with belt operations. (5 Tr. 29).

The mining equipment in the affected area was now being pulled and being brought to “one North, where the 4W and 4E panels were projected.” (5 Tr. 29).

Hensley’s explanations raised red flags to Cain. Contestant appeared to be withdrawing from areas that it had earlier, in January 2012, projected would be mined. The floor heave under the belt was now so bad that the belt was being pushed into the mine roof and continued mining had to be abandoned. (5 Tr. 29-30).

Cain presented various photographs depicting the floor heaval under and into the belt. (MSHA B-24 – B-28).<sup>6</sup>

Based upon his past experience Cain opined that any continued operation of the belt would pose a fire hazard due to the belt rubbing against the ceiling, roof bolts, or floor upheavals. Further, a belt fire might result due to the added strain or friction on belt rollers/bearings. (5 Tr. 34-36).

Cain described multiple jacks that had been installed in the belt area and elsewhere, many of which were knocked out, severely bent, or clearly failing. (5 Tr. 36-40, 56-60; *see also* MSHA B- 30 – B-34).

Cain concluded that coal production had been stopped because the squeeze between the floor and ceiling had rendered the belt inoperable. (5 Tr. 41; *see also* Cain’s inspection notes at MSHA F-1).

None of the conditions which Cain observed were reported in the mine’s records, leading Cain to conclude that hazards were not being seen or not being recognized or not being recorded. (5 Tr. 43).

Cain proceeded with Randy Hensley and Gary Hall into the secondary escapeway. He observed more floor heaval, continued scooping, significantly more floor material in the cross-cuts, and more deterioration in the ribs than what he witnessed previously. (5 Tr. 50-53).

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<sup>6</sup> In this decision and order Government exhibits are referred to as “MSHA” followed by alphabet/exhibit number. Contestant exhibits are referred to as “LS.”

Initially advising Hensley that he would probably be issuing a 107 order, Cain, after discussing the matter with Hall, decided to hold off until reviewing “the area as a whole.” (5 Tr. 51).<sup>7</sup>

During further inspection Cain observed numerous jacks in the area of the secondary escapeway that had been knocked out of place and not reset. Regarding such as further signs of rib deterioration and roof support problems, Cain concluded that Contestant was at this point just scooping the alternative escapeway enough to remove machinery. (5 Tr. 61-68; *see also* MSHA-B-15 – 22).

Cain noted seven miners working in the affected area. (5 Tr. 67). Cain testified that the primary escapeway was located in the intake entry.<sup>8</sup>

Hensley informed Cain that a four-wheeler (mantrack) could not travel the primary escapeway but that a three-wheeler could make it. (5 Tr. 69).

Cain parted company with Hensley and continued to traverse the primary escapeway with Hall. Cain began to take photographs of the primary escapeway. Areas were observed where there was rib deterioration and significant floor heaval directly under the life line. In case of any emergency miners “walking blind” or with disabled miners on a stretcher would have difficulty traversing such. (5 Tr. 72-75; *see also* photographs at MSHA B-1 – MSHA B-2).

Cain’s field notes indicated that the bottom had heaved and squeezed almost to the mine roof, measuring thirty-five to thirty-six inches in most places and even less in others, the weaving back and forth into enteries and cross-cuts. (5 Tr. 75-76). There were again signs of rib deterioration. (5 Tr. 77). Tire tracks over the top of a floor heaval showed that at some time an examiner had passed through. (5 Tr. 77).

Although there was evidence that the Contestant had been scooping the alternate escapeway to keep it travelable, there were no signs of scooping in the primary escapeway. (5 Tr. 77).

Cain referred to MSHA B-6 which showed rib deterioration and the upheaval transferring itself from the life line and snaking back and around.

After failing to find an open door, Cain finally came upon Hensley and informed him that he was issuing an imminent danger order for the entire South East Mains area. (5 Tr. 81-82). This order was later reduced to writing. (MSHA E-1).

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<sup>7</sup> Cain specifically testified that, based upon what he had already heard from Hensley and based upon the conditions he had already observed in the A Left area, he was already inclined to issue a 107 order. (Tr. 51-52).

<sup>8</sup> Throughout the hearing testimony the terms intake escapeway and primary escapeway were used interchangeably.

Cain was told by Hensley that the area “wasn’t this bad” when he had inspected it a week and half previously. (5 Tr. 83, 85). However, Hensley conceded that, due to heaving, individuals were unable to travel the primary escapeway in a mantrip. (5 Tr. 85).

Given, *inter alia*, the significant hooving and squeeze affecting the entire Southeast Mains area, the conversations with management that observed conditions had been worsening, the adverse impact upon the escapeways, especially the primary escapeway, and the mandates of §107, Cain felt compelled to issue an imminent danger order. (5 Tr. 82-88).

In determining that the violation of §75.380(d)(1) was “S&S” in nature, Cain noted that the hazard created was that miners working on the 001 MMU would not have a safe means to escape during a major event occurring at the mine. (5 Tr. 105; *see also* MSHA E-2) During equipment removal, scoops, diesel scoops, battery scoops, electrical equipment would be involved. It was apparent that miners were in haste trying to retrieve the equipment. If one of the equipment were to catch fire (in the alternate escapeway) the only means of access in and out would be blocked. (5 Tr. 105)

In concluding that any injury caused by the hazard would be highly likely and could be expected to be fatal in nature, Cain considered the potential of the alternate escapeway being blocked if there were a sudden deterioration in the already degrading ribs and floor heaval. (5 Tr. 105-106).

As to his conclusion that the negligence involved rose to a level of reckless disregard, Cain testified that the Contestant was only focusing on maintaining the alternate escapeway so that its machinery could be retrieved -- and essentially ignoring the primary intake escapeway. (5 Tr. 106).

The Contestant had knowledge of the unsafe conditions as evidenced by Hensley’s conclusion that a mantrip could not be driven through the primary escapeway. (5 Tr. 107). Hensley had been in the same area a week and half prior. (5 Tr. 107).

Cain further noted that the return had multiple stopping lines that had been crushed out, rebuilt and re-patched. There was one set of stoppages completely crushed out. There were multiple areas where foam expansion packs were used to fill in the voids. The primary escapeway had rehabilitation and damage to stoppings. (5 Tr. 108).

Referring to Citation No. 8178573 (MSHA E-3), Cain stated that Contestant also had violated §75.364(b)(1) in that hazardous conditions in the intake for Southeast Mains, A Left and B right, were not recognized or reported during weekly examinations. (5 Tr. 109).

Cain noted that none of Contestant’s weekly examination reports for the month of May 2012 listed any of the hazards observed by him on May 22, 2012. (5 Tr. 110-114; *see also*

Contestant's weekly examination reports at MSHA G).<sup>9</sup> Given *inter alia* that the hazards had existed for some time prior to May 22, 2012, Cain concluded that the violation was significant and substantial in nature, the possibility of injury being reasonably likely to occur, the degree of negligence high, and any injury reasonably expected to be fatal in nature. (5 Tr. 115).

Considering that there were no mitigating circumstances that could be discerned at the time Citation No. 5178573 was issued, Cain further made a determination that the violation was an unwarrantable failure to comply with a mandatory safety standard. On page 2 of the citation, Cain listed some of the specific reasons for his unwarrantable failure determination. (5 Tr. 116).<sup>10</sup>

Cain asserted that the conditions leading to the issuance of his §104(d)(1) order were some of the worst he had ever seen. (5 Tr. 117).

Referring to Citation No. 8178574 (See MSHA E-4), Cain stated that the examiner designated by the operator to conduct examinations of the return for Southeast Mains had also failed to adequately record or report the hazards observed by Cain during his May 22, 2012 inspection. (5 Tr. 107-120). Cain again concluded that said failure was "S&S" in nature, reaching a high degree in negligence and constituting an unwarrantable failure. (5 Tr. 118-119). Cain noted that at some point the return had been scooped but "everything was gobbled out and it was in complete failure." (5 Tr. 119).

Cain testified that when he returned to the surface he met with the operator's intake examiner, Bruce Martin. Cain reported that Martin said "Thank you" after being informed that Cain was issuing an imminent danger order. (5 Tr. 120-121).

On cross examination, Cain again testified that Hensley had informed him that the beltline was against the mine roof and production had be stopped by the time of his May 22, 2012 inspection. (5 Tr. 128).

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<sup>9</sup> As shall be discussed *infra*, there were significant legibility issues as to the records in question.

<sup>10</sup> See MSHA E-3, p. 2, wherein Cain stated:

This violation is an unwarrantable failure to comply with a mandatory standard. The operator of this mine engaged in aggravated conduct constituting more than ordinary negligence in that;

1. The examiner designated by the operator failed to recognize hazards.
2. The record shows the examinations being countersigned by the operator.
3. The operator failed to ensure a proper examination is being conducted and recorded.
4. This violation has existed for a period of time.
5. The hazards found were obvious and extensive.

Cain confirmed that many of the photographs taken by the government during its case in chief had been taken on May 24, 2012 and not during the actual inspection of May 22, 2012. (5 Tr. 128; See *inter alia* MSHA B-23 to B-34).

Cain did not know whether the floor heaving had gotten worse between May 21, 2012 and May 22, 2012. (5 Tr. 129).

Cain conceded that it was not required that a miner be able to ride a vehicle in an escapeway but only that miners, including disabled persons, could travel such. (5 Tr. 136). Cain did not take any ventilation readings on May 22, 2012 nor did he evaluate ventilation before issuing the imminent danger order. (5 Tr. 137).

Cain himself had never been part of a mine rescue team; nor had he ever fought a mine fire. (5 Tr. 140).

Cain found it necessary to crawl in places over top of the hooved bottom in the intake escapeway. (5 Tr. 140). There was no access in and out of the intake escapeway for 1,400 feet. (5 Tr. 140). Cain could not access the intake escapeway just out by seven drive. (5 Tr. 141). Cain did not actually measure the flexibility of the lifeline. (5 Tr. 143).

Cain did not allow the performance of a stretcher test, noting *inter alia* that he had difficulty traveling the intake escapeway even without a stretcher. Given all the circumstances, conducting a stretcher test would be too risky. (5 Tr. 147).

Cain had not returned to the mine after May 24, 2012. (5 Tr. 148).

Cain described the “problem” area covered by the imminent danger order thusly:

The problem started off with – the floor heaving and ride started coming out of the B Left panel which is to the left of A Left. As they mined the five west panel out and second mined it, when they went outby the Southeast Mains. The Southeast Mains was originally stopped due to conditions.

When they mined that area outby, second mined it outby, it accelerated the floor heaval. And the pressure, instead tried traveling with the section, instead, tried to cut across the Southeast Mains and those two pressure zones tried to link up.

(5 Tr. 151).

On redirect examination, Cain stated that the alternate escapeway was not wide enough to get all the machinery out. Contestant planned to use the continuous miner to mine its way through the area to get additional width. Ultimately, Contestant had to turn the miner around, “either cut their way out or continue to scoop with a diesel scoop to allow them a wider entry (to) get all this equipment out.” (5 Tr. 157). Any retrieval operation would involve more than simply driving equipment or hooking it with a scoop and pulling it out. (5 Tr. 158).

Cain summarized his position that there was no need to further inspect the belt line on May 22, 2012 because he had seen enough in the escapeways to justify the imminent danger order: he knew floor heaving had occurred; the other entries were bad; the return was the worst of all; Hensley had informed him that number six belt had been squeezed between the floor and roof. (5 Tr. 159).

### Gary Hall

Gary Hall appeared and testified on behalf of the Secretary. Hall had started with MSHA in 2006. He was currently working as a roof control supervisor. (5 Tr. 160-161)

He graduated high school and had an associate's degree in Mine Technology. From 1981 until joining MSHA, he had worked continuously as a miner. His mining jobs included rodman, roof bolt operator, scoop and shuttle car operator. He attended the National Mine Academy in Beckley, West Virginia and graduated in 2007. He became an AR and went through a special investigation class. He was a field office supervisor from June 2009 to February 2012. (5 Tr. 162-163).

He had accompanied Chris Cain during the May 22, 2012 inspection of the Low Splint A Mine. When he arrived at the mine office, Randy Hensley advised him and Cain that the mine was not running coal. The Contestant was moving to another section of the mine and moving out equipment. Hensley further explained that the "bottom had started heaving in the belt entries so bad that it was hard to keep the belts running. And they had made the decision to pull back." (5 Tr. 164-165).

Referring to MSHA exhibit G, the Contestant's weekly examination sheets, Hall stated that the review of such revealed no safety hazards reported. (5 Tr. 166-167).

Hall, Inspector Cain, and Hensley proceeded underground on a mantrip. Traveling in a south-easterly direction in the alternate escapeway Hall began to see a "squeeze" in the Southeast Mains area, the bottom heaving up, the ribs sloughing off, travel ways and cross-cuts being recently scooped. (5 Tr. 168-169).

Hall saw "heaving all around the seven drive" and evidence of pressure. Cain asked a section foreman to set up extra supports because the area appeared to be deteriorating. Cain informed Hensley that he was going to issue an imminent danger order but Hall advised Cain to hold off until there was further inspection conducted. (5 Tr. 171-172). Hall counted seven miners in the affected area. (5 Tr. 174).

Going into the primary (intake) escapeway, Hall took photographs of the bottom heaving. (5 Tr. 178-180; *see also* MSHA B1-B6). In case of an emergency, the heaving would hinder access to the life line. (5 Tr. 179- 180).

While the alternate escapeway revealed evidence of having been recently scooped, there was no evidence of recent scooping in the primary escapeway. (5 Tr. 181-185; *see also* MSHA B8-B12).

Hall noted various jacks in the alternate escapeway that appeared to have been recently set — because there was no rock dust on them — but were already showing signs of being bent due to pressure from the ribs or floor. (5 Tr. 185-186; *see also* MSHA B14-B18).

Based upon his own personal observations, Hall agreed that an imminent danger order should have been issued. (5 Tr. 188).

If the imminent danger order had not been issued, and mining operations would have continued, the miners faced the risk of roof collapse and inaccessible or untravelable escapeways. Individuals could not get from the secondary escapeway to the primary escapeway. Entries were blocked with material scooped from previous heaving. Doors would not open. (5 Tr. 188-189).

As to the area covered by the imminent danger order, Hall opined that the affected area had to be as large as it was because “when it comes to protecting miners... you’re not going to take chance on putting them on the edge of danger.” (5 Tr. 191). Given the evidence of squeeze, Hall and Cain did not know “when it starts failing, how far back it’s going to go. And the five drive seemed like the logical place to make sure that everybody was protected.” (5 Tr. 191).

Referring to Citation No. 8178570, Hall stated that, based upon his own personal observation during the May 22, 2012 inspection, the Section 8 description of (unsafe) conditions in Southeast Mains was accurate.<sup>11</sup> Hall further agreed that the discrete safety hazard caused by the unsafe conditions witnessed was that miners would not have a safe means to escape during a major event occurring at the mine and possibly be killed. (5 Tr. 193).

Based upon his own observations and experience in mining operations, Hall agreed with the conclusions of Inspector Cain that the mine operator had engaged in negligent conduct that rose to a level of reckless disregard for the safety of miners which constituted an unwarrantable failure on the part of the mine operator. (5 Tr. 194-195).

There were obvious and extensive hazards, particularly in the primary escapeway. While “everybody works in low conditions,” the mine area was “being low[ered] by the pressure” and despite “red flags that were going up to warn” the operator, the operator failed to correct the conditions. (5 Tr. 195).

Likewise, Hall agreed with Cain’s conclusion that the operator’s weekly examiner during the month of May had failed to list any of the hazards observed by Cain and Hall, justifying the issuance of Citation No. 8178573. (5 Tr. 195-196; *see also* MSHA E-3). Not every miner had

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<sup>11</sup> However, Hall also agreed that “Southeast” Mains was incorrectly referred as “Southwest” Mains.

an opportunity to review the weekly examination report but they all had the right to know if there was a safe way out of the mine and to know if somebody should be sent to remedy the situation. (5 Tr. 197).

In reference to Citation No. 8178574, Hall again agreed with the conclusions of Inspector Cain that the operator's weekly examiner responsible for reporting hazards in the return for Southeast mains was derelict in his duties, his failure to recognize and record hazards constituting a high level of negligence. (5 Tr. 198-200; *see also* MSHA E-4).

Hall confirmed that he had accompanied Government Expert Michael Gauna on May 24, 2012, during Gauna's inspection of Low Splint A Mine. (5 Tr. 201). Hall noted some changes in the primary escapeway since May 22, 2012: a little more rock on the bottom in places; a bigger chunk of rock, approximately ten feet long and four inches thick, had fallen out and pulled some lifeline down; timbers showing pressure. (5 Tr. 203).

On cross examination, Hall conceded that there was always pressure on the mine roof from the overburden. (5 Tr. 207). Some of the government's photographs, including MSHA B-8 and B-12, were pictures of the cross-cuts which were not part of the escapeway. (5 Tr. 207-208). Hall did not know when some of the jacks, which were laying on the ground, had actually been knocked out. (5 Tr. 210). Hall agreed that steps (in an escapeway) in a smoky environment could be a stumbling hazard as could an uneven mine floor. (5 Tr. 211-212).

When traveling the escapeway, Hall had to crawl in areas, the traverse not being easy. (5 Tr. 213). Hall agreed that MSHA exhibit B-7 depicted the floor heave at its closest point to the mine roof. (5 Tr. 214). However, Hall did not actually grab the lifeline to test whether it could be used "comfortably." (5 Tr. 215).

Referring to MSHA B-18, if the jacks pictured on the ground had been knocked out during machinery removal, and had not be replaced, Hall opined that this also was an unsafe practice. (5 Tr. 218-219). Further, allowing chunks of coal to remain on the floor of the escapeway could also warrant a §104(a) citation pursuant to §75.380. (5 Tr. 219-220).

### Michael Gauna

Appearing also on behalf of the Secretary was Michael Gauna, a mine engineer with MSHA technical support group. (5 Tr. 224-225). Gauna had a Master's in Mine Safety, a Master's in Mine Engineering, and a Bachelor's degree in Geological Engineering. Testifying as an expert, Gauna, since 1979, had worked for twenty years in the mining industry. In 2000 he joined MSHA and the last twelve years had been work as a specialist in roof control. He had conducted over 150 underground investigations, twenty-four of which involved fatalities or serious injuries. He had also performed over 200 investigations in reference to pillar design for various mines. (5 Tr. 225-226; *see also* MSHA D for *curriculum vitae*).

Gauna conducted an underground investigation of the Low Splint A Mine on May 24, 2012. Prior to physical inspection of the mine, Gauna was briefed by MSHA personnel and

representatives of the operator. As part of his inspection he put together a collection of mine photographs contained in MSHA exhibit C. (5 Tr. 227-228). Gauna initially rode on a mantrip with Don Jacobs and John Richardson.

Gauna noted that the roadways were showing intermittent signs of “pressure floor heave.” (5 Tr. 231).

Gauna also observed evidence of pillar degradation which he attributed to the affected area being in a squeeze situation. (5 Tr. 232-233). Although unable to photograph some sections of the mine, Gauna observed extensive floor heaving in the old face areas, A Left. The amount of closure along the bank of the B Left pillar recovery had totally failed. (5 Tr. 235).

Damaged stopping, roof degradation, and pillar degradation was observed in the primary escapeway. (5 Tr. 236). Gauna opined that “the six belt area is pretty much being hit by two failure zones that are trying to merge with each other.” (5 Tr. 238).

Based upon his own past experiences and investigations of pillar squeezes in the industry as well as with MSHA, Gauna drew various conclusions from the convergence and closure that he had witnessed in the operator’s mine.

He summarized such thusly:

And this type of closure that’s been going on for quite a while... there’s evidence here of at least two to three generations of stoppings that had to be rebuilt because of the squeeze and closure coming from the B Left recovery.

Again, the photographs and also the evidence show that there’s a lot closure here in the low base area near five west... in my opinion... you have two independent failures that have now managed to try to merge... and the consequence... pillar stability failure along the six belt and in the vicinity of this six belt drive... my conclusions is that this areas is not just simple floor heave. The degree of pillar degradation and the degree of pillar sloughage; it’s a pillar system failure... the most important thing is that you need to have a pillar system that holds the entire area up... or you’ve lost control in the overall stability.. when you’re in system failure like this, things can become unpredictably... when it wants to shift... it’ll dot hings you don’t expect it to...

That’s my conclusion. It’s a pillar system failure that has to be continuously approached and cautiously worked on...

(5 Tr. 241-242).

In his past investigation of pillar squeezes, the mining equipment had already been taken out. This was the first time in his career where he had seen people working in this situation “with this degree of failure.” (5 Tr. 244).

In Gauna's opinion the issuance of the imminent danger order was justified. Miners should not be working when the primary support system has been lost and unforeseen events could take place because global stability is no longer present. (5 Tr. 244).

Gauna did not believe his analysis was hampered by the lack of bore hole analysis; nor did he believe that the MSHA inspector(s) had acted imprudently in issuing an imminent danger order without drilling test holes and taking bore hole data. (5 Tr. 245).

Even accepting that the operator had ceased mining operations on May 21, 2012 and now only wished to retrieve equipment through the secondary escapeway, Gauna opined that such should not be permitted given *inter alia* there was only one visible travelway, an equipment breakdown could raise problematic safety issues. (5 Tr. 246).<sup>12</sup>

Based upon his past experience with pillar failures, Gauna speculated that Contestant might need to mine their equipment out from a different direction. (5 Tr. 248).

On cross examination Gauna stated that he had not put a tape measure up any existing test bore hole. (5 Tr. 249).

Gauna commented that Contestant had originally intended to mine Southeast Mains all the way into the five west but — probably due to an underlying Taggart interaction causing the system to fail — had stopped advancing and pulled back. (5 Tr. 255-256).

Stating that the affected mine area degradation had been going on for a very long time — “you just don't have these sets of doors, these sets of stoppings immediately installed” — Gauna emphasized that closure was like a “fish trap” waiting to happen. It could happen over an indeterminate period of time or it could be instantaneous. One could not control the time frame of pillar failure. Things could happen in a much faster time from that what one could imagine. (5 Tr. 257-258).

Gauna was called in rebuttal in reference to Dr. Newman's testimony. Gauna testified that the model is a very powerful tool and that it is used in the coal mining industry, especially in multiple seam environments. (5 Tr. 235). However, MSHA does not consider them valid for different reasons. Sometimes the model situation does not lend itself to looking at the overall global stability of an area. (5 Tr. 236). The model was flawed and not the right tool to look at the Low Splint A Mine situation where the foundation of the pillars are in question. (5 Tr. 236). The model cannot distinguish between weaker foundation compared to overburden. (5 Tr. 236). The model has an inherent problem in that it assumes that there is a rigid floor. (5 Tr. 236). This assumption that the pillars are reinforced by a strong floor gives the appearance that the pillars are stronger. (5 Tr. 236). Such a strong floor does not exist. (5 Tr. 236). The model does not

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<sup>12</sup> Gauna further reported that he had discussed possible machinery retrieval solutions with the operator's representatives involving use of the belt line as the second escapeway. But this was before he discovered that “the roof was so bad.” (Tr. 247).

accurately display the global stability of this area because it over states the fact that these pillars are stable when they can not be because the entire system is on a weak foundation. (5 Tr. 236).

Gauna stated that the model is also flawed because, numerically, it shows that the roof and the floor will not come together. (5 Tr. 238). However, in reality, the floor heaving and roof will come together. (5 Tr. 238). Gauna testified that his opinion that the roof and floor would come together was based solely on his personal observations. (5 Tr. 238). For this reason, the model is not the correct tool to use in this type of situation. (5 Tr. 238). In situations with soft floor, the model can be misleading. (5 Tr. 238).

### Daniel McGlothlin

Daniel McGlothlin appeared and testified on behalf of the Contestant. McGlothlin was currently a safety manager for Alpha Natural Resources. He had long experience in the mining industry, working for both himself and for his father who owned a coal company. He had received a mine engineering degree from Virginia Tech. He had experience in mines that had floor heaval. (5 Tr. 262-268).

McGlothlin had been asked to go to Contestant's mine on May 22, 2012 where he met with Inspector Cain. After being informed of the 107(a) Order, McGlothlin requested that a stretcher test be conducted but Cain refused. McGlothlin opined that, given Cain's expressed concerns regarding the travelability of the primary escapeway, a stretcher test would have been appropriate. (5 Tr. 269).

McGlothlin eventually did conduct his own inspection of the affected mine area. He initially proceeded underground with John Richardson. He was able to travel the primary intake escapeway on a motor vehicle up to almost the mouth of A Left at which point the height precluded further travel. (McGlothlin could no remember whether he was traveling on a two or four man vehicle). (5 Tr. 272-273).

Approaching the door on the left hand side going toward six belt, McGlothlin stated: "John got hold of the door, pulled, pulled, pulled. He got the door open but could not get it completely shut." (5 Tr. 273).

McGlothlin stated that the lowest point in the primary escapeway which could not be traveled by vehicular means was thirty-eight inches. (5 Tr. 276).

In response to whether he had difficulty traveling a particular entry, McGlothlin responded that "bent over walking is always difficult for a man my age." (5 Tr. 277). While he needed to drop to a knee to do measuring he never had had to crawl. (5 Tr. 278). Although the types of doors used were typically self closing one of the doors could not be completely closed, having a four to five inch gap.

Assessing the intake escapeway in terms of passability, McGlothlin conceded that it could not be traversed on a vehicle. However, “at least one side of the heave, in every instance, there was... access to travel the primary escape.” (5 Tr. 278).

McGlothlin further opined that, if Cain had consented to a stretcher test in the primary escapeway, miners would have “got through it, but it wouldn’t have been easy.” (5 Tr. 279).

McGlothlin opined that imminent danger order was not justified in that “imminency is not here.” (5 Tr. 281). There was not a likelihood of fire because most fires in a coal mine were belt fires and the belt was not running and was not going to run. Further, there was not a reasonable likelihood of equipment catching fire: scoops had a fire suppression system and electrical equipment had breakers. (5 Tr. 282). There was further little likelihood that the intake escapeway would be so contaminated with smoke such that a lifeline would be required, if there were a fire in the alternative escapeway. There was also little likelihood that the battery operated mantrips, three and four wheelers would catch on fire. (5 Tr. 283).

Bore scope testing could not be performed on May 24, 2012 because the screen and recorder would not work. (5 Tr. 285).

McGlothlin estimated that he had traveled the intake escapeway approximately six times during the two nights. The jacks that had been installed were for floor heaving, not for roof support. (5 Tr. 291).

If MSHA had not shut the mine down, the plan was to remove the shuttle cars, then the MRS’s, then the roof bolters. If the feeder would not clear, a decision would need to be made whether to widen the area or leave the feeder. (5 Tr. 294).

On cross examination McGlothlin agreed that floor heaving, rib sloughage, and bent jacks were all signs of pressure being exerted in the area. (5 Tr. 301). McGlothlin further agreed that when an area exhibits continuing pressure, there must eventually be a determination as to whether to stop mining. (5 Tr. 302). While McGlothlin was advised that mining had been ceased at Contestant’s mine due to “excessive floor heave” he could not say that all floor heave was a hazardous situation. (5 Tr. 304).

McGlothlin denied observing any mine areas that posed imminent danger. He did not see any area of roof conditions that gave him “great heartburn.” He did not see any area that he would consider “impassable” — though he conceded passage would be “difficult.” While agreeing there was a “great amount of floor heaval” and evidence of pillar stress, McGlothlin did not believe there was danger of imminent collapse. (5 Tr. 307-308).

Though he believed that the imminent danger order was unjustified McGlothlin conceded that “if I’d went through that area, I’d say, we’re pulling out of there.” (5 Tr. 312).

Harold “Randy” Hensley

Harold Hensley and testified on behalf of the Contestant. He had worked for the Mill Branch Coal Corporation for three years and had worked at the Low Splint A Mill Branch location since January 2012 as a mine foreman. (6 Tr. 4-5). The Low Splint A location had one producing section, located at B Right. (6 Tr. 7). He has worked in underground coal mines for thirty-three years. (6 Tr. 5). As a mine foreman he was responsible for projects including installing new beltlines and setting new drives. (6 Tr. 5).

On May 8, 2012, Hensley had taken over as acting superintendent. (6 Tr. 6; S. Tr. 13).

Prior to working for Mill Branch, Hensley had experience with floor heaving at an Arch Minerals mine. (6 Tr. 7).

On May 21, 2012, Mill Branch Coal Corp. decided to cease mining B Right and remove the equipment out. (6 Tr. 8). The last production shift on B Right was the evening shift of May 21 and the mine began moving equipment as soon as the evening shift concluded. They successfully moved one shuttle car, the belt head, and the safe haven. Hensley believed that the miner, the feeder, and all other equipment would have been removed from B Right within twenty-four hours. (6 Tr. 8).

On May 22, 2012, Inspector Cain met and informed Hensley that there would be an EO1 inspection and that the beltline would be examined. (6 Tr. 9). Before entering the mine, Hensley and Inspector Cain discussed the bottom heaving in A Left and B Right. (6 Tr. 15). Hensley informed Inspector Cain that there was work being conducted on the roadway in order to acquire enough clearance so that the equipment could be removed. (6 Tr. 15). Hensley stated that the roadway had been a low area since he arrived at the Low Splint A Mill Branch and that it was scooped constantly but that it was not any different than any other mine. (6 Tr. 11).

Inspector Cain and Hensley parked the ride on the six roadway at the turn off towards B Left and walked towards the seven drive. (6 Tr. 12). Inspector Cain said that the bottom was hooving and the miners then dangered off the area with timbers. (6 Tr. 12).

After parking the ride, Inspector Cain walked to the face, down the intake, and through the return. (6 Tr. 12-13). Hensley went a different route and was informed that Inspector Cain had written an imminent danger order from Five Drive inby when he rejoined the inspector. (6 Tr. 14). The imminent danger order was written because the bottom had hooved and that it was

difficult to travel through the primary escapeway. (6 Tr. 14). The imminent danger order covered the entire Southeast Mians, A Left, and B Right areas of the mine. (S. Tr. 16).

Inspector Cain then informed Hensley that power could not be supplied to the area because the imminent danger order prevented miners from conducting a preshift examination. (6 Tr. 15). Accordingly, electricians discontinued power to the area. (6 Tr. 15).

Hensley did not believe that there was an imminent danger because there was not any issue that anyone could be harmed.

Hensley went back into A Left and B Right on May 23 with the state mine inspector. Along with the two state inspectors, Hensley traveled in the neutral roadway, across the faces where the mining had been stopped, down the intake, and came out at Cross-cut 70. There were portions that were low that forced Hensley to bend over and duck walk. The state inspectors told Hensley that they did not see anything wrong with the top and did not understand the imminent

danger order. On May 24 the state mine inspectors issued a notice of violation because “the intake escapeway was not maintained in a good condition.” The notice of violation further alleged that:

The mine floor has hooved starting at number two entry Southeast Mains starting in the intersection of survey SPAD 1593 for approximate distance of 400 feet.

Travelways along the number five and number six belt conveyor between the secondary and primary escapeways were not maintained clear of material and the gob has the travelways blocked. . . . The man doors are inoperable due to hooving pressure in this area. Has received excessive pressure from undermining area of Taggart seam located approximately 150 to 200 feet below this.

(6 Tr. 33).

He also reentered the area on May 24 with Inspector Cain for five to six hours and did not see any change from the 22nd to the 24th. Hensley reentered the area on June 1 and measured one area that had thirty-eight inches of clearance.

On April 22, MSHA Inspector Johnny Turner traveled Low Splint A Mill Branch. As Hensley was setting additional jacks Turner stated that it would be appropriate to install additional support to the area. Inspector Turner stated that no miner needed to be in the area so it would be appropriate to set four jacks across each cross-cut and danger the area off. Hensley followed Inspector Turner’s advice, set four jacks across each crosscut.

Sometimes the jacks bent as the bottom was hooving. (6 Tr. 34) Whenever a jack was bent, Hensley would replace it with another jack to prevent the bottom from hooving further. (6 Tr. 34). The miners would dig the bottom down to solid material, six to ten inches, and make the bottom flat to set the jack. (6 Tr. 34).

There was not any problem with ventilation in the area on May 22, 23, 24 or June 1.

The May 22 weekly examination reported that there was hooved bottom in A Left, that the mantrip cannot transverse the intake. (6 Tr. 37; MSHA G). The May 15 weekly examination report did not note any hazard for the primary escapeway (which was also the intake) or the

return. (S. Tr. 7; MSHA G).<sup>13</sup> Hensley stated that the hazards cited in the imminent danger order were not present on May 15 and that all of the heaving in the primary escapeway occurred in two weeks. (S. Tr. 8, 17). Hensley stated that he was not aware that the bottom had hooved because it was not reported on the May 15 weekly examination. (S. Tr. 13). Hensley did not read the weekly examination reports of May 1 or May 8 because at the time he was a foreman and not acting superintendent and the first report he read was for May 15. (S. Tr. 13-14). Hensley testified that Low Splint A had been dealing with hooving since January 2012. (S. Tr. 16).

The standard height in the entries and cross-cuts at Low Splint A Mill Branch was about five feet. (S. Tr. 11). Hensley stated that the primary escapeway was below average and, because of this, the regular ride would not make it down the primary escapeway. (S. Tr. 11). Hensley would use a low-profile stringer to get through the primary escapeway because the clearance was approximately forty inches. (S. Tr. 10, 13).

Hensley stated that all of the miners in Low Splint A were new to the mine when they began working in January. (6 Tr. 38). All of the miners went through a drill, required by the Mine Act every six months, by going through the primary escapeway so that they could practice and know where the lifeline was. (6 Tr. 38). The miners had not completed another drill through the primary escapeway between January and the time the imminent danger order was issued on May 22. (6 Tr. 39).

Hensley said that in his thirty years of mining he had never seen a citation for a primary escapeway violation but was aware that an operator had to keep the primary escapeway free and clear of hazards for passage for an emergency because he read the regulations. (6 Tr. 41-43).

Hensley testified that there was enough seismic pressure and heaving that the main travelway, also the alternate escapeway, had to be cleared constantly. (6 Tr. 48). However, it was not dealt with on the primary escapeway. (6 Tr. 48).

Hensley testified that Mill Branch Coal was aware that the belt had been raised one time. (6 Tr. 52).

Hensley testified that it was his call to stop production on May 21. (6 Tr. 59).

Hensley's supervisor was John Alan Richardson and Mr. Richardson's superior was Barry Compton. (6 Tr. 61-62).

Hensley testified that Mill Branch was constantly dealing with the floor heaving but that it still kept unpredictably cropping up in different places. (6 Tr. 62). Hensley conceded that the miner operator was essentially playing "whack-a-mole" when it came to dealing with unpredictable and unstoppable floor heaving. (6 Tr. 63-64).

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<sup>13</sup> S. Tr. refers to the supplemental transcript.

## Bruce Martin

Bruce Martin appeared and testified on behalf of the Contestant. Martin had been working at the Low Splint A Mine since January 3, 2012 as a fire boss. (6 Tr. 67). Among his duties, Martin checked beltlines, roadways, travelways, power centers, and conducted weekly examinations. (6 Tr. 68). Martin had approximately thirty-eight years experience in the mines, including six years as a fire boss. He has also worked as a miner operator and cutting machine operator. (6 Tr. 68-69).

During May 2012, Martin conducted weekly examinations in the area of Southeast Mains, A left and B right. (6 Tr. 69).

On May 15, 2012 Martin traveled in the intake escapeway and return. Martin was either able to drive, duck-walk, or crawl through areas he examined. (6 Tr. 70-71).

Referring to his weekly examination records of May 8, 2012 (at MSHA G), Martin read his handwritten entries under “Examination for Hazardous Conditions Including Tests for Methane” as follows:

Went up left returns to section across face, down intake, up left turn. Fixed deadbolts ... scaled rock. Appeared to be ok[ay] at the time of exam. Bottom heaving in some places.

(6 Tr. 71-73).

Under “Examination of pillar falls, seals, idle workings, abandoned areas” Martin read out his handwritten notes as follows:

Check all rooms in the intakes, left turn, checked all seals, side sticks. All ‘appear to be’ ok[ay] at time of examination.

(6 Tr. 73).<sup>14</sup>

Martin denied seeing any hazards. (6 Tr. 74). On May 22, 2012 Martin examined the areas at issue. He was able to traverse such by either walking, duck-walking, or crawling. Because of poor knees it was easier for him to crawl than to duck-walk. He denied having any “real difficulty” in traversing the intake. (6 Tr. 75).

Martin confirmed that the return was lower than it had been on the May 15, 2012.

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<sup>14</sup> Martin’s actual handwritten notes at MSHA G, were in parts, indecipherable to undersigned ALJ; and indeed appeared also to be to Hensley. (See 6 Tr. 37; Secretary’s brief at p. 66).

Upon getting outside Martin intended to inform Hensley that the bottom had “heaved over on intake” and that the return was getting lower. However, the MSHA inspectors had shut the mine down before he could do so. (6 Tr. 77-78).

After finding out an imminent danger order been issued, Martin filled out his May 22, 2012 week exam entries at MSHA G. (6 Tr. 79).

Martin read aloud his notes.<sup>15</sup> He indicated return was getting very low in such.

Martin further indicated that Cain had asked him regarding his evaluation of regulations and whether Martin was performing such daily examinations. Martin thanked Cain for this enquiry but denied that he had thanked Cain for the issuance of the imminent danger order. (6 Tr. 81-82).

Martin opined that the intake escapeway on May 22, 2012 was “passable” and could have been used in an emergency situation by walking, duck-walking, or crawling. (6 Tr. 84).

On cross examination Martin confirmed that the only working section of the mine in the month of May was the area subject to the imminent danger order. (6 Tr. 88). During the month of May Martin was aware of beltline problems because of floor heaving. The bottom was heaving up and stopping the rollers from turning. (6 Tr. 88). Martin denied knowing the number of times the beltline had to be stopped so that the belt could be raised. (6 Tr. 88-89).

Martin indicated that Randy Hensley, Chris Gibson and “some other fellows” were setting up jacks around the “belt drives and things...anywhere we need them.” On occasion Martin also set up jacks. (6 Tr. 89-90).

Asked what his impression was of the pillars of the mine, Martin stated:

Well, the bottom was heaving... they had set up jacks through mine. And we had raised that belt through there where that bottom heaving. And it needed attention... it needed to be where the belt was picked up all the way and it needed to be where it was heaving up under the belt, it needed to be cleaned out.

(6 Tr. 92)

Martin did feel the area was under a squeeze. (6 Tr. 93). He informed Hensley of such and “that’s why they put jacks and things in there.” Even though there was bottom heaving, Martin did not see the area as being unsafe “because the top wasn’t breaking.” (6 Tr. 94).

If a squeeze gets worse, the “company” could make other arrangements including “pull[ing] out of that place.” (6 Tr. 95).

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<sup>15</sup> There again appeared to be legibility issues. Martin was uncertain as word used to describe intake.

Martin was unable to answer whether Southeast Mains should have been moved out of sooner. (6 Tr.96).

Acknowledging that his duties included looking for hazards that would impede passage in intake and return travelways, Martin stated that some stoppings in the primary intake “needed to be fixed from the hooving.” (6 Tr. 99).

Referring to the photographs in MSHA B-1 through B-7, Martin agreed that conditions had worsened between May 15, 2012, when he had examined the mine areas and May 22, 2012, when the photograph was taken. (6 Tr. 105-106).

Martin agreed that the entire section, including the primary escapeway had been under a squeeze. Jacks had been placed and the bottom had been scooped. but Martin swore that if he were unable to “have got there, that it would have been made known.” (6 Tr. 107).

Martin conceded that he did not mention bottom heaving in his May 15, 2012 weekly examination report. (6 Tr. 108; *see also* MSHA G).

While he “was concerned” about the heaving he witnessed on May 22, 2012, he actually wrote the report only after learning the mine would be shut down. (6 Tr. 108-109).<sup>16</sup>

Martin asserted that by reporting that there was bottom heaving this gave sufficient notice that the area was under a squeeze. (6 Tr. 111-112).

Referring to Order No. 8178573 (MSHA E-3), Martin agreed that under the section for condition and practice it was accurately reported that there was a hooving bottom and deteriorating rib lines. He was uncertain if there were damaged stoppings because on May 22, 2012 he went no further than five drive. (6 Tr. 112-113).

Martin felt the escapeways were travelable but a stretcher could not be carried. (6 Tr. 113).

Referring to Citation No. 8178574 (MSHA E-4) Martin again agreed with the report of hooving bottom. (6 Tr. 114).

In reference to Inspector Cain’s notes at MSHA F-1, Martin agreed that he had informed Cain that he had to crawl in a portion of the intake and agreed that he had observed more hooving in the intake since the previous week. (6 Tr. 115). Martin could not remember if he had no answer to Cain questioning him as to why he had reported no hazards. (6 Tr. 116).

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<sup>16</sup> Despite having learned the mine was being shut down, Martin denied knowing that MSHA was going to issue an imminent danger order. The ALJ found that this assertion, given Martin’s many years of mining experience, undermined his creditability. (*See also* 6 Tr. at 109-110).

Martin conceded that everyone in the mine knew the South Mains area was under squeeze. (6 Tr. 116). Martin further agreed that if a squeeze area continued to deteriorate and remedial action was not taken, eventually the area would collapse or close up. (6 Tr. 116-117). Martin further agreed that if such collapse or closure took place men working on the face could be trapped. (6 Tr. 117).

Martin explained that he did not mention such a serious condition in any of his weekly reports because he did not know it was wrong not to report bottom hooving. “Just about any mine” had bottom hooving. A state inspector had not commented on such and Hensley knew about it. “The bosses knew about. Everybody in the mine saw it...” (6 Tr. 117).

On redirect Martin indicated that others, including MSHA inspectors, did not see hooving as necessarily a hazard. (6 Tr. 119).

### John Richardson

John Richardson appeared on behalf of the Contestant. Richardson had worked for Alpha Natural Resources for three years and in the mining industry for thirty-eight years. (6 Tr. 122).

Richardson opined that floor heaving, when it was normal, did not necessarily indicate imminent danger. (6 Tr. 123).

Richardson had accompanied McGlothlin on May 22, 2012, going into Low Splint A but saw nothing that would justify issuance of an imminent danger order. Richardson also went into the intake escapeway on Wednesday and Thursday. (6 Tr. 124-125).

Richardson stated that the intake escapeway had hooved bottom. 5’6” in height, he was able “to get down low” and that he was able to walk all of the return except for twenty to thirty feet. (6 Tr. 126).

Richardson did not see anything that would indicate imminent danger. He heard no noises. (6 Tr. 126).

Stating both the primary and alternative escapeways had “good” roof, he believed that the machinery could have been retrieved in less than two days but for the imminent danger shut-down. (6 Tr. 127).

On cross examination Richardson admitted that, despite his characterization of the primary escapeway as being “good,” there were recent roof falls in the area. (6 Tr. 128-129). Due to such, the path of the escapeway had to be rerouted; miners could not go in a straight line. They would need to make sharp left and right 90° turns and go over a cross-cut. (6 Tr. 130).

Richardson, however, denied that this would constitute a safety hazard, even under smoky or emergency conditions. (6 Tr. 131).

Being shown MSHA exhibit B-7, which depicts heaving in the primary escapeway, Richardson did not think such to be a hazard, even with blinding smoke. (6 Tr. 132).

Being shown MSHA exhibit B-1, which depicted floor heaving under the lifeline in the primary escapeway, Richardson opined that the life line should be repositioned but disagreed that such constituted a hazard. (6 Tr. 133-134).

Being shown MSHA exhibit B-2, which again depicted heaving under the life line, Richardson again denied such constituted a hazard but conceded that he would “fix it...just to make it more comfortable to walk.” (6 Tr. 134). If he had observed the conditions depicted in MSHA B-7, Richardson would also have directed that the line be “fixed.” (6 Tr. 134).

While not conceding that the position of the life line over a heave constituted a hazard, Richardson stated that “it makes it easier to travel if it’s over to the side of the heave.” (6 Tr. 135).

Richardson testified that he was Randy Hensley’s supervisor to whom Hensley reported. (6 Tr. 136). Richardson confirmed that Hensley had conveyed to him Bruce Martin’s reports of heaving and some squeezing in the §107(a) area of May 8, 2012. (6 Tr. 136).

When mining ceased on May 21, 2012, it was intended that all belts and equipment would be moved to four West which was “ready to go.” Richardson denied any knowledge of Hensley having told MSHA inspectors on May 24, 2012 that four West would not be ready for a week. (6 Tr. 136-138).

Richardson agreed that focus was being centered on the alternate travelway because this was the escapeway through which machinery would be retrieved. (6 Tr. 139-140). He denied that he had told Gary Hall that it would be unsafe for an examiner to travel the return. (6 Tr. 141). He further had no recollection of Hall having questioned him regarding the mine examiner’s failure to report hazards, including heaving and belt rubbing, in their reports. (6 Tr. 142).

### Donald Jacobs

David Marshall Jacobs appeared and testified on behalf of Contestant. Jacobs worked for Alpha Natural Resources as Senior Manager of Geology for Virginia and Southern Kentucky divisions. As Senior Manager he handled geologic issues, including ground control issues and exploration. He earned a B.S. degree in Geology and had worked as a geologist for thirty-one years. (6 Tr. 144).

Jacobs was familiar with the area in which the Low Splint A mine was located. He had explored the area and once worked for Westmoreland Coal Company which had operated a mine

below the site of the Low Splint A. The mined out area was called the “Taggart seam,” was approximately 250 feet below the Low Splint A, and had since closed. (6 Tr. 145-146).

Because of this Taggart seam, it was not uncommon for there to be floor heaving in the Low Splint A mine, including in Southeast Mains. As one advanced in the mine, typically about a break or break and a half, there would be heaving. The floor would pop up. “It would converge and as you continue to advance, you would see that heaving progressed relatively slowly.” (6 Tr. 147).

Jacobs asserted it was “typical” of the mine. “As the floor heaves, you’ll see that the ribs will slough and that’s sort of a mode of failure.” (6 Tr. 147).

As to whether the floor heave would continue, Jacobs stated:

if you extract something out of the earth, over time, its going to converge. It’s a question of time...

(6 Tr.148)

As to whether there could be failure at some point, Jacobs opined:

In extreme cases, we’ve seen some areas in the mine that actually had some areas, that after the floor heaved and the ribs sloughed, we had cutters and in several areas of the mine where we had that situation, we went back and glued the top. We also noted that in the test holes, you could measure – actually see the separation of bedding planes.

(6 Tr. 148).

Jacobs had entered the mine on May 24, 2012 to check test holes with a bore scope but the scope did not operate correctly. (6 Tr. 149). He also checked two test holes with a tape measure to see if there were any offsets or separations. Although some separations were found about three or four feet, he did not find such “worrisome.” (6 Tr. 149).

Jacobs stated that he did not see anything that indicated an imminent failure of the roof nor anything to suggest there would be imminent failure in the §107(a) section. (6 Tr. 150). Jacobs further opined that the situation could have been handled by pulling the equipment out. (6 Tr. 151).

On cross examination Jacobs agreed that the pillars and blocks left behind after the Taggart seam operation ended could cause upward pressure. (6 Tr. 154). However, Jacobs did not believe that “a pillar or barrier seam and Taggart seam” would affect the whole area. (6 Tr. 154).

While agreeing that the area was “under convergence,” Jacobs testified that the convergence was “at various rates over various times,” exhibiting itself in floor heave and rib slough. (6 Tr. 155-156).

Jacobs denied that the convergence could have led to a catastrophic failure. (6 Tr. 157).

### David Newman

Dr. Alan Newman appeared and testified as an expert witness for Contestant. Newman had operated Appalachian Mining and Engineering, an engineering consulting firm, for the past twenty-four years. He possessed a Ph.D. in Mining Engineering and had focused on ground control issues.<sup>17</sup> (6 Tr. 160-163).

He had dealt with the issue of floor heaving in the past. (6 Tr. 163).

Dr. Newman first visited Low Splint A Mine on June 1, 2012. He was accompanied by Scott Peterson, Randy Hensley, Forest Lambert, and Gary Hall. (6 Tr. 164).

Dr. Newman traveled underground to the Southeast Mains and conducted a series of bore scope<sup>18</sup> tests on pre-existing test holds. (6 Tr. 165). The bore holes were two feet above roof bolt length, being approximately eight feet in length. (6 Tr. 165-166).

If a tape measure were used instead of a bore scope, one could check a test hold by feeling whether the lip of the tape measure would be hung on a crack. (6 Tr. 166).

Contestant’s exhibit LS-4 contained the map on which Newman plotted the location of the places where he used the bore scope (6 Tr. 167)

Newman started testing on B Right, along E Left, then coming into Southeast Mains. Instead of going into the intake escapeway, he picked this route as it would be the main route by which equipment would be brought out of the mine. (6 Tr. 167). Newman did go into the intake escapeway: from bore hole eleven, he came down across the belt, through a door and worked his way up the intake escapeway to where the regular was. (6 Tr. 168; *see also* B-32).

Newman took photographs of the bore holes and noted observations of each. (6 Tr. 169; *see also* Contestant’s exhibits LS-6 and LS-8).

Although noting some cracking in the bore holes, Newman did not observe any cracks above the bottled horizon and/or anything that was indicative of imminent failure. (6 Tr. 169-

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<sup>17</sup> *See also* Dr. Newman’s resume at Contestant’s LS-3.

<sup>18</sup> A bore scope is a device with a camera within a steel cylinder. Approximately an inch in diameter, the bore scope enables the user to visually inspect everything that’s within the bore hole. (Tr. 165).

171). He made a video of the bore holes which was reduced to a disk. (6 Tr. 172; *see also* Contestant's Exhibit LS-7). Referring also to the photographs of the bore holes (*see also* LS-3), Newman opined that the roof appeared in "excellent" condition. The conditions appeared "wonderful." (6 Tr. 174).

Newman also heard no mine noises. (6 Tr. 175).

Explaining what he observed from photographs from bore hole five, Newman saw floor heave to the left hand side of the ride and "some pillars falling." (6 Tr. 175). However, Newman opined that this was not indicative of pillar failure. As the floor heaves upward, it's pulling the interface between the pillar and the floor with it, which as that pulls out, causes spalling and the "rib on the pillar beings to sit down a little bit." (6 Tr. 176). Newman noted that rib spalling is common and did not indicate pillar failure or pillar instability. (6 Tr. 176).

Newman further stated that scooping up material and piling such against a rib, as depicted when viewing outby hole five, actually reinforces the rib. (6 Tr. 177).

Based upon his bore scope testing, Dr. Newman felt there was no problem in terms of stability-related issues and no potential for imminent collapse of the roof. (6 Tr. 178).

Dr. Newman further opined that, but for the imminent danger order, the mine operator could have safely removed the mining equipment—whether it would have taken one, two or three days. (6 Tr. 178).

In addition to his bore scope testing, Dr. Newman also performed "modeling." Dr. Newman explained modeling as follows:

Moore: First of all, tell me how you do the modeling.

Newman: Initially what's done is to take the geometry of the mine. There are three mines that are involved. There is a mine in the lowers Parsons and that is a seam that lies above the Low Splint. And then the Taggart seam underlies the Low Splint. The max of those three mines are superimposed on each other and they are used to create a model – and this is done by grids. Each of these are on five-foot elements; five foot by five foot small blocks. And so the mine maps are reduced to areas that are solid coal, pillars, gob, entries, or cross-cuts.

Moore: Now, do you put in the strengths of the coal, the rock, that sort of thing into this model?

Newman: What you put in is modulus of the rock meaning its stiffness, and the strength of the coal, 900 pounds per square inch is an MSHA accepted, NIOSH based standard strength. That was used to develop the coal strength.

Moore: What are you trying to do with modeling? Is it going to show you exactly what's there, or what are you trying to do?

Newman: What you try to do is you break these as I mentioned into five foot by five foot elements. Ultimately it gives you an idea of relative stability of one area of the mine to another. And specifically an idea of pillars that would be under higher or lower stress, relative to other pillars, allows you to pinpoint specific areas that may be problematic.

Moore: Would you describe it as a tool?

Newman: Yes.

Moore: And is it a tool used in the coal industry?

Newman: Yes, it is.

(6 Tr. 179-180).

As to the Low Splint A Mine, the modeling essentially indicated that, although the Southeast Mains area was under stress with predictable floor heaving and spalling, the pillars themselves were stable. (6 Tr. 181-184). After review of the modeling Newman again concluded that it was safe to remain in Southeast Mains and to retrieve equipment. (6 Tr. 185).

Except for the area of the roof fall, the roof of the intake escapeway was, in Dr. Newman's opinion, in good condition. (6 Tr. 185).

Once mining is stopped, there would, in Dr. Newman's expert opinion, be no further dynamic change in the distribution or magnitude of stress. (6 Tr. 186). "In terms of mining you have reached an equilibrium where there will be no further change in stress distribution or magnitude." (6 Tr. 186).

Based upon his review of an E-Log<sup>19</sup> of a bore hole near the center of A Left, Dr. Newman concluded that beneath the Low Splint seam were spike indicative of coal streaks which diminished with depth to the rock formation becoming more uniform shale and a stronger heaving surface. (6 Tr. 188).

On cross examination Newman agreed that he conducted no bore hole testing in the primary escapeway. (6 Tr. 189). Newman disagreed that various photographs showed roof degradation but rather areas of draw rock. (6 Tr. 192).

As to his modeling, Newman stated that he relied upon data supplied by Alpha, including maps and flown typography. (6 Tr. 192). The modulus was based upon "some testing for Alpha on other core holes, not in this vicinity."

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<sup>19</sup> E-Log is an electronic log where a nuclear device is lowered down a bore hole, giving a review of the composition of the rock itself. (Tr. 187).

Although for modeling purposes, the mine roof and floor were considered synonymous, Newman confirmed that in reality the rock in Low Splint's floor was not the same as in its roof. The rock had a different lithology and different shales. (6 Tr. 193). Newman further indicated that the model and specific software was not designed to characterize the roof or the floor; the intent was to examine pillar stability. (6 Tr. 194).

Further, the model was not designed to examine the stability of entries nor was it designed to deal with the convergence of the floor. (6 Tr. 195-196)

Newman again conceded that he had spent most of his time in the secondary escapeway. However, he characterized the situation in said section thusly:

What is happening is the floor had heaved. The ribs had spalled, both in reaction to the floor heaving and also due to the combination of overburden pressure and abutment stresses coming off of those areas that had been pillared. So if you have three components; you have the roof, the pillars, the floor, it is the floor where convergence or the movement has occurred. So looking at the E-log, one can intuit that there are several layers of floor. And after scooping as they have the weaker layers out of the way, eventually what you would expose is a stronger, more compact layer of shale. And at the time I was there, there was no sounds or no evidence of rock failing or movement. So therefore, the thought is that you had come to an equilibrium where at that time, there was no further convergence. There was no further degradation of the floor.

(6 Tr. 197-198).

Newman conceded that he would not have expected the MSHA inspectors to have conducted the type of analysis he had testified to in determining whether to issue an imminent danger order. He agreed they would have to draw on their observations onsite. (6 Tr. 200). However, on redirect, he opined that the inspectors could have examined the test holes. (6 Tr. 201).

On further direct examination, Dr. Newman reasserted that the model used in this situation was appropriate. (6 Tr. 241).

Dr. Newman further testified that it was established that the roof was stable via the bore scope. (6 Tr. 240). Dr. Newman also elaborated that the initial layer that the pillars are sitting on is weak material but, ultimately, that weak material had been scooped out and the pillars rested on more competent material. (6 Tr. 240). This layer of competent stable material is why

the area was quiet on June 1 when Dr. Newman inspected the area. (6 Tr. 241). If the layer were not stable, there would have been noise and cracking during the six hours that Dr. Newman was at the area. (6 Tr. 241).

## William Dupree

William Alan Dupree, Jr., was the president of the Virginia operations of Insured Services, a subsidiary to Alpha Natural Resources. (6 Tr. 202). The Mill Brach Low Splint A mine was one of the underground mines under the umbrella of the Virginia business unit. (6 Tr. 202). At the time of hearing, Dupree had held this position for two and a half weeks. (6 Tr. 202). Prior to this position, he also worked for Alpha Natural Resources with the responsibilities of oversight of all the underground mines, surface mines, and preparation plant. (6 Tr. 203). He was responsible for developing the business plans, responsible for overall health and safety, human resources, and all financials. (6 Tr. 203). He held this position for one year. (6 Tr. 203). Prior to that, he also worked for Alpha Natural Resources as the Vice President of Continuous Improvement for one year. (6 Tr. 203). Before being employed by Alpha Natural Resources, he graduated from the University of Pittsburgh in with a bachelor of science and worked for the Mine Safety and Health Administration in the ventilation division. (6 Tr. 205).

While working for MSHA's ventilation division, he would go to mines with complex ventilation issues and help resolve the condition and make recommendations. (6 Tr. 205). If there was a fire or an explosion in an underground mine, the ventilation division provided gas sampling instrumentation to sample the gases and also analyze the concentrations for explosibility, toxicity. (6 Tr. 205).

With respect to the imminent danger order at issue, Dupree held a meeting with MSHA's technical expert, MSHA's representatives, and Virginia state agency officials about what needed to be done at the Low Splint A mine. (6 Tr. 212).

During this meeting, MSHA expressed concerns that if the pillars lost strength then the roof could weaken. (6 Tr. 212). At this meeting, Dupree suggested that test holes be examined to give a view of the strata in the immediate roof and determined what the roof looks like. (6 Tr. 212-213).

Dupree did go underground the Low Splint A mine with Danny McGlothlin. (6 Tr. 213). They both traveled up the travelway, crossed under the belt, and into the primary escapeway. (6 Tr. 214). After traveling the primary escapeway a distance, Dupree and McGlothlin walked and crawled the escapeway to the section in question. (6 Tr. 213-214).

Dupree stated that the roof looked pretty good at the intake escapeway and that the escapeway was passable. (6 Tr. 214-215). Next, Dupree went to the one cross-cut inby seven belt to assist with the borescope. (6 Tr. 215). Ultimately, the borescope was not operable. (6 Tr. 216).

After his examination, Dupree came to the conclusion that there was not an imminent danger. (6 Tr. 216). There was not anything ventilation-wise, methane-wise, or roof control-wise that would cause an imminent danger. (6 Tr. 221).

Dupree testified that the purpose of a 107(A) order is when an imminent danger situation is recognized that a 107(A) is issued so that MSHA can have control over the situation. (6 Tr. 224). When an imminent danger is observed, a 107(A) order is issued for the purposes of removing personnel from exposure from those areas and situations that could within a reasonable short time frame cause serious injury or death. (6 Tr. 225). An exception allows some individuals to stay in the mine for a limited purpose of abating the condition upon which the 107(A) order was issued. (6 Tr. 224). The Mine Act allows miners to re-enter the area if the condition is abated. (6 Tr. 225). Next, MSHA re-inspects the mine to determine if the conditions have been abated. (6 Tr. 227). If the conditions have been abated, then MSHA terminates the order. (6 Tr. 227).

Dupree believed that the imminent danger order was, in this case, used as a control order. (6 Tr. 218). MSHA came across a situation unsure of what type of enforcement action was appropriate and issued the 107(A) order as a mechanism to control the situation. (6 Tr. 218). This uncertainty was due to the fact that there has been a high turn-over rate at MSHA with supervisors being only trainees three years previously. (6 Tr. 219). This is despite the normal five years it took an inspector to see enough to be a good, experienced, comfortable inspector. (6 Tr. 219).

Dupree stated that it was very common for an escapeway to make changes in direction. (6 Tr. 220). There have been numerous occasions where an operator has to move the stopping line over to bypass a fall area to create another avenue for the escapeway. (6 Tr. 220).

In Dupree's opinion, there was almost zero likelihood of a major event that would require the use of one or both of the escapeways. (6 Tr. 220). It was also very unlikely that there would

be an event that would cause smoke to fill the intake escapeway. (6 Tr. 221). There was not an ignition source because the belts were not running or any active coal production. (6 Tr. 221-222).

During his conversations with Inspector Cain on October 24 while underground, Dupree stated that he wished Mill Branch would have pulled the equipment out of the area a day earlier. (6 Tr. 232). This is because the more bottom hooving occurs more work has to be done to re-enter the mine and retrieve equipment. (6 Tr. 233).

## Finding of Fact and Conclusions of Law

I. There was a significant and substantial violation of §75.380(d)(1). Based upon such and the observed global conditions in Low Splint A Mine, the Inspector did not abuse his discretion in issuing an imminent danger order pursuant to §107(a).

Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representatives shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in Section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 104(d)(1) provides the following:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Section 3(j) of the Act defines “imminent danger” as “the existence of any condition or practice in a coal mine or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. §802(j).

This definition has not changed from the definition contained in the Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 *et. seq.* (1976) (amended 1977) (the “Coal Act”).

On May 22, 2012, MSHA Inspector Chris Cain and Gary Hall conducted an inspection of Operator’s Low Splint A mine during which time the inspectors concluded that there were unsafe conditions which compelled the issuance of a §107(a) imminent danger order.

The Order No. 8178569 reads as follows under the heading “Condition or Practice”:

All entries outby the 001 MMU where miners are removing equipment after second mining are currently on a ride and are squeezing the bottom to the mine roof. The primary and secondary escapeways are affected. Also the intake and return air courses are all showing signs of excessive pressure. The worst area is from #6 drive at S.S. 1562 to #7 Drive at S..S. 1602 including all entries. The hooving bottom will adversely affect the miner’s safety and health while trying to recover the 001 MMU equipment with only one travelable entry. These conditions according to mine management have dramatically worsened in the last week. The bottom has bent 100 ton jacks, broke posts, and is starting to affect the stability of the mine ribs.

This order was issued orally to Randy Hensley in the primary escapeway near #6 Drive at 11:15 a.m. on this date

This imminent danger order was, in part, based upon the inspectors’ observations and conclusion that the escapeways from the mine area in question, specifically the primary escapeway, were so compromised that 30 C.F.R. §75.380(d)(1) was violated.

This section provides, in pertinent part: “(d) each escapeway shall be (1) maintained in a safe condition to always assure passage of anyone, including disabled persons.”

Under the heading and caption “Conditions or Practice” Citation No. 8178570 alleged as follows:

The primary escapeway provided for miners removing equipment from the 001 MMU is not being maintained to always ensure safe passage of anyone, including disabled persons. The bottom has hooved and made travel slow and difficult for myself and would for others. The excessive pressure is created by the second mining of the 5 West Mains which has put the area on a ride. The bottom and ribs are showing signs of significant deterioration inby and outby the #6 Drive located in the Southwest<sup>20</sup> Mains after the second mining of the adjacent 5 West Mains. The condition of the escapeway severely increases the risk to miners working on the 001 MMU. The hazard exists that miners working on the 001 MMU do not

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<sup>20</sup> At the hearing, the Secretary noted that “Southwest” was a typographical error and that it was obvious that the “Southeast” Mains was being referred to. (Tr. at 104).

have a safe means to escape during a major event occurring at the mine and being killed. The alternative escapeway is the only safe means of travel from the 001 MMU outby to the #6 Drive and is common with the belt entry. The doors allowing access to the intake escapeway were blocked or damaged to prevent miners from entering or leaving the escapeway for 1,400 feet.

The operator has engaged in aggravated conduct constituting more than ordinary negligence in that:

1. An examination of the intake is conducted on a weekly basis.
2. The mine has a history of showing signs of excessive pressure.
3. The decision made by mine management to discontinue mining on the 001 MMU was made after the bottom hooved and created these problems.
4. No effort by mine management was made to correct or prevent this condition from occurring. This violation is an unwarrantable failure to comply with a mandatory standard.

This citation is being issued in conjunction with a 107(a) Order No. 8178569.

As described *supra* Inspectors Cain and Hall and expert Gauna testified at length as to why their personal observations led them to believe the escapeways, especially the primary escapeway, were unsafe and not travelable by disabled miners during a major event.

Further, all three witnesses gave extensive testimony as to why they believed that the significant floor heaving, broad-based squeeze, and potential pillar system failure in Low Splint A Mine created an imminent danger to miners, including the seven miners who were engaged in a hasty retrieval of machinery.

This Court recognizes that imminent danger orders can be issued regardless of whether the Mine Act or the Secretary's regulations have been violated. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

After a careful evaluation of the record, however, this Court finds that §75.380(d)(1) had in fact been violated and that said violation in part justified Inspector Cain's issuance of the §107 imminent danger order.

Section 75.380(a) requires that underground coal mine operators designate and provide as escapeways at least two separate and distinct "travelable" passageways that meet the extensive requirements of §75.380. Although there is no definition of "travelable" in the Mine Act, §75.380(d) specifically provides for assured "passage of anyone, including disabled persons."

There is no dispute that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring

escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legislative History*, at 209 (1975).

The location and physical attributes of escapeways must be such that those disabled in a mine accident and needing assistance can quickly and safely get from the start of the escapeway to the surface. Moreover, §75.380 obligates operators to continually maintain the condition of escapeways so that such passage is not hindered. See *Maple Creek Mining, Inc.*, 27 FMSHRC, 555, 559-61 (Aug. 2005). Section 75.380(d), as discussed *infra*, also provides that MSHA may require a “stretcher test” where four persons carry a miner through the area in question on a stretcher.

In *Sec. of Labor v. The American Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007) the Commission held:

...the test with respect to the use of an escape route is not whether the miners have been safely traversing the route under normal conditions, but rather the effect of the conditions of the route on miner’s ability to expeditiously escape a dangerous underground environment in an emergency.

The Administrative Law Judge found both Cain and Hall to be credible in their explanations as to why miners in an emergency could not quickly or expeditiously traverse the primary escapeway pursuant to the above cited case and statutory law.

Contestant’s own witness, Bruce Martin, gave problematic testimony as to whether individuals could carry a stretcher in the primary escapeway. (5 Tr. 113).

Another of Contestant’s witnesses, Daniel McGlothlin, conceded that travel in the primary escapeway would be difficult. (5 Tr. 307-308).

The Administrative Law Judge recognizes that the performance of a stretcher test – and the inability to perform such – would have further supported the issuance of the imminent danger order and Citation No. 8178570. However, there is no statutory or case law that mandates performance of a stretcher test before an inspector can issue a §107(a) order or a §75.380(d)(1) violation. Further, the Administrative Law Judge finds that Cain was warranted in not permitting a stretcher test in view of the rapidly changing global conditions and risk posed to miners. Considering the signs of pressure convergence, floor heaval, pillar collapse, rib compromise, bent/knocked jacks, reports of cessation, and worsening conditions, Cain had sufficient grounds for issuing an imminent danger order and §75.380(d)(1) violation with or without stretcher testing.

Indeed, Contestant’s own witness, Daniel McGlothlin, conceded that miners would have had difficulty performing a stretcher test – and this difficulty was without regard to aggravating emergency conditions such as smoke or fire. (5 Tr. 278-279, 307-308).

The Administrative Law Judge agrees with the arguments of Contestant that a mine is not an “office environment” and that escapeways need not be free of all “the normal mining conditions a miner might encounter.” (See Contestant’s brief at p. 24). However, the record here is quite clear that disabled miners could not be expeditiously and quickly evacuated in an emergency situation through the primary escapeway which is the “essence of the standard” which Contestant argues was not violated. (See Contestant’s brief at p. 24).

As noted *supra*, the Government presented photographic evidence of massive floor heaving, much sneaking its way through the primary escapeway<sup>21</sup> which served as the intake air course for fresh air coming from the surface. (See MSHA B-1 and B-2).

The floor heaving, which was sometimes present directly below the life line, would have clearly impeded escaping miners. (5 Tr. 72). In the case of emergency conditions, such as a smoky environment, miners might have significant difficulty in utilizing the life line and/or escapeway. (See also 5 Tr. 178-179).

### Significant and Substantial

A violation is properly designated S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has set forth the elements that the Secretary must establish. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The elements are:

- (1)[T]he underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury;
- and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Id.* 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 (Aug. 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 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

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<sup>21</sup> The same pathway that is the subject “primary escapeway” of Citation No. 8178570 is the “intake air way” that is the subject of Order No. 8178573. MSHA E-3.

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 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); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

### Unwarrantable Failure

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 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). 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 Secretary has established all four elements of the S&S test as it pertains to Citation No. 8178570.

There was an underlying violation of a mandatory safety standard – §75.380(d)(1) – which provides that underground mines shall have at least two separate and distinct travelable passageways, designed as escapeways, which shall be “maintained in a safe condition to always assure passage of anyone, including disabled persons. 30 C.F.R. §75.380(d)(1).

There was a discrete safety hazard contributed to by the violation – that is “miners working on the 001 MU do not have a safe means to escape during a major event occurring at the mine...” (See MSHA E-2).

The primary escapeway in the mine had been essentially neglected by the operator who appeared to be focusing its efforts on maintaining the alternate secondary escapeway – most probably because this travelway had to remain open for the removal of machinery.

The inability of miners, disabled or otherwise, to escape in a quick and expeditious manner would reasonably cause a serious injury so as to satisfy the third prong of *Mathies*. Again, under the third prong of *Mathies* the test is whether the hazard fostered by the violation is reasonably likely to cause injury, not whether the violation itself is reasonably likely to cause injury. *Pine Ridge Coal Co., LLC*, 2012 WL 601258 (Jan. 2012) (emphasis in original) *citing Cumberland Coal Resources LP*, 2011 WL 5517385, at \*5; *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1280-1281 (Oct. 2010).

The inability of miners to get out quickly and safely in emergency conditions would clearly lead to a reasonable likelihood that injury would be of a reasonably serious nature so as to satisfy the fourth prong of *Mathies*.

The Administrative Law Judge essentially adopts the arguments advanced by the Secretary that §75.380(d)(1) was in fact violated and that said violation was significant and substantial in nature. (*See also* Secretary's brief at pp. 57-62). The Administrative Law Judge further agrees with the gravity assessment of highly likely.

However, after considering the record *in toto*, including the arguments advanced by Contestant in its brief (*see* pp. 29-32) the Administrative Law Judge has some question as to whether the mine operator's conduct, though highly negligent, constituted an unwarrantable failure.

Though a "close call," the Administrative Law Judge accepts the Contestant's witness testimony as credible to the extent that the mine operator may not have been acting in a complete "reckless disregard" for the safety of miners or engaging in "intentional misconduct," so as to support an unwarrantable finding.

*Inter alia*, in reaching said conclusion the Administrative Law Judge has considered the Contestant's witness testimony that the primary passage was still "passable," that the geologic phenomena and mining conditions witnessed were essentially benign in nature and that, in any case, given the cessation of mining, there was little chance of an emergency situation involving smoke or fire.

#### Other Conditions Warranting Issuance of a §107(a) Order

In addition to the violation of §75.380(d)(1), the Secretary presented further evidence indicating that there might be a massive failure of the structural integrity of the mine. Both eye-witnesses and expert testimony was offered showing that the mine area at issue might be subject to unpredictable floor hooving, rib compromise, and possible pillar collapse. The combination of §75.380(d)(1) violation together with the signs of structural collapse properly warranted the issuance of a §107(a) order.

As noted *supra*, section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. §802(j). To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)).

The Commission has held that an “abuse of discretion” is found when “there is *no evidence* to support the decision or if the decision is based on an improper understanding of the law.” *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (citations omitted and emphasis added) (affirming the judge’s determination that the inspector did not abuse his discretion when he issued an order extending abatement time).

Considering the record, *in toto*, this Administrative Law Judge cannot find that there was no evidence to support Inspector Cain’s decision to issue the 107(a) order pursuant to the Commission’s holding in *Energy West*.

Further, considering the above cited testimony of Secretary’s witnesses, the Administrative Law Judge cannot find that there was a “clear error of judgment” on the part of Inspector Cain. (*See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Secretary has correctly stated that the standard for reviewing an inspector’s imminent danger order is “abuse of discretion” and has further correctly argued that an MSHA inspector has considerable discretion in determining whether an imminent danger exists. (*See also* Secretary’s post trial brief at p. 34). However, the Contestant is also correct in its position that an inspector’s discretion is not without limits.

As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (Mar. 1993):

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

An inspector “abuses his discretion...when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.” *Utah Power and Light Co.*, 13 FMSHRC 1617, 1622-23 (Oct. 1991).

In concluding that Inspector Cain had not acted arbitrarily or capriciously in issuing his imminent danger order, the Administrative Law Judge fully recognizes that an inspector’s *bona fide* concerns about a potential disaster and the safety of miners cannot – standing alone – overcome contradictory evidence or the inspector’s lack of knowledge and inquiry. (*See Cumberland Coal Resources*, 28 FMSHRC 545, 556-558 (Aug. 2006)). The Administrative Law Judge further recognizes that reliance upon a “single criterion” in issuing an imminent danger order may amount to an abuse of discretion. *Id.*

However, Inspector Cain's issuance of an imminent danger order on May 22, 2012 was clearly not based simply upon a generalized anxiety regarding miner's safety at the Low Splint A Mine or the observation of one safety criterion. Cain testified that he had prior knowledge of squeeze/convergence problems at the mine, that he had been informed that mining operations had been stopped due to belt/squeeze problems the day prior to his inspection, that he had personally observed impediments to easy traverse of the primary escapeway, and that he had witnessed multiple stigmata of pressure convergence, including floor heaval, rib sloughing, and jack collapse.

In her brief, the Secretary persuasively argued that relevant case law requires the Court, in determining abuse of discretion, to focus on the information that was reasonably available to the inspector when he made his decision. (*See* Secretary's brief at p. 35; *see Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992)).

Given the objective stigmata of dangerous pressure convergence, including floor heaval, rib collapse, compromised jacks, signs and reports that conditions had significantly worsened in recent days, and given that Contestant had in fact stopped mining and was in the process of retrieving equipment, a reasonable person, possessing a qualified inspector's education and experience, confronted with such circumstances that Cain had before him on May 22, 2012, would have been warranted in issuing a §107(a) order. (*See also* Secretary's cited case law in brief at pp. 35-36).

Thus, Order No. 8178569 was justified.

The Administrative Law Judge agrees with the Secretary's position, which is supported by abundant case law, that imminent danger orders should be reviewed through the perspective of an MSHA inspector who "must act quickly to remove miners from a situation he believes is hazardous." Because the consequences of making an incorrect determination could be fatal, "the benefit of any doubt" must "cut in favor of withdrawal." (*See also* Secretary's brief at pp. 36-38).

Thus, the critical question before this Court is not whether Cain was ultimately correct in his assessment of overall geologic conditions and hazards at the Low Splint A Mine. The essential issue is whether, given the exigent circumstances that Cain was confronted with, did he abuse his discretion in issuing a §107(a) order.

Accordingly, although Dr. Newman, the retained expert of Contestant, presented some sophisticated analysis to support a conclusion that there was no actual imminent danger existent at the time of the §107(a) order,<sup>22</sup> Newman himself conceded that the MSHA inspectors could

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<sup>22</sup> This Court found Dr. Newman's testimony to be only partially credible for the same reasons ably set forth by the Secretary. Dr. Newman based his conclusions on observations ten days after the order was issued. He did not perform testing in the primary escapeway. His modeling program assumed the roof and floor were the same rock. MSHA's expert, Michael Gauna, gave persuasive testimony regarding flaws in Newman's model. (*See also* Secretary's brief at pp. 26-28).

not have been expected to have engaged in such analysis, retroactive or otherwise, prior to issuing a §107(a) order. Inspectors would have instead had to rely on their own observations on May 22, 2012 at the scene.

Associated with Newman's testimony, Contestant has argued that the cessation of mining had lessened stresses on the roof and that a state of equilibrium had been attained. (*See* Contestant's brief at p. 19). The Court has credited this argument only to the extent that the mining cessation might be considered a mitigating factor in determining unwarrantable failure. However, this Court was more persuaded by contradictory evidence presented by the Secretary, including Michael Gauna's testimony regarding the unpredictable nature of the global environment at Low Splint A, even after the work stoppage.

In *Cyprus Emerald Corp.*, 12 FMSHRC 911 (May 1990), the Commission held that a mine operator had acted appropriately in dangering off an area of bad roof in that no miners worked, traveled, or were required to enter the area at issue. However, the Commission upheld the validity of the 107(a) order, noting:

Under section 107(a) of the Act, the Secretary is responsible not only for determining the area of the mine affected by the danger and removing miners from such area but also determining when miners may safely re-enter the affected area because conditions or practices that caused the danger no longer exist. We cannot conclude that the inspector abused his discretion in issuing an order prohibiting re-entry into the area until the hazard was eliminated.

Given the photographic, documentary, and testimonial evidence presented by the Secretary as to the potentially catastrophic conditions present at the Contestant's mine, this Court can find no "clear error of judgment" on Cain's part in issuing the imminent danger order.

#### Burden of Proof and Assessment of Credibility

Contestant has properly argued that it is the Secretary's burden of proof to establish the fact of violation by the preponderance of the evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). (*See also* Contestant's post hearing brief at p. 14).

However, the Commission has long held that the preponderance of evidence standard only requires that the trier-of-fact believe that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

The Administrative Law Judge finds that the Secretary has carried this less onerous burden of proof.

In reaching this determination the Administrative Law Judge has carefully evaluated the veracity of all witnesses. It is black letter law that the Administrative Law Judge as trier-of-fact must assess the credibility of all witnesses and determines the weight their testimony deserves.<sup>23</sup>

I found Contestant's witness, Randy Hensley, to be less than fully credible. A critical question raised at hearing was: why had mining suddenly stopped on May 21, 2012, less than twenty-four hours before the issuance of the imminent danger order on May 22, 2012?

Hensley's explanation that there simply happened to be another section ready to be mined struck this Court as just too happy a coincidence.<sup>24</sup>

The recollection of Cain, as corroborated by his contemporaneous field notes and Gary Hall's testimony, that Hensley had admitted on May 22, 2012 that the decisional motivation for the mine move was floor heaving under the beltline was far more believable.<sup>25</sup> (*See inter alia* 5 Tr. 28-29; 6 Tr. 8; MSHA F-1, p. 2).

Hensley's testimony was further undermined by Contestant's own witness, Safety Manager McGlothlin, who stated that he had learned on Monday night, May 21, 2012, of the pull out "because of excessive floor heave." (5 Tr. 304; *see also* Secretary's brief at p. 51).

Further, Hensley's assertions that floor heaving did not constitute a hazard despite the multiple problems caused by such at the Low Splint A simply did not ring true.<sup>26</sup>

As noted *infra*, although he asserted otherwise, Contestant's witness, Danny McGlothlin, essentially admitted to the "imminency" of the unsafe mining condition at Low Splint A by conceding that "if I'd went through that area, I'd say 'We're pulling out of there.'" (5 Tr. 312).

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<sup>23</sup> A Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

<sup>24</sup> The undersigned is reminded of the old Rabbinic saying: "When falsehood saw he had no legs, he made himself wings."

<sup>25</sup> In its brief at p. 2, fn. 2, Contestant conceded that "the recent heaving in A Left would have made it more labor intensive to continue mining in B Right and a move to a new section made sense." Understandably, however, Contestant did not draw the same negative inferences as to its witnesses' credibility on this point.

<sup>26</sup> *See also* detailed outline of Hensley's inconsistent and contradictory statements in Secretary's brief at pp. 21-23, 50-51, 64).

Likewise, the Administrative Law Judge found Contestant witness, Bruce Martin, only partially credible. Martin may have testified to a good faith (but altogether mistaken) belief that it was unnecessary to fully report hazards such as floor heaving and squeeze because miners were already aware of such. (6 Tr. 117). However, the Administrative Law Judge did not fully credit Martin's explanation as why he thanked Cain at their meeting on May 22, 2012. The Administrative Law Judge believes that the thanks arose out of a belated epiphany as to the imminent danger presented by the unreported hazards than gratitude for unrelated esoteric information.

Similarly, the undersigned found Contestant's witness, John Richardson, to have given inherently contradictory testimony. On the one hand he considered the roof safe. (6 Tr. 123-127). On the other, however, he admitted that recent roof falls had occurred, one of which cause significant rerouting of the escapeway. (6 Tr. 132-135).

As noted *supra*, the Administrative Law Judge also found the expert opinion<sup>27</sup> testimony of Dr. Newman to be "problematic." Newman spent little or no time assessing the primary escapeway. His narrow focus on the "stability of the immediate roof" raised questions regarding his conclusions about the mine's global stability. (*See also* analysis of Newman's testimony at pp. 26-28 of Secretary's brief).

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<sup>27</sup> The ALJ fully recognizes the necessity for expert testimony in many of the cases before the Commission. However, there is abundant case law indicating why expert opinion evidence may in and of itself be problematic. Indeed, many states' juror instructions contain the following or similar language:

In evaluating the credibility of the witness, you should consider their interests in the outcome of the case; that is, whether that interest in any fashion affected their testimony.

The testimony of an expert witness is merely an opinion. An opinion is what someone thinks about something and the thought may be precisely accurate or totally inaccurate and yet represent the absolute, honest conviction of the person who expressed it. Because of this, opinion evidence is generally considered of inferior or low grade and not entitled to much weight against positive testimony of actual facts.

*Fay v. Philadelphia*, 344 Pa. 439, 441-43, 25 A.2d 145, 146-147 (1942); *Kutchinic v. McCrory*, 439 Pa. 314, 226 A.2d 723 (1970). Though not bound by said jurisprudence the undersigned, as trier-of-fact, believes such contains sage cautionary advice regarding the evaluation of expert opinion.

Many of the conclusions that Newman drew from his modeling analysis were persuasively called into question by Michael Gauna who pointed out fundamental flaws in said analysis. (*See inter alia* 6 Tr. 236).<sup>28</sup>

On the other hand, Secretary's witnesses all appeared to be more forthright and consistent in their testimony.

The Administrative Law Judge found no credible evidence of any underlying personal animosity that Cain might have harbored toward any employees of Contestant which would have prejudicially motivated issuance of the §107(a) order.<sup>29</sup>

The Administrative Law Judge also rejects Contestant's suggestion that an adverse interest should be drawn from the "fact" that imminent danger orders are rare and Cain had issued four of such within two years. (*See* Contestant brief at p. 22). Without knowing the surrounding circumstances of Cain's other imminent danger orders, these facts standing alone have little probative value. One could just as easily infer from such that Cain had been investigating unusually dangerous mines in recent years.

The Administrative Law Judge discovered no "hidden agenda" underlying Cain's testimony and finds that Cain truthfully described the mining condition which he believed in good faith justified an imminent danger order.

The Administrative Law Judge further found that the testimony of Gary Hall and Michael Gauna essentially corroborated Cain's testimony both as to the conditions witnessed by Cain and the reasonable inferences that Cain drew from said observations.

Unlike the testimony of many of the Contestant's witnesses, Cain's, Hall's, and Gauna's testimony was remarkably consistent, both internally and externally, raising no issues of credibility. Regardless of whether these witnesses were actually correct in their interpretations

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<sup>28</sup> Of course the ultimate issue before the ALJ was not whether Newman, as Contestant's retained expert, was expressing his honest convictions about conditions at the mine and, indeed, was not whether Newman was correct in his retroactive analysis that no imminent danger in fact existed. The ultimate issue was, as Secretary correctly stated: "Whether the MSHA inspectors abused their discretion in determining there was an imminent danger in the Low Splint A Mine on May 22, 2012, based on the circumstances and information that was before them at the time the determination was made, such that the 107(a) order (Order No. 8178569) was lawfully issued on May 22, 2012." (*See* Secretary's brief at pp. 30-31).

<sup>29</sup> The ALJ rejects Contestant's suggestion that Cain's reported remark to Hensley that Hensley would "remember me when I leave today" indicated an improper *mens rea* on Cain's part. (*See* 5 Tr. 9-10; pp. 22 of Contestant's brief).

and assessments of conditions observed, the Administrative Law Judge found all three witnesses to be fully credible in their recollections of events and completely honest in their expressed convictions.

However, although finding that the Secretary has proved her case by the preponderance of the evidence, the Administrative Law Judge acknowledges that this case is not without uncertainty.<sup>30</sup> The Contestant has offered some evidence and presented some argument which raises some doubt regarding the validity of the within imminent danger order. If this were a criminal proceeding, this Court may have found that the Secretary had failed to carry the more onerous burden of proof beyond a reasonable doubt.

II. Both Sections 75.364(b)(1) and (b)(2) were violated and both violations were significant and substantial in nature

Section 75.364(b)(1) and (b)(3) state as follows:

- (b) Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:
- (1) in at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.
  - (2) in at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

Order No. 8178573 (MSHA E-3) states as follows under Section 8 Condition or Practice:

The weekly examiner designated by the operator conducting the examination for the intake for Southeast Mains, A Left, and B Right did not recognize hazards found throughout these areas. The previous examinations recorded in the record book did not list any hazards for the examinations conducted during the month of May prior to this date. Hooving bottom, deteriorating riblines, damaged stoppings, and failure to maintain a travelable escapeway were found during an inspection of the area. The failure to recognize and record hazards in the record books does not allow or show miners and mine management an accurate depiction of the intake or escapeway and can seriously injure miners that work or travel through the affected area.

This violation is an unwarrantable failure to comply with a mandatory standard.

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<sup>30</sup> Such, however, is the “nature of the judicial process.” As Benjamin Cardozo observed nearly a century ago: “...in my first years upon the bench...I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. *The Nature of the Judicial Process*. 1921.

The operator of this mine engaged in aggravated conduct constituting more than ordinary negligence in that:

1. The examiner designated by the operator failed to recognize the hazards.
2. The record shows the examinations being countersigned by the operator.
3. The operator failed to ensure a proper examination is being conducted and recorded.
4. This violation has existed for a period of time.
5. The hazards found were obvious and extensive.

Order No. 8178574 (MSHA E-4) states as follows under Section 8 Condition or Practice:

The weekly examiner designated by the operator conducting the examination of the return for the Southeast Mains, A Left, and B Right did not recognize the hazards found throughout these areas. The previous examinations conducted in the record book did not list any hazards for the examinations conducted during the month of May prior to this date. Hooving bottom, deteriorating riblines, and damaged stoppings were found during an inspection of this area. The failure to recognize and record hazards in the record book does not allow or show miners or mine management an accurate depiction of the return air course that affects the 001 MMU. This case seriously injure miners that work or have to travel through this area to maintain the returns.

This violation is an unwarrantable failure to comply with a mandatory standard.

The operator of this mine engaged in aggravated conduct constituting in more than ordinary negligence in that:

1. The examiner designated by the operator failed to recognize the hazards.
2. The record shows the examinations being countersigned by the operator.
3. The operator failed to ensure a proper examination is being conducted and recorded.
4. This violation has existed for a period of time.
5. The hazards found were obvious and extensive.

At hearing the Secretary, as noted *supra*, presented extensive testimony, further corroborated by photographic evidence, that there were numerous observable hazards present in the intake air course which was also the primary escapeway. (*See inter alia* S. Tr. 52-63, 178-181, 236-237; MSHA exhibits B-1 – B-7).

Despite the obvious and possibly ominous nature of these conditions, the weekly examiner essentially failed to recognize, record, or report such.

The Administrative Law Judge specifically rejects Contestant's argument that the weekly examinations had been conducted in a fashion consistent with what a reasonably prudent person would do. (*See* Contestant's brief at pp. 34-35). To the contrary, given that the required

examinations are “of fundamental importance in assuring a safe working environment underground,” (see *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995)), the Administrative Law Judge finds Bruce Martin was clearly derelict in his duties. The Administrative Law Judge hereby adopts the rationale of the Secretary in support of this violation being at a significant and substantial level. (See Secretary’s brief at pp. 62-64).

Incorporating the rationale recited *supra*, the Administrative Law Judge further agrees with the levels of gravity and negligence assessed by the Secretary at Order No. 8178573.

However, the Administrative Law Judge again questions as to whether the operator’s negligence rose to a level of unwarrantable failure. *Inter alia*, as argued by the Contestant in its brief (pp. 38-40) there remains some questions as to the length of the time the conditions were known to the operator. Further, the Administrative Law Judge found Martin to be somewhat credible in explaining that he had failed to fully report floor hooving because it was such a common phenomenon at Low Splint A Mine that miners were aware of such. Although this explanation was clearly an inadequate defense as to the fact of violation and S&S nature of such, the Administrative Law Judge did find that Martin’s failures were more the result of ignorance, misunderstanding, and incompetence than that of intentional misconduct or reckless disregard, so as to justify an unwarrantable finding.

As to Order No. 8178574 regarding failure to report hazards in the return for Southeast Mains (see MSHA E-4), the Administrative Law Judge again incorporates the rationale previously recited *supra*. As persuasively argued by the Secretary (see brief at p. 67-68), the failure to report any signs of squeeze, pillar/floor closure, or extreme floor hooving constituted a significant and substantial violation of §75.364(b)(2). The Administrative Law Judge hereby adopts the Secretary’s rationale regarding such as well as its gravity/negligence assessments. (See pp. 67-69 of Secretary’s brief).

However, for the same reasons set forth *supra*, the Administrative Law Judge hesitates to find unwarrantable failure, given *inter alia* the changing conditions of the mine and questions regarding length of notice to the operator.

Therefore, the Administrative Law Judge finds the following: the imminent danger order at No. 8178569 was properly issued pursuant to §104(a) of the Act; the violations of §§75.380(d)(1), 75.364(b)(1), and 75.364(b)(2) at Citation/Order nos. 8178570, 8178573, and 8178574, respectively, were significant and substantial in nature but were not unwarrantable failures.

## ORDER

In view of the above, it is ordered that the §107(a) imminent danger order at No. 81878569 was validly issued.

It is further ordered that the separate citation at No. 8178570 and separate Order Nos. 8178573 and 8178574, issued in conjunction with said §107(a) order, were validly issued based upon significant and substantial violations of §§75.380(d)(1) and 75.364(b)(1) and (2), respectively, pursuant to §104(d)(1).

It is further ordered, however, that said violations were not a result of unwarrantable failure(s) on the part of Contestant.

/s/ John K. Lewis  
John K. Lewis  
Administrative Law Judge

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/smg

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 9, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. WEST 2010-38
Petitioner,	:	A.C. No. 05-03836-195088
	:	
	:	Docket No. WEST 2009-1323
v.	:	A.C. No. 05-03836-19225
	:	
	:	Docket No. WEST 2010-578
	:	A.C. No. 05-03836-207148
	:	
TWENTYMILE COAL COMPANY,	:	Mine: Foidel Creek
Respondent.	:	

**DECISION**

Appearances: Amanda K. Slater, Esq.; Alena Amundson, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary

Christopher G. Peterson, Esq.; Page Jackson, Esq., on behalf of Jackson, Kelly, PLLC, Denver, Colorado, on behalf of Twentymile Coal Company

Before: Judge David F. Barbour

These matters concern consolidated Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to sections 105(d) and 110(I) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815(d), 820(I). The petitions allege that Twentymile Coal Company (“Twentymile”) is liable for seventeen violations of the Secretary’s mandatory safety standards for underground coal mines. 30 C.F.R. Part 75. The Secretary proposes penalties of \$63,698 for the violations. The parties presented testimony and documentary evidence at a hearing in Steamboat Springs, Colorado.

At the commencement of the hearing counsel for the Secretary stated that the parties had settled six of the violations. Counsel read the settlements into the record, and the court approved them. Tr. 15-16. Details of the settlements will be set forth at the close of this decision.

## STIPULATIONS

Before presenting testimony regarding the contested violations the parties stipulated as follows:

1. These cases involve an underground bituminous coal mine, the Foidel Creek Mine, which is owned and operated by Twentymile;
2. The mine is subject to the jurisdiction of the Act;
3. The Court has jurisdiction over these proceedings;
4. Twentymile is an operator as defined in section 3(d) of the Act;
5. The exhibits offered by the parties are authentic, but the parties do not stipulate to the relevancy of the exhibits or to the truth of the matters asserted in the exhibits;
6. The operations of Twentymile affect interstate commerce;
7. The individuals whose signatures appear in block 22 of the citations and orders at issue were acting in their official capacities and as authorized representatives of the Secretary when they issued the citations and orders;
8. The penalties proposed for the violations alleged in the citations and orders will not affect Twentymile's ability to remain in business;
9. Twentymile is a large operator;
10. The certified copy of the MSHA assessed violation history reflects the history of the mine for the 15 months prior to the date of the citations and orders and may be admitted into evidence without objection from Twentymile;
11. In Docket No. WEST 2010-578 the parties agree that if Order No. 8460435, which was issued pursuant to section

104(d)(2) of the Act (30 U.S.C. §814(d)(2)), was the result of Twentymile's unwarrantable failure to comply with the cited standard, the order was properly issued under section 104(d)(2);

12. In Docket No. WEST 2010-578 Order No. 8460435 refers in its body to Citation No. 8430434. This citation is marked as Government Exhibit 2 and the parties agree that it may be admitted into evidence without objection;

13. Citation No. 8430434 is final pursuant to a settlement in Docket No. WEST 2010-162. The settlement was approved by Commission Administrative Law Judge Margaret Miller on September 21, 2011.

See Tr. 16-18.<sup>1</sup>

**WEST 2009-1323**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>
8457448	6/23/09	75.516-2(c)

Rather than try the issues involved in this citation, the parties agreed that the Secretary would rely on a written declaration from Inspector Charles Bordea who issued the citation and Twentymile would rely on the transcript of the testimony of Rick Stillion, who was called as its witness in a case heard and decided by Commission Administrative Law Judge Richard Manning. *Twentymile Coal Co.*, 33 FMSHRC 1885 (August 2011). They further agreed that the issues with regard to Citation No. 8457448 are the same as those in Judge Manning's case. Tr. 22-23.

Citation 8457448 states:

At the inspection of Load Center #29, located at 5<sup>th</sup> Main North X-43, it was found that the active . . . communication cable passing through this area was lying across two lengths of energized high voltage cable (12,470 VAC). No additional insulation was installed at this point to protect the communication cable. No visible damage was

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<sup>1</sup> While the substance remains the same, the wording of the stipulations has been slightly modified for editorial reasons.

observed to any of these cables and no methane was detected. WEST 2009-1323, Petition for Assessment of Civil Penalty, Exhibit A.<sup>2</sup>

Section 75.516-2(c) requires that “[a]ll communication . . . cables installed in track entries shall . . . be installed on the side of the entry opposite to trolley wires and trolley feeder wires.” It also requires that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.”<sup>3</sup>

In the case before Judge Manning, the Secretary alleged that Twentymile violated the standard in two different instances when it failed to provide additional insulation for two communication circuits where they passed under, over and in one case touched energized power conductors and an energized fluorescent lighting fixture. The communication circuits were mine phone lines. No added insulation was applied to the wires. *Twentymile*, 33 FMSHRC at 1940-41. MSHA’s inspector believed that pursuant to section 75.516-2(c), additional insulation should have been provided to the outer jackets of the phone lines. This insulation “would be something in addition to the outer jacket of the communication cables.” 33 FMSHRC at 1941. The inspector feared that a communication cable would touch a damaged power cable, the higher voltage of the power cable would be transmitted by the communication cable to a telephone, shocking a miner using the phone. *Id.* According to the inspector, the added insulation would provide an “extra measure of safety” and prevent the feared accident. *Id.*

The inspector testified that the communication circuit had two insulated and twisted wires inside an insulated jacket.<sup>4</sup> However, the inspector insisted that more insulation was needed on the already insulated conductors, and he advised mine management that no matter how well insulated the circuits were, the standard required additional insulation for circuits where they passed over or under high voltage power conductors or cables. *Id.* at 1941-1942. The company questioned this interpretation of the standard and maintained because the insulation already on the communication and power cables eliminated the potential for a transfer of electricity to the communication cables, additional insulation beyond what is already in place was unnecessary. *Id.* at 1944.

After considering the evidence and the parties’ arguments, Judge Manning held:

The cited standard requires, in pertinent part that “[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.”

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<sup>2</sup> Punctuation changes have been made for editorial reasons.

<sup>3</sup> The standard excepts communication cables that are buried. 30 C.F.R. § 75.516-2(b).

<sup>4</sup> At other mines communication circuits are just two insulated twisted conductors that do not have an outer jacket. 33 FMSHRC at 1941.

30 C.F.R. § 75.516-2(c) [(emphasis added)]. I find . . . the language of this safety standard to be quite clear. This is a safety standard that served an important purpose when it was first promulgated because much of the electrical wiring in mines was either uninsulated or poorly insulated. Adding extra insulation where power conductors passed near communication circuits was designed to protect those using the communication system from . . . electrical shock. I credit the testimony of [Twentymile’s electrical department supervisor] concerning modern insulated power conductors and communication circuits as well as the substantial outer jackets of power conductors. These improved, well-insulated power conductors have rendered the safety standard obsolete. The risk of electric shock is nonexistent as long as the operator frequently checks the conductors for abrasion or other damage. The Secretary accepts a single wrapping of electrical tape on the power conductor to abate these types of violations. Nevertheless, I do not have the authority to modify or vacate the safety standard. Mine operators are required to add “additional insulation” where communication circuits pass over or under any power conductor no matter how well insulated the conductor is.

33 FMSHRC at 1945.

In the case before the court, the Secretary echoing Judge Manning and the words of the standard, states that “mine operators are required to add ‘additional insulation’ where communication circuits ‘pass over or under any power conductor’ no matter how well-insulated the conductor is.” Sec’s Statement of Position (February 2, 2012) at 1 (*quoting Twentymile*, 33 FMSHRC at 1945, and 30 C.F.R. §75.517-2(c). Like Judge Manning she further states that “ALJs have no authority to modify or vacate the safety standard.” Sec’s Statement at 1(*quoting Twentymile*, 33 FMSHRC at 1945. The Secretary adds that there is no dispute that additional insulation was lacking on the communication cable at the location cited by Inspector Bordea, that it is also undisputed the communication cable passed over two lengths of power conductors, that mine management was aware additional insulation was required, and therefore consistent with Judge Manning’s ruling the court should uphold the citation as written. Sec’s Statement at 2.

The company highlights the fact that communication wires are insulated by the manufacturer and that around the insulated wires the manufacturer provides a wrapping that augments the existing insulation. Twentymile points out that the communication cable consisted of four insulated communication wires, that each set of two wires formed a communication circuit, that around each of the insulated wires there was a layer of material that insulated the

conductors and that around all of the wires there was another covering that provided an additional layer of insulation. Twentymile maintains that this jacket constituted the “extra insulation” required by the standard. Twentymile’s Statement of Position (February 2, 2012) at 1. It states that the issue is whether the Secretary can prove a violation of section 75.516-2(c) when manufacturer-provided additional insulation is wrapped around already insulated conductors. Twentymile Statement at 2. Twentymile asserts that the court should follow the reasoning of Commission Administrative Law Judge Gary Melick who found no violation of section 75.516-2(c) where the evidence established the manufacturer provided additional insulation. *Id.* (Citing *Emerald Coal Resources, LP*, 29 FMSHRC 660 (July 2007)).<sup>5</sup> Not surprisingly, Twentymile agrees with Judge Melick and states that because the language of section 76.516-2(c) does not instruct how or when the required additional insulation should be provided, “either operators *or* manufactures may provide the additional insulation which the standard demands.” Twentymile Statement at 2 (*emphasis in original*).

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<sup>5</sup> In *Emerald* Judge Melick stated:

The Secretary argues . . . that the additional insulation required by her regulation must be provided by the mine operator and cannot legally be provided by the manufacturer . . . . She provides no legal or rational basis for this argument. Indeed, the Secretary does not even claim that her interpretation of the standard requires deference under applicable law. In any event, deference to an agency’s construction of her own regulation is due only when the plain meaning of the rule is doubtful or ambiguous. Here the meaning of the regulation is clear on its face.

Under the circumstances I find that there was no violation of . . . [section 75.516-2 (c)].

29 FMSHRC at 661 (notes and citations omitted).

Judge Manning acknowledged Judge Melick’s ruling and empathized with Judge Melick’s apparent “frustration with the pointless requirement that additional insulation must be provided in all circumstances, even where the insulation provided by the manufacturer more than meets the requirement to protect the communication circuit from becoming energized.” *Twentymile*, 33 FMSHRC at 1945 n.6. However, Judge Manning disagreed with Judge Melick’s conclusion that the phrase “additional insulation” could be interpreted to refer to the insulation that was provided by the manufacturer for the entire length of the power conductor. *Id.*

## THE VIOLATION

The court respects the analyses of Judges Manning and Melick. The reasoning of each is logical. However, the court must choose, and the court sides with Judge Manning. The court is persuaded that in general and in the case before it, a standard's mandate is directed at the operator. Therefore, it is the operator who must provide "additional insulation" when its "communication circuits pass over or under any power conductor" (30 C.F.R. §75. 516-2(c)), and the operator is required to comply even if the insulation it adds augments the insulation with which the circuits are manufactured. The court recognizes, as did Judge Manning, that there may be particular situations in which the requirement is "pointless" (*Twentymile*, 33 FMSHRC at 1946 n. 6), but the court observes that there also may be situations where it is not, and the court's primary duty is to derive the standard's meaning from its words and to apply the meaning to mine-specific facts. The court is bound by the law as it is not by what it or others think it should be. If the standard needs changing the duty of going forward lies with the Secretary, not with the Commission. Because the court reads the standard as requiring the operator to provide extra insulation ("[a]dditional insulation shall be provided") and because Twentymile did not add any insulation to the cited communication cable, the court holds that the company violated the standard.

## GRAVITY AND NEGLIGENCE

The citation asserts that the violation was unlikely to cause injury and that it was due to the company's moderate negligence. Citation No. 8457448. The parties do not dispute the inspector's findings, and the court certainly agrees with the inspector that the violation was not serious. However, given the plausible arguments on both sides of the issue as to whether compliance was required by Twentymile, the court will order the Secretary to modify the inspector's "moderate" negligence finding to one of "low" negligence.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8463328	6/16/09	75.380(d)(2)

The citation states:

The escapeway from the return air course, north mains, 7 left, was not clearly marked to identify the escapeway direction. The escapeway sign provided in the return air, # 1 entry was observed pointing to the wall and did not identify the direction of travel in this area. There were three directions of travel in this area and the escapeway from the return entry #1 changed direction at this location. Examiners travel this entry on

a weekly basis and the condition was not identified or corrected. Gov't Exh. 8.<sup>6</sup>

Mark J. Albrecht is a coal mine safety and health specialist who has worked in MSHA's Gillette, Wyoming office since 2007. Albrecht started with MSHA in 1998 following approximately 11 years of employment in western underground metal mines. Tr. 33-34. Albrecht stated that he is familiar with Twentymile's Foidel Creek Mine. He estimated he has been to the mine on official business approximately six to eight times. Tr. 34. Most of his visits have been to perform inspections. Tr. 53.

One of those inspections occurred on June 16, 2009. Albrecht went to the mine to conduct respirable dust sampling on a miner, but Albrecht was unable to sample the miner because the miner had gone home. Tr. 35. Therefore, Albrecht decided to check the seal line in the 2 North Mains. *Id.* Albrecht was accompanied by company representative, Matt Winey. Tr. 36. According to Albrecht, he and Winey traveled inby in the No. 1 entry of the North Mains. Tr. 37, 38, 46. The entry is a return entry. Tr. 39. After proceeding some distance they came to an area where the entry and the lifeline that ran along the side of the entry turned and went to the right. The lifeline was coming from the 12 Left Section and it was going to the portal.<sup>7</sup> Tr. 47. Following the lifeline offered miners a quick route out of the mine. Tr. 53.

Albrecht stated that although Winey did not agree that the 12 Left Section was an active working section, the escapeway was marked on the map as an escapeway and therefore it had to be maintained as an escapeway. This meant, among other things, that the signs in the escapeway had to be correct.<sup>8</sup> Tr. 52. Albrecht testified that as he and Winey traveled the entry they noticed a sign near the lifeline. The sign read, "Escapeway." The sign included a directional arrow. Tr. 38, 41. However, there was a problem. The arrow pointed into, not out of the mine. Tr. 37-38, 41. Albrecht believed the misdirection of the escapeway sign violated section 75.380(d)(2) because under the standard escapeways must be "clearly and conspicuously marked." Tr. 38. As Albrecht understood it, the sign needed to show the "direction of . . . travel of the escapeway outby" and it had to also indicate the "most direct route" out of the mine. *Id.* Albrecht described the misdirected sign as confusing. The lifeline and the sign were not indicating the same direction to exit the mine. Tr. 42. Therefore, Albrecht believed that the escapeway was not clearly marked to show the direction of travel and that this violated section 75.380(d)(2). *Id.*

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<sup>6</sup> Spelling corrections have been made for editorial reasons.

<sup>7</sup> 30 C.F.R. §75.380(d)(7) requires each escapeway to be provided "with a continuous directional lifeline" that can guide miners to the surface. The required lifeline is frequently a steel cable covered with vinyl. Cones are attached to the lifeline indicating the direction to the surface.

<sup>8</sup> On contemporaneous notes that Albrecht wrote, "The map shows this is an escapeway and they are required to maintain it." Gov't Exh. 9 at 7.

The miners who traveled in the area were the weekly mine examiner and those who corrected conditions found by the examiner. Miners who rock dusted also traveled in the area. Tr. 42, 44. The weekly examiner was supposed to check to make sure the escapeway was properly marked. Albrecht believed that the misdirected sign was “[v]ery obvious” and that the condition should have been detected and corrected. Tr. 43. Albrecht was not sure how the sign became turned in the wrong direction. Tr. 44.

Albrecht testified that the danger posed by the misdirected sign was mitigated by the fact that the lifeline was in place. Consequently, he believed that it was unlikely miners would be injured trying to exit the mine. Tr. 43. Albrecht agreed that if a fire or explosion occurred a miner might or might not be able to see the sign depending on the density of the smoke in the entry and in such circumstances it was most likely that miners would follow the lifeline to the surface. Tr. 54. Still, if visibility was not impaired it was possible a miner or miners could see the sign and go the wrong way, traveling into not out of danger. Tr. 44. When he issued the citation Albrecht thought that one person, the weekly examiner, most likely was affected by the violation. Gov’t Exh. 8; Tr. 56.

Albrecht acknowledged that abating the condition was simple. He stated, “We flipped the sign around so it was pointing in the right direction.” Tr. 44.

Matt Winey has worked for Twentymile for 23 years, both as a rank-and-file miner and as a salaried employee. Tr. 57-58. On June 16, 2009 he was working as a shift foreman. Tr. 58. One of his duties as a shift foreman was to accompany any MSHA inspector who was conducting an inspection, which is why he accompanied Inspector Albrecht. Tr. 59.

Winey was asked to locate the allegedly misdirected sign on the company’s mine map. Winey drew an oval with red ink around the No. 1 Entry of 2 Main North in the 7 Left Section. Tr. 60; Resp. Exh. 11. However, according to Winey, the 7 Left Section was sealed and was not a working section at the time of the inspection. Tr. 67, 70. In addition, the 12 Left Section, the section where the lifeline originated, was not an active working section on June 16. *Id.* Winey thought that it had been “a year or so” since the two sections had been in production. Tr. 71, 76.

Winey also maintained that the only persons who would be in the area were the fire bosses who traveled the area on a weekly basis. Tr. 74. This meant that one time a week someone walked by the area where the sign was hanging. *Id.* Winey agreed with Albrecht that the sign was pointing the wrong way. *Id.* He also agreed that the sign and the lifeline were indicating different directions. Tr. 74-75. Asked if it was possible someone could be confused by the direction of the sign, Winey responded, “I guess it’s possible.” *Id.*

According to Winey, on June 16 the working sections of the mine were “further in the mine on the left side in 15 Left and 16 Left.” Tr. 62-63; Resp.’s Exh. 11. He indicated that there were two faces being mined. He identified on the map where the faces were located on June 16. Tr. 64; Resp. Exh. 11. One of the faces, 15 Inby, he labeled No. 1 and the other, 15 Outby, he labeled No. 2. *Id.* The primary escapeways from the faces are marked on the mine map in blue.

Resp. Exh. 11. The escapeways lead to the 6 Main North Intake Shaft, which Winey circled in red and marked with the number 3.<sup>9</sup> Tr. 65-66; Resp. Exh. 3. Winey also identified the secondary escapeways. They are marked on the map in red. Tr. 66. Winey testified that the secondary escapeways lead to some parked trucks that were a few breaks from the 6 Main North Intake Shaft. Winey circled the area and numbered it with a 4 and wrote “trucks” on the map. Tr. 66; Resp. Exh. 11. Should miners need to use the secondary escapeways, they would travel to the trucks and drive to the portal. Tr. 67.

### THE VIOLATION

Section 75.380(d)(2) requires that each escapeway be “clearly marked to show the route and direction of travel to the surface.” The parties do not disagree about the fact that a directional sign marking an escapeway was turned the wrong way and did not show “the route and direction of travel to the surface.” Tr. 37-38, 41, 74. However, the fact that the sign did not show the route and direction of travel to the surface does not in and of itself establish the violation. This is because the signage requirement is premised on the fact that the sign shows the route and direction of travel of an escapeway and because escapeways must be provided from “each working section.” 30 C.F.R. §75.380(b)(1). If an area is not a “working section,” there is no requirement to maintain an escapeway and hence no requirement to maintain proper signs.

A “working section” is defined as, “All areas of the coal mine from the loading point of the section to and including the working faces.” 30 C.F.R. 75.2. In turn, a “working face” is defined as, “[a]ny place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.” *Id.* The problem for the Secretary is that the testimony does not permit finding that the cited sign was located in a “working section” and therefore was required to be in compliance with section 75.380(d)(2). Inspector Albrecht was not sure if the sign was located in a working section. Rather, Albrecht based his conclusion that a correctly placed sign was required on the fact that the sign was in an entry marked as an escapeway on the mine map. Tr. 51-52. (“It was an escapeway that’s marked on the map and it has to be maintained.” Tr. 52.) Although the exact location of the sign is the subject of confusing testimony, it seems clear that it was located off of either the No. 12 Left Section or the No. 7 Left Section. Tr. 47, 60. In either event, Winey was definite in testifying that neither section was a “working section.” Tr. 70, 71. In fact, he believed neither had been an active working section for “a year or so.” 71. According to Winey, on June 16 the active working section was the 15 Left Section, a section where two active faces were located. Tr. 64, *See* Resp. Exh. 11. He located the section’s two faces on the mine map. *Id.* He identified the primary and secondary escapeways from the section. Tr. 65-67. The Secretary did not dispute his testimony. For these reasons, I find that the cited escapeway sign was not one that showed the route and direction to travel to the surface from a “working section” and that there was no violation of the cited standard. The citation must be vacated.

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<sup>9</sup> Winey testified that there was an escape capsule located at the shaft. Tr. 68.

**WEST 2009-1323**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>
8463331	6/17/09	75.202(a)

The citation states:

Loose unconsolidated material was observed in the access to the belt line at 1 main north, # 3 entry, # 1 crosscut. The loose material was evident by the material that had previously fallen on the ground and there were rocks 1'x5'x8" thick observed hanging in this area. The area of loose material was 4'x5' and was not scaled down to prevent it from falling on persons accessing this area. There was a crack that was visible behind the loose material and there were foot prints observed on the ground under the affected area. The fire boss was required to travel through this area to access the air lock where the DTI [date, time and initials] board was located. The area had been accessed on 6-15-09 and the condition was not identified. If an accident occurred, it would be expected to result in broken bones, contusions and fractures.

Gov't Exh. 10 at 1.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>
8460324	6/23/09	75.363(b)

The citation states:

In # 2-Main North entries, #3-entry at crosscut-1, the operator failed to maintain the roof in a safe condition to protect person[s] traveling or working in the said location from hazards related . . . [to] falls of the roof (loose material in the roof prone to fall). The Operator received [C]itation # 8463331 on 06-17-2009 for the violative condition/hazardous condition. Also received a failure to abate [Section] 104(b) Order for this violative condition. Consequently, the operator failed to make [a] record of this hazardous condition which was found during an exam/inspection of the belt line (other than a pre-

shift, on-shift or weekly exam). The initial effort made was to post the hazardous condition by delineating a portion of the actual affected area underground with yellow caution tape. No further corrective action was taken to support the area in question.

Gov't Exh. 13.

On June 17, 2009 Albrecht returned to the mine. This time he was accompanied underground by foreman, John Boone. Tr. 78. Albrecht testified that he and Boone traveled along the beltline at 2 Main North, No. 3 Entry, No. 1 Crosscut. The men crossed through one of the double air doors in the crosscut (also called "machine doors" or "man doors") to reach the beltline side of the crosscut. Once through the doors, the first thing that Albrecht noticed was an area of fallen rock and debris on the mine floor. The fallen material measured approximately 4 feet by 5 feet. Tr. 80-81. Rocks in the material were about "a foot square." Tr. 82. Above the material Albrecht noticed "an indentation" in the roof (*Id.*), which contained, as Albrecht put it, "loose material still hanging out of the roof where the rock had actually fallen." Tr. 83. There also was loose roof on the "outskirts" of the loose, indented area. *Id.*

Albrecht testified that he asked Boone about the pile of rocks and debris. Boone replied, "[T]hat should be cleaned up." Tr. 83. Then, Boone looked at the hanging material in the roof and said, "[T]hat should be barred down." *Id.* About this time the company's examiner came down the beltline. He joined Albrecht and Boone, and Albrecht asked about the fallen material on the ground. The examiner told Albrecht, "[T]hat was there two days ago." Tr. 83-84. The examiner stated that the material on the floor, "Probably should be cleaned up." Tr. 91. Albrecht maintained that he then pointed to the roof and asked the examiner, "What about that?" and the examiner replied, "Oh, that needs to be barred down and took [sic.] off." *Id.* Albrecht did not know the name of the examiner. Tr. 84. Albrecht was sure, however, that the examiner had to pass the material when he came into the crosscut to sign the DTI board.<sup>10</sup> Tr. 91.

In Albrecht's opinion because the roof above the fallen rock and debris exhibited hanging, loose material, the roof was not adequately controlled, and the loose material should have been "scaled down". Tr. 84. Albrecht acknowledged that no one could be certain if the roof was going to fall, but he thought that any reasonable person familiar with the mining industry would not believe that the roof was adequately controlled. Tr. 85. Such a person would believe that the loose material should be taken down. *Id.* The condition of the roof as "[v]ery obvious." Tr. 86.

Albrecht testified that the existence of the hazardous roof condition was the result of Twentymile's high negligence. Tr. 90; Gov. Exh. 10 at 1. The on-shift examiner told him that

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<sup>10</sup> The DTI board was located between the two manddoors. Tr. 102.

the material on the ground had existed “for at least two days.” Tr. 90. It is the examiner’s job to identify the hazard so that it can be corrected. Tr. 90-91.

Albrecht testified that there were “a number” of miners who were exposed to the hazard created by the condition. These included the on-shift examiner who inspected the belt and traveled into the crosscut to sign the DTI board and any miners who worked on the belt and traveled through the door in the crosscut to reach it. Tr. 86, *see also* Tr. 87-88. He noted that the on-shift examiner had to examine along the belt and go into the crosscut at least once each shift. *Id.* Albrecht also noted that the fallen material had been rock dusted and there were footprints in the rockdust. Tr. 87. Someone had traveled under the defective roof. *Id.*

Albrecht stated that “due to the amount of people that traveled in [the] area” and the fact that at least once a shift the on-shift examiner passed the area, it was reasonably likely a miner would be injured because of the condition of the roof. He feared that as a miner passed beneath or adjacent to the roof, the loose, hanging material would fall and strike the person. Tr. 88, 101. Albrecht observed that the examiner was exposed to the hazardous roof twice during a shift; when he walked to the DTI board to initial it and when he walked back out of the crosscut. Tr. 102. If a miner was hit by the material, the miner was likely to suffer broken bones or a head injury. The extent of the injury depended on where a miner was hit by falling roof. Tr. 82, 88.

Albrecht asserted the condition violated section 75.202(a), which requires that roof be supported or controlled to protect persons from roof fall hazards, and he cited the company for the violation. Tr. 97. Company officials then dangered-off the area with tape because they could not find a scaling bar to bring down the hanging, loose material. Tr. 92.

When he returned to the surface Albrecht looked at the on-shift examination book. The condition of the roof was noted. Tr. 87. Albrecht also looked at the pre-shift examiner’s book for the evening shift on June 17. The report stated in part, “Top is scally and some needs [to be] barred down.”<sup>11</sup> Tr. 89-90; Resp. Exh. 22 at 74.

Barry Grosley works for MSHA in the agency’s Craig, Colorado field office where he supervises coal mine inspectors. Prior to becoming the office’s full time supervisor, Grosley was the acting supervisor. Tr. 105. As the acting supervisor he conducted mine inspections. Before he was hired by the agency in 1999 Grosley had 15 years of experience as an underground coal miner. Tr. 106. He holds an associate’s degree in geology and mine engineering. *Id.*

Grosley participated in a comprehensive inspection of the Foidel Creek mine in June, 2009. Tr. 107-108. At the time Grosley was the acting supervisor, which meant that in addition to inspecting the mine, he supervised those who were helping with the inspection, and he

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<sup>11</sup> Albrecht observed that the examiner wrote the statement in the “Remarks” section of the book. In Albrecht’s opinion the examiner should have written the statement in the section headed, “Hazardous Conditions Observed and Reported.” Tr. 90, 97.

reviewed their citations. Tr. 108. Grosley reviewed the roof control citation issued by Albrecht, and on June 23, 2009, six days after the roof control citation was issued, he went to the mine to determine whether the cited loose, hanging roof had been taken down or supported. Tr. 109-110, 112.

Grosley travel to the No. 1 Crosscut of the No. 3 Entry where the roof condition cited by Albrecht was located.<sup>12</sup> Grosley testified that upon reaching the crosscut it was clear that the condition cited by Albrecht on June 17 had not been corrected. For this reason, Grosley issued an order charging the company with a violation of section 104(b) of the Act.<sup>13</sup> Tr. 113; Gov't Exh. 14. In his opinion the hazardous condition that was cited by Albrecht still existed. Tr. 128. Grosley testified that he had seen "a lot" of injuries caused by material falling from the roof, injuries such as broken bones and lacerations. Tr. 127. The fallen roof material and the allegedly unstable roof were cordoned off with yellow tape, but in his opinion this did not abate the condition. Tr. 116. Moreover, Grosley noticed other hazardous roof conditions that were not mentioned in the June 17 citation.

Grosley testified that there was still fallen rock on the floor (Tr. 126-127) and the roof above the material was fractured with many hanging rocks. The rocks were up to one foot square or of irregular shapes and they were 4 to 5 inches thick. Tr. 123. He also stated that a "fracture zone" in the roof extended past the yellow tape line and into the belt entry.<sup>14</sup> Tr. 124. The yellow tape cordoned off some, but not all of the area of unsupported roof, and Grosley noticed several loose roof bolt bearing plates above the belt walkway.<sup>15</sup> Tr. 122, 123. Tr. 117. The tape did not

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<sup>12</sup> Before entering the mine on June 23, he looked at the report of the pre-shift examination for the area Albrecht cited. Tr. 154. He found nothing in the report about hazardous conditions that he would later find. Tr. 154.

<sup>13</sup> Section 104(b) provides in part that if an inspector:

finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed . . . and (2) that the . . . time for abatement should not be further extended, he shall . . . promptly issue a [withdrawal] order[.]

30 U.S.C. § 814(a).

<sup>14</sup> In Grosley's opinion the fracture zone in the roof might or might not be related to continuing stress on the roof. Tr. 146.

<sup>15</sup> The roof bolts were installed when the entries were developed, some 20 years before Grosley's inspection. Grosley did not know if the roof bolts were mechanical bolts or resin  
(continued...)

extend out into the walkway of the beltline so there was room to walk between the tape and the belt and under some of the loose plates. Tr. 123. Because the tape did not “delineate the entire . . . affected area,” Grosley suggested that what Twentymile should have done was erect a physical barrier barring entry to the area or scale down the loose material and tighten the roof bolt plates. *Id.* Grosley believed that the company “failed to maintain the roof in a safe condition to protect persons traveling or working in the . . . location from hazards related [to] fall of the roof.” Gov’t Exh. 13 at 1. His belief was based on the fact that the bearing plates on some roof bolts were not in contact with the roof, as well as the fact that there was roof material “that was prone to fall.” Tr. 159. He added, “It was obvious to me that there was additional support needed in the area.” *Id.*

Grosley’s concern about the roof bolt plates was based on the fact that because they no longer contacted the roof, they no longer served their intended purpose. They offered little resistance to the roof material they were supposed to support.<sup>16</sup> Tr. 124, 125-126. On a schematic drawing of the No. 3 Entry and the No. 1 Crosscut, Grosley indicated there were seven roof bolts in the No. 3 Entry that had loose bearing plates, four were above the belt, one was in the part of roof that was cordoned off by the caution tape, one was in the roof outside the tape in the crosscut leading to the manddoors, and one was in the roof above the walkway of the belt entry. Tr. 144, 154; Gov’t Exh. 20 at 7. Grosley testified that miners traveled beneath the loose bearing plates that were not located above the beltline. Tr. 122. In his opinion the entire area of inadequately supported roof was a hazard that should have been reported and corrected. Tr. 123.

Because Albrecht cited Twentymile for some of the same conditions Grosley found on June 23, Grosley was sure the company knew about the hazards. Tr. 128. But the company had done nothing except install the caution tape. There were no scaling tools in the area and, as Grosley recalled, “it did not appear that anyone had scaled anything down.” Tr. 155. Even if the roof’s condition had worsened since Albrecht’s inspection, the condition should have been reported. *Id.* The company’s failure to record the conditions violated section 75.363(b).

In Grosley’s view, a reasonably prudent person familiar with the mining industry would have recognized the hazard created by the condition of the roof because the roof was no longer adequately supported and because it contained “material [that was] prone to fall.” Tr. 129. When examiners see such hazardous conditions, they are supposed to correct the conditions if possible, but if not, they are supposed to record them. *Id.*

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<sup>15</sup> (...continued)

bolts. Tr. 142. He agreed that if the bolts were resin bolts despite the loose bearing plates, the bolts could have been “somewhat” effective in anchoring the roof. Tr. 143.

<sup>16</sup> Grosley determined the bearing plates were loose by tapping the plates with his sounding stick. He was able to see space between the plates and the roof. Tr. 145. Grosley stated that as a result of what he found he could “say most certainly [that] the roof bolts were no longer supporting the immediate roof.” Tr. 156.

Grosley reviewed the pre-shift and on-shift and weekly examination books. Tr. 130. Grosley identified copies of the pre-shift examination reports for the belts beginning on June 17, 2009 and ending on June 23, 2009. Tr. 131; Gov't Exh. 15. On the report of June 17, the examiner stated, "[Cross cut No.] 1 between the machine doors & belt [the] top is scally and someone needs bar down." Tr. 147; Gov't Exh. 15 at 1. The words were highlighted with a green marker. Tr. 147. According to Grosley, this condition was entered after it was cited by Albrecht and it encompassed the affected area that was involved in Albrecht's citation. Tr. 132, 152. However, between June 17 and June 23, the condition of the roof in the affected area was not mentioned again. *Id.*, Tr. 133. Grosley believed that the condition should have been "carried forward until . . . [it was] corrected." *Id.*

Grosley testified that it was important to record hazardous conditions "to give oncoming crews an idea of any condition that would need to be corrected or that would cause harm to anyone." Tr. 133. The failure to record the condition was S&S because the rock hanging from the roof was "prone to fall" at any time, and a miner could be struck and seriously injured. Tr. 134. He further noted that an examiner was in the area at least once each production shift. *Id.*

The alleged violation of section 75.363(b) was abated when the hazardous condition was recorded in the examination book. Tr. 136; Gov't Exh. 13 at 2.

Grosley also stated that he viewed the violation as caused by Twentymile's moderate negligence because there was an attempt to cordon off the area with tape. But the caution tape did not include all of the dangerous area and Grosley did not feel the company made diligent efforts to abate the condition.<sup>17</sup> Tr. 135. However, on cross examination Grosley admitted that he did not know for sure if the tape he found on June 23 encompassed the entire area delineated in Albrecht's citation. Tr. 137-138. He also did not know for sure if the conditions he saw occurred before or after Albrecht issued his citation. Tr. 153.

Carl T. McGruder has been the pre-shift examiner at the mine for approximately a dozen years. Tr. 161. He described his responsibilities as "check[ing] the beltlines for gas and . . . hazards." *Id.* McGruder described the mine's two belts as running in sequence. According to McGruder, the belts are examined three times a day, once each shift. Tr. 162. Usually it takes two miners to examine the belts, one begins at the portal and walks to Crosscut 55. Another examiner then walks from Crosscut 55 to the end of the belt. *Id.* After the two are finished they "[g]o out and do the books." Tr. 163.

On June 17, McGruder was conducting a pre-shift belt examination when he encountered Albrecht in Crosscut No. 1. Tr. 163. As McGruder described his encounter, he came to the crosscut and Albrecht and another person were there. McGruder spoke with Albrecht who

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<sup>17</sup> Even if the company had completely barricaded off the roof condition, in Grosley's opinion it still should have recorded the hazardous condition in the examination book. Tr. 137.

pointed out some roof that he thought was bad and who asked McGruder what he was going to do about it. McGruder testified that he told Albrecht that “as soon as I got the pre-shift done I [will] scale it.” Tr. 164. He maintained that after the pre-shift ended he scaled all of the loose material down with a “Kennedy rail.”<sup>18</sup> *Id.*, Tr. 169. He then “leaned the rail up against the top and used it for a cordon to danger . . . off” the area.<sup>19</sup> Tr. 164. After McGruder left the mine he “put [the condition] in the book.” Tr. 165. He testified that his entry in the examination book read in part, “Crosscut [No.]1 between machine doors and belt top is scally and some needs barred down.” Tr. 166; Resp. Exh. 22. He also testified that he highlighted what he wrote with a green marker. By highlighting what he wrote, McGruder meant to signal that he had barred down the scally top. Tr. 166. According to McGruder, when something is highlighted in green in an examination book it means, “[T]hat you have corrected the problem and you cross[ed] it out.” Tr. 167. McGruder maintained that anyone familiar with the mine who read the highlighted words would know that the problem was corrected. *Id.* McGruder testified that when he left the No. 1 Crosscut on June 17, the problem was in fact fixed. Tr. 168. McGruder agreed that as the pre-shift examiner he was required to record a hazardous condition in the pre-shift examination book any time he found one, and he agreed that he conducted pre-shift examinations of the area “a lot of times” after June 17<sup>th</sup>. Tr. 170.

Kevin Willbur works as a safety compliance specialist for Twentymile. He also has worked as a foreman for the company. He has worked for Twentymile for 22 years. Tr. 172-173. Willbur testified that on June 23, 2009 he accompanied Inspector Grosley who had come to the mine to determine if Citation No. 8460323 could be terminated. Willbur testified that when the two came to the area encompassed by the citation, “it seemed like there was a little bit of loose rock in this . . . area”<sup>[20]</sup> and Grosley “started going around and tapping the roof bolt plates . . . and decided . . . [there were] loose roof bolts.” Tr. 175. According to Willbur, Grosley was in the beltline entry and he used a walking stick with a brass knob on its end to tap the roof bolt plates. When the knob hit the plates, “It knocked off some [loose] material . . . and then the plate would move.” *Id.* Willbur maintained that Grosley “tapped several roof bolt plates over the belt and . . . in the walkway.” Tr. 176. Willbur stated that he immediately had miners come to the area and start setting timbers to support the roof. *Id.*

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<sup>18</sup> McGruder described a Kennedy rail as a metal, 10-foot long rail that is used to hold stoppings in place. Tr. 165.

<sup>19</sup> When asked by the Secretary’s counsel why he “dangered off” the area if he scaled down all of the loose roof, McGruder replied that Albrecht maintained that “the whole area look[ed] bad” and that McGruder had not corrected the problem by scaling the roof. Tr. 169. McGruder did not agree with Albrecht. He stated “my . . . assumption was that it . . . wasn’t that bad.” *Id.*

<sup>20</sup> When asked on cross examination if he observed “loose rock,” Willbur stated, “I believe so. It’s hard to remember that far back.” Tr. 178. He also could not recall “exactly where that loose rock was” but he agreed it was possible that some of it was “outside of the caution tape.” Tr. 178. He added, “I don’t remember exactly.” Tr. 178.

Turning to the pre-shift report for June 17, Willbur agreed that the green highlighting of a reported condition “signifies that the condition has been taken care of, that somebody has fixed the problem.” Gov’t. Exh. 15 at 1; Tr. 177. However, he also agreed that there was no way to determine when the words had been highlighted or who highlighted them. Tr. 186-187. Willbur acknowledged that the pre-shift examiner had to sign the pre-shift report and that the report was countersigned by the mine foreman at the end of the day so that management would know if something “need[ed] to be taken care of.” Tr. 179.

### THE VIOLATIONS

Section 75.202(a) requires in part that, “The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs.” To establish a violation of the standard, the Secretary must prove the condition cited pertains to the mine’s roof, face or ribs; that the specified part or parts is located in an area where “persons work or travel;” and that the specified part or parts is inadequately supported or controlled such that it might fall and endanger a miner or miners working or traveling in the vicinity of the part or parts.

Albrecht was concerned with the condition of roof at the No. 1 Crosscut. His testimony about the condition of the roof in this area was specific. On June 17, when he viewed the roof in the area, some material had fallen from the roof and was lying on the mine floor. He stated that “loose material [was] still hanging out of the roof where the rock had actually fallen . . . out.” Tr. 83. Because the material in the roof was loose, it needed to be barred or scaled down. Tr. 84.

Albrecht was also clear in his testimony that the cited area was one where miners traveled. He testified that miners could reach the belt by passing through the manddoors located in Crosscut No. 1. Tr. 100-101, 103. He and Boone traveled this route, and others could as well. Further, he testified that the on-shift examiner had to pass the cited area twice, once to initial the DTI board and once to return to the belt entry to continue examining the belt. Tr. 102; *see also*, Tr. 87-88. The hanging rock indicated to Albrecht that the roof was reasonably likely to fall, although no one could say when it would happen. Tr. 85. With at least one miner having to pass under the hanging rock at least twice a day, it is clear that the cited roof was not controlled to prevent a hazard to miners, and I find that the Secretary proved a violation of section 75.202(a).<sup>21</sup>

Four days after Albrecht cited Twentymile for a violation of section 75.202(a), Grosley charged that the company violated section 75.363(b). The standard requires that a mine examiner record hazardous conditions in a book maintained of the surface at the mine, that the record be made by the completion of the shift on which the hazardous condition is found and that the record “shall include the nature and location of the hazardous condition and the corrective action taken.” 30 C.F.R. §75.363(b).

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<sup>21</sup> The conclusion is buttressed by the fact that footprints in the fallen material indicated that at least one miner actually traveled under the subject area.

Just as Albrecht properly found a violation of section 75.202(a), so did Grosley correctly find a violation of section 75.363(b). Grosley was at the mine on June 23 in part to determine whether the roof condition cited by Albrecht in Citation No. 4863331 had been corrected. Tr. 109-110, 112. Grosley traveled to the site of the inadequately supported roof and he found what he believed to be the same condition. In other words, he found that the roof in the area was still inadequately supported. Tr. 127. While some of the area of inadequately supported roof had been cordoned off to protect miners from the hazards noted by Albrecht, part of the inadequately supported roof was located outside the cordoned off area. Tr. 117, 123-124. Grosley also found at least two loose roof bolt plates, one above the belt walkway and one in the crosscut, which were outside the cordoned off area and under which miners could walk. Tr. 118, 123. Grosley believed that additional roof support was needed in the area and that the conditions posed a hazard to miners who were likely to travel under them. In this regard, the court finds entirely credible Grosley's belief that the pre-shift examiner would travel under these two defective roof bolts. Tr. 122. Moreover, the court accepts Grosley's testimony that at least once every shift the belt examiner had to travel beneath the area of defective roof. Tr. 155. Further, miners coming through the mandors and traveling in Crosscut No. 1 to the beltline were likely to pass beneath part of the defective roof that was not cordoned off. Tr. 122.

Section 75.363(b) requires Twentymile to make a record of "any hazardous condition found by" its on-shift examiner, to keep the record "in a book maintained for this purpose" and to make the record "by the completion of the shift on which the hazardous condition is found." 30 C.F.R. §75.363(b). The standard goes on to require that the hazardous condition "shall include the nature of the hazardous condition and location of the hazardous condition and the corrective action taken." *Id.* After he observed the defective roof in the No. 3 Entry at the No. 1 Crosscut, Grosley reviewed the examination reports. Grosley's testimony was clear. He found that the condition cited by Albrecht had been noted on June 17. Tr. 147; Gov't Exh. 15 at 1. The notation was highlighted with a green magic marker, but the roof conditions were not mentioned again between June 17 and June 23, the date of Grosley's visit.

The court finds ample evidence that the hazardous condition of the roof found by Grosley on June 23 existed for at least several shifts. The court infers this from the fact that the scally roof conditions were so extensive as to be highly unlikely to have occurred since the last examination before Grosley's visit. Further, the court finds that the defective roof bolt bearing plates almost certainly became loose over a long period of time as roof around and under the plates scaled and fell away. Given the "silence" of the examination reports about the roof and roof bolt plates the court finds that the hazardous conditions were not reported as required. Since the condition of the roof was not corrected, it is no wonder its "correction" was not reported. For these reasons, the court finds that Twentymile violated section 75.363(b).<sup>22</sup>

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<sup>22</sup> Because the court concludes that hazardous roof conditions existed in addition to those noted by Albrecht, the issue of whether highlighting a reported condition in green (or in any other color for that matter) satisfies the requirement of section 75.363(b) that the operator record (continued...)

## S&S AND GRAVITY

As a general proposition, a violation is properly designated as a significant and substantial contribution to a mine safety hazard (an S&S violation) if, based on particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained.

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

6 FMSRHC at 3-4; *see also Austin Power v. Secretary*, 861 F.2d 99, 103-104 (5<sup>th</sup> Cir. 1988), *aff'g* 8 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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<sup>22</sup> (...continued)

“the corrective action taken” need not be decided. Nonetheless, if faced with the issue the court would be hard pressed to find that the practice constitutes compliance. The practice offers no way in which a miner reviewing the report can know the nature of the corrective action taken to eliminate the hazard, and certainly a plain reading of the standard makes clear that the nature of the corrective action must be indicated. *See* Tr.186-187. The court further observes that it may behoove Twentymile’s examiners to be more precise when recording hazards they observe. The examination book contains a section entitled “Hazardous Conditions Observed and Reported,” yet it is the apparent practice at the mine to report hazardous conditions in the “Remarks” section of the report. This can easily confuse those looking for reported hazards, something about which Albrecht was rightly concerned. TR. 90, 97.

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained part three of its *Mathies* criteria as follows:

[T]he third element of *Mathies* . . . “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) (emphasis in original).

The Commission subsequently reasserted its prior determination that as a part of any S&S finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Co.*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996). However, the Secretary is not required to show that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

Resolution of whether an inspector’s S&S finding is proper must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 18 FMSRHC 1541, 1550 (September 1996). Thus, consideration must be given to both the time that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal operations had continued. *Bellefonte Lime Co.*, 20 FMSRHC 1250 (November 1998); *Halfway, Inc.*, 8 FMSRHC 8, 12 (January 1986). Further, the question of whether a particular violation is S&S must be based on the facts surrounding the violation. *Texas Gulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987). Finally, the Commission and the Courts have held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 179 (December 1998); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136 (7<sup>th</sup> Cir. 1995).

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

The court concludes that both violations were S&S. The court has found that Twentymile violated section 75.202(a) in that just as Albrecht testified, the roof in the cited areas was loose and parts of it were hanging. Tr. 83. As previously noted, miners were required to work and travel in the vicinity of the loose and hanging roof. Tr. 86-87. The on-shift examiner traveled in the area at least twice each shift. Tr. 102. Further, footprints in the rock dust that lay on top of

already fallen material indicated to Albrecht that someone actually had traveled under the hazardous roof. Tr. 87. The hazard contributed to was that the loose parts of the roof would fall, strike, and seriously injure a miner. Although no one could say when the roof would fall, the fact that pieces of the roof were loose and hanging meant that they were at some point likely to come down. Miners were repeatedly exposed to the area, which meant that it was reasonably likely a miner would be hit by the falling roof. The court agrees with Albrecht that broken bones, a head injury and/or contusions were the most likely results of such an accident, and the fact that such injuries were likely to be serious is obvious. Tr. 82, 88.

The court also has found that the company violated section 75.363(b) in that even though examinations were made as required following June 17, after that date and until June 23, hazardous roof conditions that existed in the No. 3 Entry and No. 1 Crosscut were not recorded. These hazardous roof conditions included hanging roof outside the cordoned off area in the No. 1 Crosscut and at least two loose roof bolt plates that existed in areas where miners were likely to travel.<sup>23</sup> Tr. 144, 154; Gov't Exh. 20 at 7.

The condition of the roof was dangerous to miners and the hazard it contributed to was that pieces of the loose roof would fall, strike and seriously injure at least one miner. The falling roof and resulting injury was reasonably likely because if the hazards were not recorded, corrective action could not be ordered when the foremen reviewed the reports. *See* Tr. 133-134. The result was that as mining continued miners would be subjected to loose, hanging roof and to inadequately supported roof around the defective roof bolt bearing plates, conditions that would have been signaled for correction had there been compliance with section 75.363(b).

Further, miners who worked and traveled under the defective roof were likely to be seriously injured when pieces of the roof came down without warning. Thus, in addition to being S & S, the violations were serious.

### **NEGLIGENCE**

The inspector found that the violation of section 75.202(a) was due to the company's high negligence. Albrecht testified that his finding of high negligence was based on the fact that the condition had existed "for at least two days," that it was the examiners job to identify the hazardous roof conditions so they could be corrected, and that despite the examiner's knowledge of the conditions they were not corrected. Tr. 90-91. However, there is a disconnect between the inspector's high negligence finding and its basis. When the court asked the inspector to identify the uncorrected condition, the inspector stated that it was "the pile of material that was on the

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<sup>23</sup> The court recognizes that four loose plates were above the belt and miners could not travel beneath them. The court also recognizes that another loose plate was within the cordoned off area, but contrary to the inspector, the court does not believe that miners would be so foolish as to purposefully travel within that area. However, the fact remains that two loose plates existed over areas where miners regularly traveled.

ground.” Tr. 91. The violation was the hazardous roof, and the fact that the material may have fallen two days before June 16 does not mean that the roof was in an obviously hazardous condition after the fall. It may have taken some time after the fall for the roof to become scaly and for the pieces of the roof that were hanging to work their way loose. In other words, the court cannot assume that the obviously hazardous roof conditions the inspector saw, were likewise seen by the examiners prior to Albrecht’s inspection. In fact, the roof may well have been in a less hazardous state when viewed by examiners after it fell than when it was later viewed by the inspector. For this reason the court will modify the inspector’s finding to one of moderate negligence.

Inspector Grosley found that the failure to record the hazardous roof conditions that existed on June 23 was due to moderate negligence on Twentymile’s part, and the court agrees. Some of the area where the roof was bad had been cordoned off, which may have led the examiner or examiners to the misguided belief that the hazard no longer existed. *See* Tr. 135. Further, the green highlighting of the written description of the condition in the examination book may have lead the examiner to think that the situation had been addressed. These mitigating circumstances warranted the inspector’s moderate negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8460322	6/23/09	75.333(h)

The citation states:

In the Main North #2 entry at crosscut-2, the operator failed to maintain the stopping at the said location to serve the intended purpose for which it was built. The stopping leaked excessively. In fact, the leakage passing thru the stopping created a noise level that could be heard from one breaker/crosscut away.

Gov’t Exh. 17.

Inspector Grosley testified that during his June 23 mine visit he was in the No. 2 Entry at the No. 2 Crosscut of Main North when he heard a loud noise that sounded “like . . . a stopping leaking.”<sup>24</sup> Tr. 189. Grosley was in an entry that carried intake air. Tr. 213. He was about 100 feet from the stopping. The stopping separated the air currents in the No. 1 and No. 2 Entries.

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<sup>24</sup> Grosley described the noise as similar to that which occurs when “you [are] driving down the highway [at] about 70 mile[s] per hour and you [crack] your window open.” Tr. 190; *see also* Tr. 212

The stopping was composed of two Kennedy panels.<sup>25</sup> Grosley testified that the noise was created by the air leaking through unfilled cracks between the stopping and the roof and the ribs (Tr. 213, 240) and that the company violation section 75.333(h) because he could tell from the noise that the leakage was excessive. Tr. 213, 219.

The No. 2 Entry provided fresh air to the working sections of the mine. Grosley did not know the velocity of the intake air, but it was, he testified, “substantial.” Tr. 216. The No. 1 Entry carried return air. *Id.* The return air ventilated seals that closed off previously mined areas of the mine. *Id.* Air from the intake entry (the No. 2 Entry) was leaking through the stopping into the return entry (the No. 1 Entry). Grosley did not know the pressure differential between the intake side of the stopping where he was standing and the return side of the stopping. Tr. 217. He stated that air that has ventilated seals can be contaminated with methane and/or carbon monoxide. *Id.* Grosley explained that it was important to prevent air that had ventilated seals from getting into the intake air because air from the seals could be contaminated with noxious gases, and the contaminated air can be carried to the working sections. Tr. 192.

Grosley did not sample the content or velocity of the air in the return. However, he noted that there were no obvious holes in the stopping, that it was leaking around its perimeters. Tr. 163. The stopping had been erected recently and Grosley believed that the leaks developed when the tech foam that sealed the stopping was still wet. *Id.* In Grosley’s opinion, because the stopping was not maintaining its intended purpose, a diminished quantity of intake air was traveling to the working sections. Tr. 193.

Matt Winey identified a map that depicted North Mains at the mine. Tr. 245; Resp. Exh. 28. Winey circled with a pen the site of the alleged violation. *Id.* He identified the particular stopping involved in the citation. Tr. 246; Resp. Exh. 28. Like Grosley, Winey explained that the stopping was located between the No. 1 and No. 2 Entries. Tr. 246. Winey agreed with Grosley that the intake air was in the No. 2 Entry and the return air was in the No. 1 Entry. Tr. 246-247; Resp. Exh. 28. Winey described intake air as “outside air . . . [that is] going into the mine.” Tr. 247. However, according to Winey, on the date the citation was written, the intake air did not ventilate a working section. Tr. 248. Rather, it ventilated an idle section. *Id.* Nevertheless, Winey acknowledged that the intake air “ventilate[d] where people [were].” Tr. 262. For example, “fire bosses or somebody might end up down there . . . doing [weekly examinations.]” *Id.* The velocity of the intake air in the No. 2 Entry was described by Winey as “a lot.” Tr. 249. The velocity of return air in the No. 1 Entry was “about the same.” *Id.* Winey also explained that return air in the No. 1 Entry went to an exhaust fan and then out of the mine. Tr. 248-249.

When asked his opinion about the effect of the leaking stopping, Winey essentially answered that the magnitude of the effect depended on the magnitude of the leak, something that

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<sup>25</sup> Kennedy panels are metal panels that are wedged tightly against the roof, floor and ribs of an entry. Any gaps between the panels and the roof, floor and ribs are filled with “tech foam.” Tr. 191. Grosley described tech foam as “like . . . frothy concrete.” Tr. 191.

could be determined by measuring the leaking air with an anemometer. Tr. 250. Although he agreed that stoppings were supposed to be as airtight as possible, he doubted that “you ever get a stopping where you completely stop leakage.” Tr. 262-263.

Winey identified a copy of the weekly examination report for June 22, 2009, the day before the inspection. Tr. 251; Resp. Exh. 27. The report indicated that in the No. 1 Entry there was 84,562 cubic feet per minute of air (“cfm”) when the reading was taken. Tr. 252; Resp. Exh. 27 at 1. In the No. 2 Entry at there was 139,000 cfm. *Id.* According to Winey this was “plenty of air . . . to ventilate what we’re trying to ventilate.” Tr. 254; *see also* Tr. 255. Winey was asked “if a stopping is leaking to the point where you can hear it, is that a problem,” and he answered “[n]ot in a high-pressure area.” Tr. 263 Winey agreed that the pressure was higher on the intake side of the subject stopping. Tr. 269.

Grosley testified that the condition could have led to miners being overcome by noxious gases due to inadequate ventilation. Tr. 194. He noted that at least once a week the weekly examiner traveled close to the affected area. *Id.* In his view the leaking stopping “adversely affected the quantity of air that was going into the working sections.” *Id.* According to Grosley when he reviewed the mine’s violation history he found “numerous” violations of section 75.333(h). Grosley identified a citation issued at the mine on June 18, 2009 for the company’s failure to maintain a leaking stopping. Gov’t Exh. 18. Although the condition was cited by another inspector, it was Grosley who terminated the citation five days later when a new stopping was installed. Tr. 196; Gov’t Exh. 18 at 2. He also identified a citation issued on June 16, 2009 for a violation of section 75.333(h). Gov’t Exh. 19. The citation was issued because of a hole in the stopping. The condition was corrected by repairing the stopping. Tr. 197; Gov’t Exh. 19 at 2. Because of the company’s prior violations of section 75.333(h), Grosley concluded that the company’s negligence was high. Tr. 199; Gov’t Exh. 17. Further, Grosley believed that any miner who traveled in the area of the stopping would have noticed the condition because of the noise it created. Tr. 199.

### **THE VIOLATION**

Section 75.333(h) requires that ventilation controls “be maintained to serve the purpose for which they are built.” The evidence supports finding that the violation existed as charged. Winey did not dispute Grosley’s testimony that the stopping was leaking, and the court finds that it was. Moreover, the court credits Grosley’s assessment that the leakage was “excessive.” Tr. 193. Grosley reached this conclusion because of “the intensity of the noise” (*Id.*) – he could hear air whistling though the stopping at a distance of more than 100 feet (Tr. 219). Winey did not, indeed could not, dispute Grosley’s assessment since Winey was not present when the condition was cited. It is obvious as well that the stopping was not serving its intended purpose. As the word suggests, the stopping was built to halt the flow of air from the intake entry to the return entry and vice versa. The stopping was not accomplishing this. Although Winey may have been

correct that it is not possible to “completely stop [air] leakage around at a stopping” (Tr. 262-263), he also acknowledged that a stopping is supposed to be kept as airtight as possible. Tr. 262. The subject stopping, far from being kept as airtight as possible, was leaking inordinately. It was not in compliance with the standard.

### **GRAVITY**

Grosley found that the violation was unlikely to cause one person lost workdays or restricted duty and that the violation was not S&S. Gov’t Exh. 17; *See* Tr. 194. The court agrees with the inspector that an S&S finding was not warranted. There was no showing that because of the leak insufficient air was reasonably likely to ventilate the seals and methane and/or CO was likely to build up. Tr. 192. Nor was there any showing that the leakage was such that miners were likely to be harmed due to insufficient intake air. However, the court finds that the violation was serious nonetheless. As previously noted, the Commission has instructed its judges to focus on “the effect of the hazard if it occurs.” *Consolidation Coal*, 18 FMSHRC at 1550. If the seals leaked and resulting bad air was not cleared from the return because of the defective stopping, mine examiners conducting examinations in the area of the seals could be poisoned by inordinately high levels of CO or been injured or killed by a mine explosion. Tr. 192-194, 262.

### **NEGLIGENCE**

The inspector found that the violation was caused by Twentymile’s “high” negligence. Gov’t Exh. 17. He based his finding on two factors, the company’s prior violations of section 75.333(h) and the audible obviousness of the violation. Tr. 199, 196; Gov’t Exh. 18, Gov’t Exh. 19. The court agrees with the inspector’s assessment. The violation found by the inspector on June 22, 2009 was the third leaking stopping cited by MSHA’s inspectors in the mine’s Main North sections in 6 days. *See* Gov’t Exh’s 18 and 19. These prior violations raised the degree of care required by the company to detect and repair or replace leaking stoppings. The company was on notice there was a problem at the mine maintaining stoppings, yet the record contains no indication it took steps to meet its higher standard of care. In addition, the violation was no secret. Evidence of its existence could be heard at least 100 feet away. It should have been detected and corrected.

**CITATION NO.**

8460313

**DATE**

6/10/09

**30 CFR §**

75.380(d)(1)

The citation states:

In the alternate escapeway for the 24[th] Right Longwall Section . . . the Operator failed to maintain the alternate escapeway in a safe condition to always assure passage of anyone, including disabled persons. In this instance the Operator failed to maintain passage to the alternate escapeway from the last shield on the Longwall. There

was rock material and coal (windrow pile) along the side of the last shield, tailgate drive unit and panline's end. The clearance between the shields canopy and the peak of the windrow was about 18 inches. Thus, hindering/blocking access to the alternate escapeway. It is important to note that at the time of issuance the 24<sup>th</sup> Right Longwall was down on a maintenance shift/non-producing shift. However, the condition cited was not recognized by the Operator based on the fact that no one was working on or assigned to correct the condition.

Gov't Exh. 21.

According to Grosley, he issued the citation on June 10 when he inspected the tailgate entry of the mine's 24<sup>th</sup> Right Longwall Section. Grosley stated that the alternative escapeway for the section is near the tailgate entry. The longwall is approximately 1,000 feet long. The alternate escapeway is accessed at the end of the longwall face where the longwall intersects with the tailgate entry. Tr. 201. The longwall face is perpendicular to the tailgate entry. Tr. 202. The tailgate drive is located at the last shield before the tailgate entry.<sup>26</sup> The drive sits on the floor and extends upward for approximately 4 ½ to 5 feet. Tr. 203. The drive is 4 to 5 feet wide and 6 to 7 feet long. *Id.* The distance between the top of the drive and the roof is 6 ½ feet, but one foot of this space is taken up by the shield canopy. Tr. 204. Grosley found that rock and coal were piled on top of the drive and extended upward leaving a space of about 18 inches between the material and the top. Tr. 204-205. There should have been approximately 5 ½ feet of open space to access the alternative escapeway, but the rock and coal on top of the drive significantly narrowed the opening. Tr. 206; Gov't Exh. 22 at 11. In Grosley's view, the narrowness of the opening would hinder any miner trying to access the alternative escapeway, especially if the miner was injured and/or was being carried on a stretcher. *Id.* If the primary escapeway was blocked, the alternative escapeway offered the sole way out of the mine.<sup>27</sup> Tr. 207. Grosley stated that going over the drive and through the 18 inch opening was "the only way" to access the alternative escapeway. *Id.*

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<sup>26</sup> Grosley stated that the tailgate drive "supplies mechanical energy to transport the coal to the other side of the face to the outby belt." Tr. 203.

<sup>27</sup> Grosley agreed however that miners could walk down the panline to the tailgate entry and out of the mine, provided the panline was not moving. Tr. 230. He cautioned, however, that if they tried to walk on the panline the miners would encounter slip and trip hazards because the panline was usually wet and "very slick" Tr. 231. The line also could have pieces of coal on it. *Id.*, Tr. 240. Moreover, miners would have to crawl over a guard to get to the panline. Tr. 231.

Grosley also testified that the alternative escapeway had to be maintained even on a maintenance shift. As Grosley explained, operators are “required to have two distinct escapeways at all times.” *Id.* When Grosley issued the citation there were 9 miners working on the longwall. *Id.* He acknowledged, however, at that time the primary escapeway was open and clear. Tr. 207.

The most likely injuries to result from the restricted access to the alternative escapeway would be those caused by slipping or tripping while trying to get through the small opening. The result could be broken bones or cuts. Or, if there was a fire that blocked the primary escapeway, miners could be overcome by smoke before they could get through the opening. Tr. 208; *see also* Tr. 236-237.

In Grosley’s opinion, the condition was obvious. In fact, the condition had been noted in the pre-shift examination report for the longwall section. Tr. 209, 220-221. The report was for a maintenance shift. Tr. 222. Although a miner who was acting in the capacity of a management official told Grosley that the company would have removed the rock and coal from the top of the drive before the start of the next production shift, in Grosley’s opinion this did not excuse the violation because the company was required to maintain two distinct escapeways at all times. Tr. 210. Grosley concluded that because the condition had been entered in the pre-shift examination book but had not been corrected and because a person acting on behalf of management acknowledged the existence of the condition, the condition’s continued existence was the result of high negligence on Twentymile’s part.

According to Matt Winey, to access the alternate escapeway from the longwall, “You . . . walk down the face and then through the tailgate.” Tr. 263. Asked if a miner seeking to access the alternate escapeway could walk on the panline, Winey answered “yes,” that the miner could walk on the panline “if he needed to, if he was trying to escape.” *Id.* In Winey’s opinion, as long as the panline was not running, it offered safe access to the escapeway. *Id.* Asked if he considered it safe to escape if there was only 18 inches of space at the top of the tailgate drive, Winey answered, “yes.” Tr. 264. He added, “[I]f the top is supported above me, I don’t know why not.” *Id.*

Tyrone French has worked for the company for approximately 10 ½ years. His present job duties include the training of inexperienced miners, but prior to taking up his training duties he accompanied MSHA’s inspectors during their inspections of the mine. Tr. 274. French testified that he accompanied Grosley when Citation No. 8460313 was issued. Grosley had gone to the 24 Right Longwall section in order to inspect the section. Tr. 275. At that time there were two mechanics working on the shearer at the head gate. Tr. 276. The only persons on the longwall were French, Inspector Grosley and the two mechanics. *Id.* French thought that the rest of downshift crew were outby the section engaging in other work. Tr. 277. French stated that he did not recall any rock on the tailgate drive. Tr. 279. He noted that on the night the citation was issued there were mantrips located on the longwall section. They could have been used as emergency vehicles if necessary. Tr. 280. French estimated that it would take approximately 40 minutes for miners to walk completely out of the mine using the alternate escapeway. Tr. 281.

## **THE VIOLATION**

Section 75.380(d)(1) requires that each escapeway be “[m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” The essence of the Secretary’s allegation is that the company failed to maintain access to the alternate escapeway on the 24<sup>th</sup> Right Longwall section because rock and coal had accumulated at the entrance to the escapeway, partially blocking it. The record unquestionably establishes that there was an opening of about 18 inches at the top of the tailgate drive and that those seeking to access the alternate escapeway off of the longwall had to go through the restricted opening. Tr. 204-206, Gov. Exh. 22 at 11. While there was testimony from Winey about walking down the panline (Tr. 263) and while Grosley agreed that provided the panline was not operating (Tr. 230) the panline offered a possible means of access, the logical and preferable means of accessing the alternate escapeway was clearly for miners to travel down the longwall, over the tail drive and out the escapeway. Grosley’s testimony that even if the panline was not moving, the panline likely would be wet and coal-covered presenting a slip and trip hazard to any miner attempting to walk it and that the miner would have to crawl over a guard to reach it, highlights the unreasonableness of Twentymile’s suggestion that the panline offered a genuine alternative to going over the tailgate drive. Tr. 230-231, 240-241. In addition, the court rejects Winey’s testimony that the 18 inch opening afforded safe access to the escapeway. The court notes that the average width of a man from shoulder point to shoulder point is at least 20 inches and the court concludes that while most miners could pass through an 18 inch opening, they could not do so without considerable difficulty. Clearly too, and just as Grosley maintained, it would be even more difficult if they were assisting a disabled person or persons. Tr. 206-207. The court therefore finds that the violation existed as charged.

## **GRAVITY**

Grosley found that the violation was unlikely to result in permanently disabling injuries, and the court agrees. While it is true that if the primary escapeway was blocked miners could suffer broken bones or cuts as they tried to squeeze through the 18 inch opening, or could be overcome by smoke as their access to the alternate escapeway was delayed, Grosley was the first to admit that when he found the violation, the primary escapeway was open and clear. Tr. 207. With the primary escapeway offering unrestricted egress from the Longwall Section, the failure to maintain the alternate escapeway to assure passage to all miners was unlikely to lead to any injuries.

## **NEGLIGENCE**

Grosley based his conclusion that the violation was due to Twentymile’s “high” negligence on the fact that no one was correcting or was assigned to correct the condition. Gov’t Exh. 21. Grosley testified that the condition was visually “obvious” (Tr. 209) and that when he checked the longwall section’s pre-shift examination report for the maintenance shift (the shift during which he found the condition), he found that the condition had been noted by the pre-shift examiner. Tr. 209, 220-221. Grosley testified that he was told that the condition was going to be

corrected on the next production shift, but he believed that the standard required the maintenance of two accessible entries at all times, not just during production shifts, and that Twentymile failed to meet this standard of care. *See* Tr. 210. Twentymile did not contradict Grosley's assertion that the condition was noted by the pre-shift examiner but that it was not corrected and was not scheduled to be corrected until the next production shift, and the court finds that Grosley accurately evaluated Twentymile's level of negligence.

**WEST 2010-578-M**

<b><u>ORDER NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>
8460435	8/11/09	75.362(b)

The order states:

An inadequate on-shift examination was conducted for the 8 Main North belt conveyor. The latest beltline examination was conducted between 07:30 a.m. and 08:00 a.m. The hazards associated with this order were not entered in the record books for either 8/10/09 [or] 8/11/09. The hazards of the coal accumulations are in contact with the return belt, as well as dried coal fines on the hardware and belt roller clusters. The conditions were volatile and obvious, extending for approximately 600 feet, and were deep and high enough to be in contact with the return belt. These conditions were cited in citation # 8460434, issued on 8/11/09. This violation resulted from unwarrantable failure based on the extensive accumulations which were obvious to anyone concerned with safety.

Gov't Exh. 1.

Randy Gunderson is an MSHA mine inspector who works in MSHA's Price, Utah office. Tr. 285. He has been employed by MSHA for 11½ years and during that time he primarily has inspected underground coal mines. Tr. 286. Gunderson began working in the mining industry in 1972. He has held many positions in private industry, ranging from laborer to section foreman. Tr. 286. On August 11, 2009 Gunderson conduct an inspection at the Foidel Creek Mine. Tr. 289.

Upon arriving at the mine, Gunderson reviewed the reports of the mine's pre-shift and on shift examinations looking for reported and uncorrected hazards. He next reviewed the mine map. Then, he traveled underground. Tr. 289-290. Gunderson was accompanied by Chris French, a Twentymile employee. Tr. 290. At 11:35 a.m. Gunderson issued Order No. 8460435 to French after observing accumulations of coal and coal fines along the 8 Main North Belt. Tr. 291-

292. According to Gunderson, the accumulations stretched along the belt for approximately 600 feet. Further, in 12 places the coal was in contact with the return belt (the bottom belt). Tr. 294. Gunderson was concerned. He feared that friction created by the belt rubbing in the accumulations could ignite the coal and coal fines. Tr. 295, 296, 298. Although the accumulations were striated with layers of rock dust, where the accumulations contacted the belt there was no rock dust. Tr. 298. In these places the accumulations were black. Tr. 300.

Gunderson believed the coal accumulations violated section 75.400, which prohibits the accumulation of loose coal and as a result he issued Citation No. 8460434 to French. The citation states:

Coal accumulations have been allowed to exist along the 8 Main North belt conveyor, from the tail piece to the take-up. The accumulations of coal have piled high enough to come in contact with the return belt and rollers, ranging in depth to 1' 8", 6' wide and 600 feet in length. Dry coal fines have accumulated on the belt structure, and around the roller clusters. This belt was in operation just prior to this inspection. All coal accumulations, both on the hardware and under the belt, shall be cleaned, in their entirety, and the area rock dusted.

Gov't Exh. 2.<sup>28</sup>

Gunderson described the amount of the accumulated coal that caused him to issue the citations as "extensive" and "more than just a little." Tr. 296. In addition to the layered accumulations of coal, there were dry coal fines on the belt structure and rollers. Gunderson testified that the coal fines were volatile, and they could "catch fire a lot easier than wet or damp coal fines." Tr. 297. He believed that the coal and coal fines primarily fell off of the conveyor belt. *Id.* Echoing what he wrote in the citation, Gunderson testified that the accumulations were one foot eight inches deep, 6 feet wide and they extended for approximately 600 feet along the belt. Tr. 298. He described the accumulations as "obvious." Tr. 300.

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<sup>28</sup> Prior to the hearing the parties settled all allegations regarding Citation No. 8460434. Tr. 302. The settlement was approved by Commission Administrative Law Judge Margaret Miller. *Twenty Mile Coal Co.*, WEST 2010-162, etc., (September 21, 2011) slip op. 1; *see also* Stip. 13.

Gunderson thought it likely that the accumulations had come into existence at a “progressive” rate. Tr. 300. “It could be a week, a couple of days. It could be a month.” *Id.*, see also Tr. 324. He based his belief on “[j]ust experience.” *Id.* Although he doubted very much that the accumulations could have occurred in two hours, to really know how long it took, he thought that he had to “watch the belt running and see how much [coal fell] off,” something he did not do during the inspection. *Id.*

Guderson testified that the day before his August 11 inspection he cited Twentymile for accumulations of damp to dry coal between airlocks of the Main Belt drive. *Id.*; Gov’t Exh. 38. The airlocks were located on the same section as the accumulations he cited on August 11. The accumulations between the airlock doors were up to three feet deep, 42 feet long and 9 feet wide. Tr. 305. Also on August 10 he cited the company for an accumulation of coal fines in a crosscut. Tr. 306; Gov’t Exh 39. This accumulation was located in the same section as the accumulations he cited on August 11. Tr. 306-307. The accumulations in the crosscut were one to one and a half feet deep, 6 feet wide and they extended for approximately 260 feet. Tr. 309; Gov’t Exh. 39. Gunderson discussed the August 10 citations with Chris French. Tr. 325. He also spoke with officials in the company’s safety department about the citations. Tr. 325.

After citing Twentymile for prohibited accumulations on August 11, he issued the subject order to the company charging it with violating section 75.362(b), the standard requiring on-shift examinations for hazardous conditions along each belt conveyor haulageway. Gunderson was asked why he believed the company violated the standard. Gunderson stated that the accumulations he found on August 11 were “obvious” and “extensive.” Tr. 310. Further, because the company had been cited previously for accumulations he thought that it “had been warned.” *Id.* The on-shift examiners job was to check for hazards along the belt haulageway and correct or report them to “make sure it’s safe for people to work in that area.”<sup>29</sup> *Id.* Gunderson testified that before his August 11 inspection he reviewed the pre-shift and the on-shift examiners’ reports for the 8 North Main belt. Gunderson believed that at the time he conducted his inspection on August 11, the examiners had already passed though the area of the 8 Main North belt because the examiners “leave their initials along the belt as well as put them in their record books on the surface.” Tr. 314, 355. Gunderson stated that the on-shift examination was conducted three to

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<sup>29</sup> Gunderson added that it was also the duty of the pre-shift examiner to look for and correct the same kind of hazardous conditions. *Id.* According to Gunderson the on-shift and pre-shift examiners are “kind of the eyes and ears of the whole mine.” Tr. 311.

three and one half hours before his inspection and that the examination was inadequate because the examiner did not report the accumulation along the belt line.<sup>30</sup> Tr. 315. Gudnerson could not say why. Tr. 316-317. He speculated that the examiner “wasn’t looking hard enough.” Tr. 316.

Because Gunderson conducted his inspection on August 11 during a maintenance shift the belt was not running. Tr. 317. Nor were men mining.<sup>31</sup> Gunderson did not think it possible that the accumulations developed after the on-shift examination. He stated that he would “ have to see the belt running [to determine if]. . . it [spilled] that much in that much time.” *Id.* Gunderson agreed he never saw it running because the belt was “down” for maintenance. Tr. 349. As a result Gunderson had no idea how much coal, if any, was run between the time of the last examination on August 11 and his inspection. Tr. 317-318.

Gunderson felt that the failure to conduct an adequate on-shift examination (*i.e.*, one that resulted in the accumulations being reported) was reasonably likely to lead to a belt fire that would cause a miner to suffer lost workdays or restricted duty because of smoke inhalation. Tr. 322. Gunderson thought that one person, a company examiner, was likely to be affected. *Id.* Gunderson testified that he could have cited the company for a violation of either the on-shift or pre-shift examination requirements since the examinations could be conducted at the same time.<sup>32</sup> Tr. 345.

In Gunderson’s view Twentymile was highly negligent. The accumulations were “extensive and obvious” (Tr. 322) and the company had been previously cited for accumulations along the belt.<sup>33</sup> He believed that the on-shift examiner should have found the accumulations. Tr.

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<sup>30</sup> As will be discussed more fully below, there was considerable confusion in terminology between the pre-shift examination and the on-shift examination. Although the Secretary alleged a violation of a standard pertaining to the on-shift examination, the Secretary’s counsel at times referred to the report of the examination as a “pre-shift report.” *e.g.* Tr. 315. The confusion was to some extent understandable because, as Gunderson noted, the company had the option of doing the required on-shift examination of the beltline haulageway during the pre-shift examination. He was clear, however, that he charged the company with a violation of the standard pertaining to on-shift examinations. Tr. 320-321.

<sup>31</sup> In fact, the only person Gunderson saw traveling the 8 Main North belt on August 11 was the on-shift examiner. Tr. 310.

<sup>32</sup> Matt Winey essentially agreed. He stated that “the fire bosses walk once every eight hours on the beltline.” Tr. 360.

<sup>33</sup> Before Gunderson went to the mine, his supervisor told him that the mine had a “problem” with accumulations. Tr. 330; *see also* Tr. 343. Gunderson later reviewed the mine’s  
(continued...)

323. They were not difficult to spot. Tr. 324. He further observed that there were four violations of section 75.362 (inadequate on-shift examinations) cited in the 15 months before the hearing date and 16 citations for violations of section 75.360 (inadequate pre-shift examinations). Tr. 332, 344. In his opinion the examiners were not “doing a very good job.” Tr. 323. To terminate the violation alleged in Order No. 8460435, the company trained the mine examiners to better recognize hazards. Tr. 332.

Matt Winey, who testified on the company’s behalf, stated that around August 11, 2009 the average production shift at the mine’s long wall ran approximately 15,000 tons of coal, or about 1,500 tons per hour. Tr. 357-359. In Winey’s opinion if a scraper was defective, coal could build up under the belt quickly. In two hours the build up could result in “some pretty good pile[s].” Tr. 359.

### **THE VIOLATION**

Section 75.362(b) requires during each shift when coal is produced that the on-shift examiner “examine for hazardous conditions along each belt conveyor haulageway where a belt is operated.” Section 75.363 requires that any hazardous condition found be posted and corrected immediately or remain posted until it is corrected (section 75.363(a)). It also requires that the condition be recorded and certified to by the examiner or other person in a book maintained for that purpose on the surface (section 75.363(b), section 75.363 (c)). The Secretary alleges that the examination conducted between 7:30 a.m. and 8:00 a.m. on August 11, 2009 was inadequate.

It is beyond doubt that the requirement of section 75.362(b) to conduct an on shift examination during each shift when coal is produced, carries with it the obligation that the examination be sufficient to detect existing hazardous conditions. In other words, subsumed in the standard is the obligation that the examination be adequate. Among the ways of proving that an operator has not met this requirement is to show that a hazardous condition existed in an area that was subject to an on-shift examination, that the hazardous condition continued to exist after the examination and that the hazardous condition was not recorded in the surface examination book.

However, the standard only applies “[d]uring each shift that coal is produced.” Order No. 8460435 charges that the on-shift examination for the morning shift on August 11, 2009 was inadequate, yet the Secretary offered no evidence that “coal [was] produced” on that shift. To the contrary, Inspector Gunderson testified that the shift was a maintenance shift and that the belt was not running. Tr. 317. He admitted that during the shift he never saw coal produced. *Id.* Because a pre-shift examination and an on-shift examination may be conducted simultaneously and because a simultaneous examination was in fact conducted on the morning of August 11, the Secretary

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<sup>33</sup> (...continued)

history of prior citations for violations of section 75.400 and found that in the 15 months before the hearing there were 74 citations for alleged violations of the standard. Tr. 331.

seems to assert that the failure to record the hazardous accumulations also violated the pre-shift examination requirements. Sec. Br. 41. She further states that the situation is “somewhat confusing” because Twentymile was combining the required examinations. Sec. Br. 41 n. 12.

Be that as it may, what is not confusing is a party’s right to know the offense with which it is charged and the government’s burden to prove that which it charges. Here, the Secretary chose to charge the company with the violation of a standard that is applicable only “[d]uring each shift that coal is produced” (section 75.362(b)) and the Secretary’s evidence failed to address this prerequisite.<sup>34</sup> There is no indication the Secretary sought company production records. She did not subpoena company officials who could testify about production. She did not move to amend the order and her petition to charge a violation of the pre-shift requirements. Nor did she plead in the alternative.<sup>35</sup> For these reasons the subject order must be vacated.<sup>36</sup>

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8456832	6/29/09	75.807

The citation states:

The energized 12,470 volt high voltage cable connected to the 17 Left section power center in crosscut 177+50 was not guarded where men regularly work traveling to and from the power center and the lunch table. The extra energized high voltage cable is unguarded on a flat bed trainer 38-42 inches from the floor and 5 feet along both sides of the trailer with a 4 foot walkway on one side and a 6 foot walkway on the other, the walkway is wet and compacted exposing the men

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<sup>34</sup> The Secretary states that Twentymile “never provided testimony as to how long the belt was running, if at all, during the three and one half hour timeframe between the . . . examination and Inspector Gunderson’s inspection.” Sec. Br. 42. If the Secretary is suggesting that the company was required to show that coal production occurred during the shift, the court rejects the suggestion and reiterates the obvious, that the burden is the Secretary’s not Twentymile’s.

<sup>35</sup> The court recognizes that the Commission has adopted a liberal approach to pleadings and their amendments, but even given this liberality the Secretary must do something to correct errors in pleading or to make her pleadings conform to the evidence, and here she did nothing.

<sup>36</sup> The court notes that Commission Administrative Law Judge Jerold Feldman reached a similar result, although for somewhat different reasons, in a case that is now before the Commission. *Black Beauty Coal Co.*, 34 FMSHRC \_\_\_, Docket No. LAKE 2008-378-R, etc., (February 10, 2012) (*Directed for Review*, March 21, 2012).

traveling in this crosscut to the hazards of slipping or electrocution when coming in contact with the unguarded energized high voltage cable.

Gov't Exh. 23.

Carol Miller is an MSHA inspector who at the time of the hearing had been employed by the agency for slightly more than five years. Tr. 362. Prior to working for MSHA she had 18 years of experience in the mining industry. Tr. 363. Miller testified that after becoming a certified representative of the Secretary she conducted several inspections at the Foidel Creek Mine. Tr. 365. During one such inspection, on June 29, 2009, she found a "high voltage cable that wasn't guarded where men work and travel."<sup>37</sup> Tr. 367. She believed the condition violated section 75.807.

Miller took photographs of the cable. Tr. 368; Gov't Exh. 24. (One photograph shows the cable coiled on the trailer. Gov't Exh. 24 at 1.) The cable was located on the trailer's bed, three to four feet above the mine floor. Tr. 368. Miller stated that the cable and the trailer on which it was sitting were in a travelway that miners used to reach a power center. *Id.* A lunch table was located behind the power center. *Id.* Miller maintained that miners walked past the trailer and cable numerous times during a shift. Tr. 377. She explained:

[Y]ou see 'em in this area when you're underground, and in order to set power up on the equipment that they're operating, they have to travel past this trailer to the power center, and there's a microwave for 'em heating up their lunch and they usually store their lunch buckets and their self-rescuers at this location when they arrive underground.

Tr. 369.

According to Miller twelve miners usually worked on the section where the cable was located. Tr. 369. In addition to using the crosscut to access the power center and lunch table (Tr. 370-371, Gov't Exh. 24 at 2), miners hung their self contained self rescue devices ("self rescuers") on the rib adjacent to the trailer. Tr. 371; Gov't Exh. 24 at 4. They did so to keep the self rescuers from getting wet. Tr. 372. Miller also noted that the cable was energized and connected to the power center. As mining advanced on the section, the cable and power center would also advance. Tr. 416.

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<sup>37</sup> The cable carried 12,470 volts of electricity. Tr. 369.

The trailer on which the cable was coiled was sitting slightly off-center in the crosscut. Tr. 368. On one side there was four feet between the edge of the trailer and the rib, and on the other side there was six feet. *Id.* There were walkways on both sides of the trailer. Tr. 369. The cable itself was coiled a few inches from the outer edge of the trailer's flat bed. Gov't Exh. 24 at 1. Yellow tape completely surrounded the cable. The tape is held in place by approximately 6 white posts that projected upward at the outer edges of the flatbed. Gov't Exh. 24 at 1. Miller called the tape "flagging." Tr. 370. She maintained that section 75.807 requires high voltage transmission cables to be "guarded where men regularly work or pass under them" and that "flagging" does not constitute a guard.<sup>38</sup>

Miller described the mine floor on both sides of trailer as uneven and wet, with water seeping up through the floors.<sup>39</sup> Tr. 370. In Miller's opinion the water created a slipping hazard. *Id.*, 377-378. In addition, there were other cables coming off of the power center that were lying on the miner floor. She thought that they too created a tripping hazard. Tr. 378.

The company abated the alleged violation by placing plastic mesh netting completely around the trailer bed.<sup>40</sup> Tr. 372-373; Gov't Exh. 24 at 6. Winey maintained the netting was really pliable and that a miner's finger could pass though it, but he agreed that a miner's hand could not. Tr. 456.

Miller found that the condition was reasonably likely to fatally injure a miner. *Id.* 373; Gov't Exh. 23. Miners passed the cable several times a day, and Miller saw miners do so during her inspection. Tr. 373-374. Miller also was concerned because when they passed the trailer, miners carried metal tools – "pliers, wrenches, screw drivers" – and metal is conductive. Tr. 374. Further, because the cable was frequently used and moved, it was subject to stress and damage from equipment and mine ribs. Tr. 375. Miller noted that such damage is not always visible.<sup>41</sup> To prevent miners from being seriously injured if they contacted the cable, the cable should have been guarded. Tr. 376. It was, in Miller's view, highly likely that a miner would slip or trip and

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<sup>38</sup> Matt Winey described the upright posts as "pogo sticks" and testified that the company usually guarded high voltage cable on trailers by wrapping flagging around the sticks. Tr. 437. Winey could not recall the company ever guarding high voltage cables on trailers differently. Tr. 439. He stated that MSHA had not cited the condition previously. Tr. 439-440. Miller acknowledged that section 75.807 does not specify how a high voltage cable must be guarded. Tr. 415.

<sup>39</sup> She acknowledged however, that when she described the condition on the citation she did not use the word "uneven." Rather, she wrote that the walkways were "wet and compacted." Tr. 418; Gov't Exh. 23.

<sup>40</sup> Miller described the mesh as, "plastic[-]like snow fencing type material." Tr. 434.

<sup>41</sup> Miller did not know if the cable was actually damaged because she did not conduct a "full examination of [the] cable." Tr. 419.

touch the energized cable because a miner's first reaction would be to reach out as he stumbled or fell.<sup>42</sup> Tr. 378. If a miner contacted the energized cable and if the cable was defective, in Miller's opinion, an electrocution was likely. Tr. 376-377.

Miller believed that the company was moderately negligent in allowing the violation to exist. Gov't Exh. 23. She noted that for two years before June 29, 2009, no citations had been issued for violations of section 75.807. Tr. 378, Tr. 421; *see* Gov't Exh. 25 at 2. Nonetheless, and although Miller did not know how long the cable had been left unguarded, in her opinion the condition was obvious and should have been corrected. Tr. 379. Finally, Miller noted that MSHA's Program Policy Manual states that "Energized high-voltage cables shall be stored in unused crosscuts or other unused areas away from haulageways or mantrip stations where miners or equipment could contact or damage such cables." Tr. 381; Gov't Exh. 26. The company had not done this. Tr. 381.

### **THE VIOLATION**

Section 75.807 requires in part that underground high-voltage transmission cables be "guarded where men regularly work or pass under them unless they are 6 ½ feet or more above the floor." The court finds that the record fully supports Inspector Miller's contention that Twentymile violated section 75.807. The Secretary established that the cited cable carried 12,740 volts of electricity, which is high voltage indeed. Tr. 373. The Secretary further established that miners regularly worked in the vicinity of the stored cable in that there were walkways on both sides of the trailer, and miners regularly used the walkways to reach the power center and lunch area. Tr. 369. Miller's testimony that miners traveled past the trailer to store and use their lunch buckets was not contested. Tr. 369. Nor was her testimony that miners passed the trailer to check on the power at the power center and to store their self rescuer devices. Indeed, she actually saw miners travel past the cable several times during her inspection. Tr. 415, 418-419. Further, as she explained, miners also moved up the power center as mining on the section progressed, work that would require them to pass the cable. Tr. 416. Thus, the need to travel past the coiled high voltage cable was well documented. As was the fact that miners did so frequently as part of their normal work on the section. The cable should have been guarded. *See Little Bill Coal Co., Inc.*, 2 FMSRHC 3634 (December 1980) (ALJ Steffey).

Guarding the high voltage cable required it to be furnished with a protective device to prevent injury. As Miller rightly noted, no such device was present. The testimony and the photographic evidence overwhelmingly support the conclusion that the tape Twentymile placed around the "pogosticks" would not prevent a miner's hand or other parts of a miner's body from

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<sup>42</sup> Matt Winey agreed that a miner could easily touch the cable if his hand or other parts of his body went under or over the flagging. Tr. 429, 456.

touching the cable should the miner slip or trip while passing the trailer. Even Winery agreed with the Secretary in this regard. Tr. 378, 429, 456; *See* Gov't Exh. 24. For these reasons the court concludes that the violation existed as charged.

### **S&S and GRAVITY**

The violation was both S&S and serious. The court has found that there was a violation thus satisfying the first *Mathies* criterion. 6 FMSHRC at 3-4. The court further finds that the other *Mathies* criteria have been met. The violation contributed to a discrete safety hazard in that a miner could easily slip or trip and touch the energized cable (Criterion No. 2). Obviously, if the cable was defective, touching the cable could result in an immediate electrocution or a severe electrical burn injury (Criterion No. 4). Finally, under all of the circumstances and as mining continued it was reasonably likely that a miner would touch the cable (Criterion No. 3). The energized, coiled cable rested unguarded on the trailer bed, three to four feet above the mine floor. It extended to within a few inches of the edges of the trailer. Walkways on both sides of the trailer were frequently used. Tr. 368, Gov't Exh. 24 at 1. The location of the cable on the trailer and of the trailer in the crosscut placed the cable within easy reach of the regularly passing miners. Tr. 368. The floor in the vicinity of the trailer was wet, making slipping a distinct possibility.<sup>43</sup> Tr. 370. The court concludes that the location of the walkways, the location of the trailer, the location of the energized high voltage cable on the trailer, and the condition of the floor next to the trailer made it reasonable likely a miner would trip or slip and come in contact with the energized, unguarded cable. All that then had to happen was for a defect in the cable to allow electricity to escape the cable's jacket and the miner would be electrocuted or severely injured.<sup>44</sup> For these reasons the court concludes the Secretary also proved the third *Mathies* criterion.

It is beyond doubt that the violation was serious. The failure to guard the energized high voltage cable easily could have resulted in a miner's death.

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<sup>43</sup> In this regard, the court does not find Miller's description in her testimony of the floor on both sides of the trailer as "uneven" inconsistent with her written description on the citation of the floor as "compacted." Tr. 370, 418; Gov't Exh. 23. Floor material can be both uneven and compacted and the court concludes such was the case here.

<sup>44</sup> Miller succinctly described the various ways in which the frequently used cable could be damaged. Tr. 374. Given the heavy use of the cable and the numerous stresses and strains to which it was subjected as a result of those uses, the court concludes a serious defect was reasonably likely to occur as mining continued.

## NEGLIGENCE

Miller found that the violation was due to moderate negligence on the company's part, and the court agrees. Gov't Exh. 23. Her testimony established in the two years prior to June 29, 2009 no violations of section 75.807 were cited at the mine (Tr. 378,421; *See Gov't. Exh. 25 at 2*), Whiney's testimony established the company's mistaken, but good faith belief that the flagging constituted compliance. Tr. 439. Still, the condition was visually obvious, and it should have been detected and corrected. It was not, and the company therefore failed to meet the standard of care required by the circumstances.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8456842	7/15/09	75.503

The citation states:

The company no. 6 . . . roof bolter in the 18 Left, no. 1 face was not maintained in permissible condition. There was cardboard around the lighting lenses on the light assemblies on the ATRS. This creates a possibility of a fire hazard due to the lens and lighting becoming hot. The bolter was operating at the time placing the two operators exposed to the hazard.

Gov't Exh. 27.<sup>45</sup>

Miller explained that during a July 15, 2009 inspection she noticed a roof bolting machine that had cardboard installed under and around the light assemblies of the machine's automatic temporary roof support ("ATRS") system. Tr. 383. Miller believed that the presence of the cardboard rendered the equipment impermissible.<sup>46</sup> Tr. 383-384. In her opinion, the cardboard

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<sup>45</sup> Miller initially found the alleged violation was S&S and was reasonably likely to cause lost workdays or restricted duty to two miners. However, before the Secretary offered testimony related to the citation, the Secretary's counsel moved to delete the inspector's S&S finding and to change the inspector's likelihood of injury finding to unlikely. Tr. 381-382. Counsel for the company did not object, and the citation was accordingly modified. Tr. 382.

<sup>46</sup> Miller explained her understanding of the regulatory requirement that equipment be "permissible":

[The] [e]quipment is designed and approved through [MSHA]. To be permissible [it has] to go through

(continued...)

constituted a violation because “the manufacturer did not have [the] . . . equipment approved to have cardboard installed around the lighting.” Tr. 384. The machine was used to bolt the roof and ribs and Miller believed that when it did coal dust created by drilling could coat the cardboard, and both cardboard and coal dust are flammable. Tr. 384-385. In addition, the machine used hydraulic oil. Tr. 385. The oil was conveyed to the machine’s drilling head through hydraulic hoses which could leak or break, and the oil could coat the cardboard. *Id.*

The lights about which Miller was concerned were florescent. The lights’ lenses were not damaged, and she did not measure the temperature of the lights when she found the condition. Tr. 405-406. Still, Miller maintained that the plastic lenses for the lights became “really warm” and the presence of the cardboard can make them “even warmer.” Tr. 385. She feared that heat from the lights could damage the lenses. Tr. 386. Miller agreed that the temperature would not reach 212 degrees Fahrenheit (Tr. 406-407), and she admitted that she did not know the allowed surface temperature of the machine. Tr. 409. Still she believed that the light’s plastic lenses could overheat and crack, exposing the interior of the lights to the mine’s ambient atmosphere. This in turn could expose the internal components of the lights to float coal dust and any methane that was present. The internal components could ignite the coal dust and methane. Tr. 386-387. Two miners who operated the roof bolting machine could be injured. *Id.*

Miller acknowledged that she inspected all of the openings of the roof bolting machine with a feeler gauge and that she also made sure the packing glands of the machine’s lights were tight to the frame of the machine. The presence of the cardboard was the only permissibility violation she found. Tr. 405.

Miller found that the company was moderately negligent in allowing the cardboard to be present around the lights. Gov’t Exh. 27. Because the cardboard was still “fairly clean,” Miller believed that the condition was of short duration. Tr. 388. Still, the presence of the cardboard was obvious, and the condition should have been corrected. *Id.*

### **THE VIOLATION**

Section 75.503 requires electrical face equipment taken into or used inby the last open crosscut of a mine to be maintained in permissible condition. It is common knowledge that roof bolting machines are “taken into and used inby the last open crosscut.” It also is clear that to be in “permissible” condition the electrical parts of the equipment must be “designed, constructed,

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<sup>46</sup> (...continued)

testing to assure that [the] equipment would not be exposed to float dust and methane and cause an ignition in the face.

Tr. 383.

and installed, in accordance with the specifications of the Secretary, to assure such equipment will not cause a mine explosion or mine fire.” 30 C.F.R. §75.2. Twentymile argues, the court believes correctly, that the Secretary failed to establish a violation of section 75.503. Resp. Br. 31.

The condition alleged to have violated the standard is “cardboard around the lighting lenses on the light assemblies on the ATRS.” Gov’t Exh. 27; Tr. 384. (As Miller put it, “the manufacturer did not have [the] . . . equipment approved to have cardboard installed around the lighting.” Tr. 384.) The problem is that the permissibility requirements do not speak to the alleged defect. The Secretary’s requirements for permissibility are set forth at 30 CFR Part 18, and a search of Part 18 reveals that while it contains much detail regarding the construction and design of permissible equipment, no construction and design requirements concern cardboard around light lenses. Rather, the permissibility requirements for lights focus on the lights’ construction, their protection from damage by guarding or location, their specified lense materials and assemblies, and their specified lens gaskets. 30 C.F.R. §18.46; *see also* 30 C.F.R. §18.66. The Secretary is not alleging that the design or construction of the ATRS lights failed to meet the specified requirements, and she has not pointed to any requirement in Part 18 that prohibits the presence of the allegedly impermissible cardboard. Moreover, as Twentymile notes (Resp. Br. 31), although Part 18.23 states that the temperatures of the external surfaces of electrical components shall not exceed 302° Fahrenheit, and although the inspector testified the plastic lenses of the cited lights can become “really warm” and that the presence of the cardboard can make them “even warmer” (Tr. 385), Miller did not know the temperature of the lenses. Tr 406. For all of these reasons the court concludes the Secretary failed to prove what she charged – that the presence of the cardboard violated section 75.503. Therefore, the citation must be vacated.

**CITATION NO.**  
8456844

**DATE**  
7/15/09

**30 CFR §**  
75.1714-5

The citation states:

The mine operator did not indicate the location of the SCSR [(self contained self rescue devices)] storage in 18 Left, no. 2 entry, crosscut 65+75. The map on the refuge alternative, and the emergency supply trailer, do not show the storage of the 36 SCRSs stored at this location.

Gov’t Exh. 30.

Section 75.1714-5 in pertinent part requires a mine operator to indicate “the locations of all stored SCRSs on [its] mine maps.” Miller testified that on July 17, 2009 she looked at two escapeway maps at the mine and she noticed that the location of 36 SCRSs she knew were stored in Crosscut 65+75 was not indicated. Tr. 389-390. The maps showed the location of other stored

SCRSs but not of those stored in Crosscut 65+75.<sup>47</sup> Tr. 391. In contemporaneous notes Miller wrote that the maps indicated there were 36 stored SCRSs at Crosscut 36+00 not at Crosscut 65+75.<sup>48</sup> Tr. 392; Gov't Exh. 32 at 3. She speculated when the 36 SCRSs had been moved to Crosscut 65+75, the maps were not updated. Tr. 392. The essence of the violation was that the location of the SCRSs should have been on the maps. Tr. 424.

Miller testified that when a section advances the SCRSs are moved, and the maps are supposed to be updated at the end of the shift. Tr. 424. Miller was sure the section was not in the process of moving. In addition, no one from the company represented to her that the section was moving. Tr. 393-394. Therefore, the maps should have showed that the SCRSs were located at Crosscut 65+75.

According to Miller, the stored SCRSs provide an hour's worth of oxygen, and miners can determine where the SCRSs are located by looking at the escapeway maps. Tr. 394-395. Failing to note their location on the maps subjects miners to the danger of not finding the SCRSs if miners are told to evacuate the mine. If they evacuate because of smoke or lack of oxygen and the miners cannot find the SCRSs, the miners can die. Tr. 395. Further, because 10 miners usually work on a section, Miller believed that all 10 were endangered by the alleged violation. *Id.* However, Miller agreed that the area where the SCRSs were stored was an escapeway and that the lifeline in the escapeway would provide a tactile indication to the miners as to the location of the devices. Tr. 425.

Miller found that the alleged violation was due to the company's moderate negligence. The company knew it was required to update the maps with regard to the location of the SCRSs, but failed to do it. Tr. 396.

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<sup>47</sup> The testimony was muddled as to whether the violation concerned two escapeway maps or one. On cross examination Miller indicated that the location of the 36 SCRSs was not shown on the escapeway map located at the refuge alternative. Tr. 423. This testimony was seemingly at odds with the citation and other parts of her testimony that can be read as indicating two maps were involved. Tr. 389-390; Gov't Exh. 30. As discussed below the inconsistency is not fatal to the Secretary's case.

<sup>48</sup> Miller testified that Crosscut 36+00 was 2,000 to 3,000 feet away from Crosscut 65+75. Tr. 393.

When he testified, Matt Winey was asked to circle in blue on a map of the 18 Left Section, No. 2 Entry where the SCSR storage caches were located. Tr. 442; Resp. Exh. 45. Winey circled and initialed 5 different locations. Resp. Exh. 45. He noted that there were additional caches of SCSRs in the adjacent No. 3 Entry. Tr. 442. He estimated that the closest cache of SCSRs in the No. 2 Entry was approximately 4700 feet from the working face, less than the 5,400 feet required. Tr. 444.

### **THE VIOLATION**

As noted, section 75.1714-5 requires an operator to “indicate the location of all stored SCSRs on mine maps required by §§75.1200 and 75.1505.” Section 75.1200 requires an operator to maintain an “accurate and up to date” mine map in a repository on the surface, and section 75.1505 requires an operator to maintain an up to date escapeway map at, among other locations, the refuge alternative. On the citation and during her direct examination Miller seemed to maintain that she looked at two required maps and that the location of the subject 36 SCSRs was indicated on neither. Gov’t Exh. 30; Tr. 389-390, 426. However, she also indicated on cross examination that the alleged violation only pertained to the map required to be maintained at the refuge alternative. Tr. 423. Since the latter allegation is encompassed by the former, the court finds that the alleged violation pertains to the map stored at the refuge alternative. It also finds that the Secretary established the violation. Indeed, Twentymile does not argue otherwise. The court therefore holds that the location of 36 SCSRs were stored in 18 Left, No. 2 Entry, Crosscut 65+75 was not indicated on the escapeway map stored at the refuge alternative and that the company violated section 75.1714-5.

### **GRAVITY**

Miller found that the violation was unlikely to cause lost workdays or restricted duty to 10 miners who normally worked on the section, and the court agrees. Tr. 395; Gov’t Exh. 30. The SCSRs were stored as required. The danger was limited. If during an emergency the miners when called upon to evacuate the mine, miners might not be able find the stored SCSRs. However, Miller noted that because the SCSRs were stored in an escapeway the lifeline in the escapeway would give some indication to the miners of the presence of the SCSR’s. Tr. 425. Further, Winey testified that numerous other SCSRs were stored in the vicinity of the crosscut, an assertion that the Secretary did not dispute. Tr. 442-444; Resp. Exh. 45. Considering these facts, the court agrees with Miller that the violation was unlikely to result in serious injuries, and the court concludes that the violation was not serious.

## NEGLIGENCE

Miller also found that the violation was due to the company's moderate negligence, and again the court agrees. There is no indication the company habitually failed to maintain accurate and up to date mine maps. Still, the duty to indicate the location of stored SCSRs on the mine maps was known to the company. Twentymile failed to meet the standard of care required.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8456851	7/28/09	75.380(d)(2)

The citation states:

The alternate escapeway for 10 Main North section to 9 Main North no. 6 entry was not clearly marked to show the route and direction of travel. The reflectors to show the route of travel were facing the opposite direction for travel.

Gov't Exh. 31.

Miller's testimony faithfully reflected the citation. She stated that during an inspection on July 28, 2009 she noticed that five or six reflectors hanging from the roof in an alternate escapeway from the 10 Main North Section to the 9 Main North Section in the No. 6 Entry were pointing in the wrong direction for a distance of approximately 500 to 600 feet. Tr. 399-400, 403, 426, 428. In her view the condition posed a potential hazard because miners are trained to consider the reflectors as indicators of the way out of the mine in the event of an emergency. Tr. 397. Such training is important because "miners that have traveled the wrong direction . . . [have] not escape[d]." Tr. 398. Miller believed that unless visibility in the escapeway was significantly obscured by smoke, miners seeking to hastily exit the mine via the escapeway would rely on the reflectors hanging from the roof and would likely go the wrong way. Tr. 403. Miller acknowledged, however, that the reflectors were not the only indicators of the way out. Lifelines were used in the mine as "tactile devices" to show the right directions of travel. Tr. 398-399. Cones on the lifelines indicated the correct way to head. *Id.*

The inspector found it unlikely that injuries would be caused by the misdirected reflectors because they were located in an alternate escapeway. If miners needed to evacuate the mine they would be "more apt to use the primary escapeway." Tr. 400. In all likelihood miners only would use the alternate escapeway if the primary escapeway was impassable. Tr. 401.

Miller noticed five miners in the area of the misdirected reflectors. Tr. 400; Gov't Exh. 31. The miners were developing a new section. Miller believed the danger to the five was if they used the alternate escapeway they might be confused and travel into rather than out of danger or they might be delayed in making their escape. Tr. 401. In her opinion either eventuality could result in the miners' deaths. *Id.*

According to Miller's notes the new section had been under development for from eight to ten weeks, and Miller speculated that the condition had existed for that length of time. Tr. 401; Gov't Exh. 32 at 4. She stated that the alternate escapeway had to be inspected weekly and that no one from mine management explained to her why the condition existed and why it had not been found and corrected. Tr. 402. Still, Miller found that the condition of the reflectors was due to the company's low negligence. Tr. 401, Gov't Exh. 32.

Winey stated that the reflectors used in the mine are round, about three eighths of an inch thick, and three inches in diameter. They have a hole in the middle and a wire passes through the hole. Each reflector is hung by the wire from the roof. Tr. 4449-450. Winey maintained that if the cited entry filled with smoke, the reflectors would not be visible. Tr. 453. In other words, they might not be of much use in an actual emergency. He was certain that regardless of the directional correctness of the reflectors, affected miners could get out of the mine by following the escapeway lifeline. Tr. 455.

### **THE VIOLATION**

Section 75.380(d)(2) requires that each escapeway be "[c]learly marked to show the route and direction of travel to the surface." The court finds that the violation existed as charged. One of the ways Twentymile chose to comply with the standard was to use reflectors as a means of showing the way out of the mine. Tr. 448. Miller's testimony that five or six of the reflectors in an alternate escapeway were turned the wrong way for a distance of 500 to 600 feet was not controverted. Tr. 397, 399-400, 403, 426, 428. As such, the reflectors did not show the "route and direction of travel to the surface."

### **GRAVITY**

Miller did not believe that the violation was serious. Neither does the court. As Winey pointed out, and as Miller agreed, the lifeline offered an alternative way to determine the correct direction to exit the mine. Tr. 455, 398. Moreover, the area where the violation occurred – the alternate escapeway – in all likelihood only would be used if the primary escapeway was blocked or otherwise impassable, a condition that made an injury or fatality caused by the violation significantly less likely. For these reasons the court concurs with the inspector that the five employees developing the new section on June 28, 2009 were unlikely to be adversely affected by the violation.

### **NEGLIGENCE**

Miller found that the violation was due to the company's low negligence and she was correct. Tr. 401; Gov't Exh. 32. The court accepts Miller's testimony that work on the new section had been ongoing for weeks before she found the violation. Tr. 402. However, there is no way to know how long the reflectors had been turned the wrong way. As pointed out, the alternate escapeway had to be inspected once a week, but since it is impossible to know or

reasonably infer when the violation occurred, it is likewise impossible to know or reasonably infer when it should have been detected and corrected. Tr. 402.

**OTHER CIVIL PENALTY CRITERIA**

**HISTORY OF PREVIOUS VIOLATIONS**

Without objection from Twentymile the Secretary entered into evidence computer printouts identifying violations cited at the mine in the 15 months proceeding the first violations at issue in the dockets. Gov't Exh. 35; Tr. 20-21, 460. The court finds that the exhibit reflects a large history.

**SIZE OF THE OPERATOR**

The parties stipulated that Twentymile is a large operator, and the court so finds. Stip. 9 *supra*.

**ABILITY TO CONTINUE IN BUSINESS**

The parties stipulated that the proposed penalties will not affect Twentymile's ability to continue in business (Stip. 8 *supra*) and the court finds the same is true for the penalties assessed.

**GOOD FAITH ABATEMENT**

The parties did not stipulate to this criterion but the court finds based on the citations and order at issue that Twentymile in fact exhibited good faith in trying to achieve rapid compliance.

**CIVIL PENALTY ASSESSMENTS**

**WEST 2009-1323**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8457448	6/23/09	75.516.2(c)	\$207	\$100

The violation was not serious and the company's negligence was low. These findings and the criteria referenced above warrant a penalty of \$100.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 CFR §</u></b>	<b><u>PROPOSED PENALTY</u></b>	<b><u>ASSESSMENT</u></b>
8463328	6/16/09	75.380(d)(2)	\$207	\$0

The Secretary did not prove a violation. A penalty cannot be assessed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8463331	6/17/09	75.202(a)	\$6,115	\$2,500

The violation was serious and the company's negligence was moderate. These findings and the criteria referenced above warrant a penalty of \$2,500.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8460324	6/23/09	75.363(b)	\$1,530	\$2,500

The violation was serious and the company's negligence was moderate. These findings and the criteria referenced above warrant a penalty of \$2,500.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8460322	6/22/09	75.363(b)	\$1,530	\$3,500

The violation was serious and the company's negligence was high. These findings and the criteria referenced above warrant a penalty of \$3,500.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8460313	6/10/09	75.380(d)(1)	\$3,405	\$1,500

The violation was not serious and the company's negligence was high. These findings and the criteria referenced above warrant a penalty of \$ 1,500.

**WEST 2010-578-M**

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8460435	8/11/12	75.362(b)	\$4,000	\$0

The Secretary did not prove a violation. A penalty cannot be assessed.

**WEST 2010-38-M**

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8456832	6/29/09	75.807	\$3,405	\$2,500

The violation was serious and the company's negligence was moderate. These findings and the criteria referenced above warrant a penalty of \$2,500.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8456842	7/15/09	75.503	\$1,203	\$0

The Secretary did not prove a violation. A penalty cannot be assessed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8656844	7/15/09	75.1714-5	\$807	\$2,500

The violation was serious and the company's negligence was moderate. These findings and the criteria referenced above warrant a penalty of \$2,500.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8456851	7/28/09	75.308(d)(2)	\$162	\$162

The violation was not serious and the company's negligence was low. These findings and the criteria referenced above warrant a penalty of \$162.

### SETTLED VIOLATIONS

The parties have agreed to the following settlements:

#### Docket No. WEST 2009-1323

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8456622	6/1/09	77.516	\$2,282	\$0

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
8456923	6/16/09	75.1714-2(f)	\$150	\$0

The Secretary will vacate the citations. Tr. 13.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
6687481	6/17/09	75.206(f)	\$3,784	\$3,784

Twentymile will accept the citation as written and pay in full the proposed penalty. Tr. 14.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
6460506	6/23/09	75.380(d)(1)	\$3,403	\$477

The Secretary will delete the inspector's finding that the violation was S&S, will change the inspector's evaluation of the likelihood of injury from reasonably likely to unlikely and will change the negligence finding from high to moderate. Tr. 14.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Penalty</u>	<u>Assessed Penalty</u>
6460507	6/23/09	75.380(d)(1)	\$13,268	\$1,858

The Secretary will delete the inspector's S&S finding, change the inspector's evaluation of the likelihood injury from reasonably likely to unlikely and will change the negligence finding from high to moderate. Tr. 14-15.

**Docket No. WEST 201-578**

<b><u>Order No.</u></b>	<b><u>Date</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>Proposed Penalty</u></b>	<b><u>Assessed Penalty</u></b>
8457357	8/11/09	75.362(b)	\$18,742	\$10,000

The Secretary will change the inspector's evaluation of the likelihood of injury from occurred to highly likely and will modify the order from one issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. §814(d)(2), to a citation issued pursuant to section 104(a) of the Act. 30 U.S.C. §814(a) . Tr. 15.

**ORDER**

In view of the above findings, conclusions and settlement approvals, within 30 days of the date of this decision Twentymile **IS ORDERED** to pay civil penalties in the amount of \$15,262 for the contested violations found above and to pay \$16,119 for the settled violations. In addition, within the same 30 days the Secretary **IS ORDERED** to modify Citation No. 8457448 by changing the inspector's negligence finding from "moderate" to "low," to modify Citation No. 8463331 by changing the inspector's negligence finding from "high" to "moderate," and to vacate Citation No. 8463328, Citation No. 8456842, and Order No.8460435. Upon payment of the civil penalties, modification of the citations and vacation of the citations and order this proceeding **IS DISMISSED**.

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

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/db

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>TH</sup> Street, Suite 443  
Denver, CO 80202-2500  
303-844-3577/FAX 303-844-5268

August 10, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of JEFFREY FLETCHER,	:	Docket No. LAKE 2012-745-D
Applicant	:	MSHA No. VINC-CD-2012-03
	:	
v.	:	Gibson South Mine
	:	
FRONTIER-KEMPER	:	
CONSTRUCTORS, INC.,	:	Mine I.D. 12-02388 A01
Respondent	:	

**DECISION AND ORDER DENYING APPLICATION  
FOR TEMPORARY REINSTATEMENT  
ORDER OF DISMISSAL**

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Applicant;  
R. Brian Hendrix, Esq., and Benjamin D. Wood, Esq., Patton Boggs, LLP, Washington, DC, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Jeffrey Fletcher against Frontier-Kemper Constructors, Inc. (“Frontier-Kemper”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the “Mine Act”). The application was filed by the Secretary on or about July 6, 2012, and Frontier-Kemper requested a hearing within 10 days of receipt of the application. The application alleges that Frontier-Kemper discriminated against Fletcher when he was terminated for participating in an inspection conducted by Inspector Stephen J. Wilson of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Fletcher was terminated from his employment on May 2, 2012, and he filed his complaint of discrimination with MSHA on May 31, 2012. The application states that the Secretary has determined that the underlying discrimination complaint filed by Fletcher was not frivolously brought. A hearing in this temporary reinstatement proceeding was held in Henderson, Kentucky, and the parties filed post-hearing briefs. For the reasons set forth below, I find that the Secretary failed to establish that Fletcher’s discrimination complaint was not frivolously brought.

## I. SUMMARY OF THE EVIDENCE

The parties entered into eight stipulations as follows:

1. Frontier-Kemper Constructors, Inc., is an independent contractor performing services at the Gibson South Mine, and it is an operator as defined in Section 3(d) of the Federal Mine Safety and Health Act, 30 U.S.C. § 802(d).

2. Frontier-Kemper Constructor, Inc.'s Gibson South Coal (South) LLC-Gibson South Slope construction project is located in Gibson County, IN.

3. The complainant, Jeffrey Fletcher, was employed by Respondent at the Gibson South slope construction project and he was a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

4. During the day shift on April 30, 2012, Mr. Fletcher was asked by his supervisor, Jeff Knowlton, to assist Mr. Knowlton in marking the drill pattern on the working face of the slope with paint.

5. While marking the working face with paint on April 30, 2012, Mr. Knowlton and Mr. Fletcher both placed themselves at least 7.5 feet beyond the last row of roof support, in violation of the approved roof support plan and 30 C.F.R. § 77.1900-1.

6. On May 1, 2012, MSHA Inspector Stephen J. Wilson, A/R Number 24865, observed the paint on the working face and determined that the face was at least 7.5 feet from the last row of roof support.

7. On May 2, 2012, Frontier-Kemper Constructors, Inc., suspended Mr. Fletcher and his employment was terminated on May 9, 2012.

8. This temporary reinstatement proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 106 of the Mine Act.

Jeffrey Fletcher worked for Frontier-Kemper as an hourly employee for about six years. (Tr. 17). As stated in the stipulations, he was terminated from his employment on May 9, 2012. At all relevant times, Frontier-Kemper was helping Gibson South Coal develop a new mine by constructing the slope that would eventually become the main entrance for the mine. Fletcher was classified as a "Miner 1" while working on this project, which denotes "a more experienced, more knowledgeable miner." (Tr. 20). Fletcher was given training on roof control plans, but he testified that the plans were not reviewed in depth. (Tr. 21). Until he was terminated, Fletcher had never received any discipline from Frontier-Kemper.

On April 30, 2012, Fletcher was working the day shift at the slope, which runs from 7:00 a.m. to 7:00 p.m. Jeff Knowlton was his supervisor. (Tr. 22). Knowlton was in charge of the slope crew and he was known as the “walk boss.” (Tr. 23). There were about six miners on the crew that day including the mechanics. (Tr. 26). Fletcher had worked for Knowlton at other projects for Frontier-Kemper and Fletcher testified that Knowlton had never done anything that caused him to distrust him. He also testified the he felt comfortable raising any safety concerns with him. (Tr. 54, 114-15). At the start of the shift, the crew was pinning the roof by installing roof bolts to support the roof. On April 30 the roof control plan required that roof bolts be installed on four foot centers. Knowlton was operating the roof bolting machine that morning. (Tr. 24). Fletcher’s job that morning was to make sure that all of the necessary supplies were available including roof bolts, plates, and glue. According to Fletcher, this pinning operation took about nine hours of the twelve hour shift. *Id.* The crew stopped roof bolting at about 4:00 p.m. that day.

At about 4:00 p.m., Knowlton told the crew to go to the surface to prepare the jumbo drill for the next cycle of mining. (Tr. 25, 61). As the jumbo drill was being prepared, Knowlton came up to the surface and told Fletcher he was going to help him paint the face. (Tr. 26, 62). The upper portion of the face is painted using a basket that is attached to a scoop. The basket, which is equipped with railings, is designed to be picked up by the bucket of the scoop. The miners painting the face stand in this basket when painting the face. (Tr. 27). The face is painted so that when the next section of the face is extracted, the slope is kept straight in accordance with the mine plan. Engineers point two beams of laser lights at the face which is marked with paint and, from those two markings, a center point is established. (Tr. 28). As described below, the crew then applies paint at other locations to designate the arch into which the steel arch support will be installed.<sup>1</sup> The paint on the face tells the operator of the jumbo drill where to drill.

Before stepping into the basket, Fletcher did not measure the distance between the last row of roof bolts and the face. He testified that he did not even look up at the roof to estimate this distance or to look at the condition of the roof. (Tr. 28-29, 65-67, 76). He did not know whether Knowlton took any measurements. Tony Theriac, a mucker, was the other miner involved in this work. Theriac operated the scoop. Besides Knowlton, Fletcher was the most experienced miner on the crew. (Tr. 63). After they found the centerline, Fletcher got into the basket with Knowlton and Theriac lifted the bucket slightly which positioned Fletcher and Knowlton about a foot from the face under unsupported roof. (Tr. 64, 115-16). Fletcher testified that he did not notice that he was under unsupported roof but that he knew that a miner is not allowed to work between the last row of roof bolts and the face if that distance is greater than four feet. (Tr. 67-68, 76). He testified that he did not know that it was greater than four feet that day because he did not examine the roof. (Tr. 68). In addition, the previous shot did not leave the face in a smooth, flat condition. (Tr. 78). Fletcher held a nine foot pole on the center point

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<sup>1</sup> Because the slope will be a permanent entry into the mine, the roof support system to be installed was more sophisticated than is typical in entries and crosscuts in the coal seam.

so he could rotate it around while Knowlton painted the arch. (Tr. 30, 64). Fletcher estimated that this task took about 20 minutes. *Id.* Fletcher admitted that the normal procedure is to pin the roof to within four feet of the face before it is painted, drilled, and shot. (Tr. 80). He testified that he just did what Knowlton told him to do. (Tr. 81). After the face was painted, Fletcher walked back to the surface, performed other duties, showered, and left the mine at the end of his shift.

On May 1, 2012, Fletcher arrived at the mine to start his 7:00 a.m. shift. He thought that the crew would start drilling the face using the painted surface as a guide and that these drill holes would be used to shoot the face later in the shift. Instead, the crew was told to take the roof bolting machine back down the slope to do more pinning. (Tr. 31). Knowlton was not at the mine that day. Three MSHA inspectors arrived at the slope at about 9:30 a.m. and one of the inspectors, Stephen Wilson, immediately “started hollering about the paint on the face.” (Tr. 32). The crew was in the process of installing another row of roof bolts. Inspector Wilson wanted to know who painted the face. Before anyone answered, Fletcher talked to Bob Smith and told him that he was on the crew that painted the face. (Tr. 32-22, 75). Fletcher testified that Smith told him “to be truthful and honest when [Inspector Wilson] asked questions.” (Tr. 33-34, 75). Bob Smith was the onsite project safety manager. (Tr. 36). Inspector Wilson approached Fletcher shortly after that and asked him questions. In response to these questions, Fletcher told the inspector that he was on the crew that painted the face, he explained the process that was used to paint the face, and he provided the names of the other crew members. (Tr. 34-35, 46, 85-86). The inspector also talked to other miners and asked for everyone’s full names and phone numbers. Inspector Wilson issued an order of withdrawal under section 104(d)(1) of the Mine Act, which closed down the slope for the day.<sup>2</sup> The crew performed work on the surface for the remainder of the shift. (Tr. 36). Before Fletcher left that day, Fletcher and other members of the crew were told to report to Frontier-Kemper’s corporate headquarters in Evansville, Indiana, the following day rather than the slope. *Id.* Fletcher thought that the meeting was going to be with MSHA. (Tr. 37).

On May 2, Fletcher reported to Frontier-Kemper’s Evansville headquarters office. Each miner was separately interviewed by George Zugel, the corporate safety director.<sup>3</sup> Exactly what happened in these interviews is in dispute. Fletcher testified that at first Zugel was “pretty laid back.” (Tr. 39). He gave him some paper and wanted him to draw a picture of the face and to write a statement of what happened. *Id.* During this interview, Zugel also asked Fletcher if he had talked to MSHA and what he had told them. Fletcher told Zugel that he told MSHA that he was involved in painting the face. (Tr. 44, 96-97). Fletcher then left Zugel’s office and went to

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<sup>2</sup> The order alleges a violation of section 77.1900-1, which requires an operator to develop and comply with a slope sinking plan that has been approved by MSHA. In this decision, I refer to that portion of the slope sinking plan dealing with roof support as the “roof control plan.”

<sup>3</sup> Angie Pullium, assistant HR manager, and Tyrone Wright, the project manager for the slope project, were also in the room. Ms. Pullium took notes.

another area to write up his statement and draw a picture of the face as it appeared on April 30. The statement he wrote is Government Exhibit 1 and the drawing is page two of Government Exhibit 2. A couple of hours later that morning, he was asked to return to Zugel's office. Fletcher handed him the statement and drawing. Fletcher testified that when Zugel looked at his statement, "he didn't like it." (Tr. 42). Zugel said, "somebody's lying" and that "he [Zugel] was going to get to the bottom of it." (Tr. 42, 95). Fletcher testified that Zugel threatened his job and talked about a "federal car" that "was waiting to take somebody to jail." (Tr. 42, 149). Fletcher testified that Zugel then said, "Now's the time to give your ass to Jesus." (Tr. 43). Fletcher testified that Zugel kept on asking him how far it was between the last row of roof bolts and the face that had been painted. It was Fletcher's impression that Zugel was trying to get him to give Zugel a definite measurement. (Tr. 43, 95). When Fletcher told Zugel that he did not measure the distance between the last row of roof bolts and the face, Zugel just "couldn't accept" that. *Id.*

Fletcher testified that Zugel gave him an "opportunity to write another statement." (Tr. 43). Fletcher said that Zugel told them that if he brought back another statement like the first one, he would no longer have a job. Fletcher then drafted a second statement, which is the first page of Government Exhibit 2. It was Fletcher's impression that when he presented the second statement to Zugel, he seemed to like it "a whole lot better." (Tr. 45). Fletcher believes that the first statement was true. The first statement sets forth details about what happened on April 30, including using the basket to paint the face. This statement does not mention that anyone was working beyond the last row of roof bolts that were more than four feet from the face. (Tr. 90, 102; Ex. G-1). Near the end of that first statement, however, Fletcher wrote that, after George Foster completed the preshift examination on the morning of May 1, he told the crew that more pinning was required "because it was over 4 ft." (Tr. 51; Ex. G-1). In the second statement, Fletcher states, in part, that on April 30 "Jeff Knowlton and I went [beyond] the last row of bolts in excess of well over the 4 ft standard bolt pattern specified by MSHA regulations from the basket and painted the top portion of the face w/ orange paint." (Ex. G-2, p. 1)<sup>4</sup>. Fletcher said that it took him awhile to write the second statement because he did not know what Zugel was looking for. (Tr. 99). Fletcher testified that he was at the Frontier-Kemper office about six hours that day. Before he left the offices that day, he was given a suspension notice. (Tr. 47).

Fletcher subsequently received a letter dated May 10, 2012, from Frontier-Kemper terminating him from his employment. (Tr. 48; Ex. G-3). The letter states that he was terminated "due to non-compliance with safety rules and regulations pertaining to the events that occurred at the Gibson South job on May 1, 2012." (Ex. G-3). The letter was signed by Angie Pulliam, Assistant HR Manager. Fletcher filed his complaint of discrimination with MSHA on May 31, 2012, alleging that he was terminated. "As a result of my participation of an MSHA accident investigation of a violation issued to Frontier-Kemper, I was terminated." (Ex. G-4). He asked for his job back with back pay. Fletcher testified that he was fired because of the "MSHA inspector that I talked to." (Tr. 49). He stated: "That's the absolute only thing I did any

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<sup>4</sup> In the second statement, Fletcher also stated that he did not notice any loose rocks or hazards that could have caused death or serious injury. (Ex. G-2, p. 1).

different than anybody else and I was fired for and they got a citation.” *Id.* Apparently, at the time he filed his discrimination complaint, Fletcher did not know that Knowlton and Theriac were also terminated from Frontier-Kemper for the events of April 30-May 1. (Tr. 70).

Fletcher admitted that he was a certified miner in Kentucky and that he received annual training with Frontier-Kemper every year. (Tr. 52-53). He was given training when he started working at the slope project in March 2012. (Tr. 54). He admitted that one of the most basic rules that an underground coal miner must learn is not to go inby the last row of roof bolts. (Tr. 55-56). He agreed that this rule had been taught in his training. In addition, Fletcher remembered that a miner was seriously injured in the slope when a rock fell from the roof on March 27, 2012. (Tr. 56, 59). Fletcher also remembered a meeting with Mr. Smith after that accident in which Frontier-Kemper stressed the importance of complying with the roof control plan. (Tr. 57). He also remembered being told by Smith at that meeting that working under unsupported top or any violation of company policy with regard to the roof control plan could result in termination. (Tr. 58). At the end of that meeting, Fletcher signed a statement signifying that he attended that meeting at which the importance of following the roof control plan was discussed. (Tr. 58-60.; Ex. R-A).

Robert Bretzman, the MSHA special investigator who investigated Fletcher’s discrimination complaint, also testified at the hearing. He signed a declaration setting forth the reason why he concluded that Frontier-Kemper violated section 105(c) of the Mine Act. (Tr. 122; Ex. G-6). In the declaration, Bretzman stated that “[b]ased on the information available as a result of the special investigation I have conducted to date in this matter, I have concluded that evidence exists the Frontier-Kemper Constructors, Inc., decided to discharge Mr. Fletcher based, in part, on his participation in an MSHA inspection, and the subsequent violation that was issued.” (Ex. G-6 p. 2). He wrote the declaration on June 27, 2012, and testified that “at that point in time [his] investigation had just begun.” (Tr. 145).

Inspector Bretzman is presently conducting a special investigation under section 110(c) of the Mine Act to determine whether a penalty case should be brought against Jeff Knowlton, an agent of Frontier-Kemper, as a result of the section 104(d)(1) order that was issued. (Tr. 123). Bretzman acknowledged that the number one rule in MSHA’s “Rules to Live By” is to never work under unsupported roof. (Tr. 126).

George Zugel, corporate safety director, testified for Frontier-Kemper. He has extensive experience in the mining industry and is an MSHA certified trainer. (Tr. 155). On March 27, 2012, there was a fall of ground at the slope project because the roof was not properly supported. (Tr. 157). It was likely that the project manager would have been terminated because of this accident, but he resigned shortly after the accident. All the miners were retrained in roof support during what the company calls a “safety stand-down” because the slope project was shut down for this lengthy training session. (Tr. 158). Zugel testified that everyone was “reschooled on the concept of ground support starting from the basic on up to and including the contents of our approved sinking plan and the expectations of upholding that approved sinking plan.” (Tr. 159,

180-81). Frontier-Kemper received a citation for the March 27 accident. To abate the citation, the ground support plan was augmented and submitted to MSHA for approval.

Zugel headed up the investigation into the events of April 30, 2012. He received a phone call from Bob Smith on the morning of May 1 advising him that MSHA would probably be issuing an order. (Tr. 160). Smith described the paint marks in relation to the last row of bolts and informed Zugel that Fletcher would be talking to the MSHA inspector to let them know that he was involved in painting the face. Zugel replied “by all means.” *Id.* Smith also told Zugel that he advised Fletcher to be truthful and forthright in his dealings with MSHA. Later Zugel learned from Smith that the MSHA inspector measured the distance between the face and the last row of roof bolts as being 7.5 feet. Zugel testified that this fact upset him because someone chose to “disregard good, solid safety training and procedures.”<sup>5</sup> (Tr. 162). Before the end of the day, Zugel determined that he should execute an investigation away from the project site to find out what went wrong. He asked the project manager to have anyone who had a role in the incident to report to the Evansville office on May 2. Four individuals came to Evansville to be interviewed. (Tr. 164).

Knowlton was interviewed first. (Tr. 165). During the first interview with him, it was not clear if he measured the distance between the last row of bolts and the face. At one point he stated that he measured the distance and it was 4.5 feet and at another point he said he did not do any measuring. (Tr. 165). He told Knowlton that he expected him to tell the truth. (Tr. 166). Zugel believed that Knowlton was lying to him and told him that it was time for him “to come to Jesus.” (Tr. 164). By that, Zugel meant it was time for him to stop lying and tell the truth. During his second interview, Knowlton broke down and started weeping. (Tr. 167). Knowlton started describing all the personal problems he was having and said he could not afford to lose his job or “get sideways” with MSHA. *Id.* Knowlton admitted that he and Fletcher went out under unsupported roof when they painted the face. (Tr. 168). He also admitted that when he measured the distance between the last row of roof bolts and the face it was about seven feet. (Tr. 194).

Zugel interviewed Fletcher after he had talked to Knowlton. Zugel testified that, during the first oral interview of Fletcher, Fletcher said that he observed Knowlton measure the distance between the roof bolts and the face and that it was about four feet. (Tr. 169). Zugel said that Knowlton said the same thing during his first interview. (Tr. 169; Ex. G-7). Zugel testified that he was both disappointed and angry with Fletcher. Zugel believed that Fletcher was a skilled miner and he could not understand why he would work under unsupported roof. (Tr. 171). Although Zugel was angry with Fletcher during the interviews, he denied making any reference to a “federal car” or otherwise threatening Fletcher. (Tr. 172). He testified that when he gave Fletcher the opportunity to write another statement, he did not order him to say anything specific other than to tell the truth but that he did tell Fletcher that Knowlton admitted that they had

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<sup>5</sup> Zugel testified that, earlier in his career, he lost a friend at another mine when there was a fall of ground due to the failure to install ground support. (Tr. 162-63).

worked under unsupported roof . (Tr. 174). Zugel asked Fletcher what he told the MSHA inspector so that he could compare what Fletcher told MSHA to what he was telling him. (Tr. 179). At the hearing, Zugel estimated that he spent about two hours interviewing Fletcher. (Tr. 176).

After he completed all of the interviews, Zugel spoke with upper management and described what his investigation revealed. In his meeting with management, Zugel recommended that Knowlton be immediately terminated and that Fletcher be terminated as well. It was Zugel's position that an "[e]xperienced miner going under unsupported ground is inexcusable" because it is "an egregious violation of safety rules." (Tr. 178). Zugel testified that the fact that Fletcher talked to MSHA did not "change the complexion" of the situation and it had no influence on the order of withdrawal being issued. (Tr. 180).

The decision to terminate Fletcher from his employment was made by Dave Rogstad, the president and CEO of Frontier-Kemper. (Tr. 189-90). He based this decision on the recommendation of Zugel and Zugel's description of what happened on April 30. Zugel testified that the decision to terminate Fletcher was not based, in any part, on the fact that Fletcher spoke with an MSHA inspector on May 1. (Tr. 190, 220). Zugel testified that Rogstad told him that he decided to terminate Fletcher, in part, to "send a clear message throughout the company that we will not tolerate unsafe acts." (Tr. 191). Knowlton, Fletcher, and Theriac were all terminated for engaging in the unsafe acts. (Tr. 192). As a result of these events and other safety-related events, the head of Frontier-Kemper's mining division is also no longer working for the company.

On May 3, 2012, Zugel met with MSHA at the district office on Vincennes, Indiana. Mary Jo Bishop, the acting district manager, Anthony DiLorenzo, the acting assistant district manager, and a special investigator were present. In addition to discussing the (d)(2) order, Zugel told them that Knowlton had been terminated and that Fletcher had been suspended pending the completion of the company's investigation. (Tr. 185). Ms. Bishop indicated that anyone terminated should not be permitted to work at other Frontier-Kemper projects. *Id.* Following this meeting, Frontier-Kemper shut down the slope project for 24 hours and retrained all the miners at a facility of Vincennes University and MSHA participated in the training session. (Tr. 187).

## **II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS**

### **A. Secretary of Labor and Jeffrey Fletcher**

The Secretary contends that the evidence clearly establishes that the discrimination complaint was not frivolously brought. She maintains that where a miner engages in protected activity, suffers an adverse employment action, and an inference of nexus exists between the two events, temporary reinstatement is proper. Fletcher spoke with an MSHA inspector on April 30, 2012; two days later Respondent's corporate safety director asked Fletcher whether he talked to an MSHA inspector and what they discussed, and he was then suspended without pay and

subsequently terminated. She argues that an illegal motive should be inferred where termination occurred just a few days after Fletcher spoke with an MSHA inspector.

The Secretary cites case law which provides that a Commission judge must determine “whether the evidence mustered” by the miner to date establishes that his complaint is nonfrivolous, “not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d 738, 747 (11<sup>th</sup> Cir. 1990). “Whether a complaint *appears* to have merit should not be equated, however, with a determination whether a complaint *actually* has merit – a determination that can and should be made only after the parties have had the opportunity to develop their cases fully through discovery and have presented all supporting evidence.” (Sec’y Br. 5) (emphasis in original). The Secretary also argues that the judge should not make credibility determinations nor weight the operator’s rebuttal or affirmative defense against the Secretary’s evidence of a *prima facie* case. In this case, Frontier-Kemper had knowledge of Fletcher’s protected activity, there was temporal proximity between the protected activity and the adverse action, and there is evidence of animus or hostility toward the protected activity.

As to the animus factor, Zugel testified that he wishes that Frontier-Kemper had not received the section 104(d)(1) order. (Tr. 180). In addition, Zugel was unable to describe what he believed was not true in Fletcher’s first written statement. Zugel further testified that although other Frontier-Kemper employees had gone under unsupported roof at other operations, he was unsure whether they were disciplined or whether they had spoken to MSHA. (Sec’y Br. 8 citing Tr. 207). The core of the Secretary’s argument as to animus or hostility is as follows:

What Mr. Zugel’s testimony makes abundantly clear is, that when the most serious of all violations occurs, AND Frontier miners (i.e. Mr. Fletcher) knowingly tell MSHA inspectors about what happened, he personally gets involved and conducts a lengthy investigation by which he doesn’t collect all the evidence (i.e. fails to keep allegedly false statements), fails to submit any written reports to upper management, and goes into the investigation with the knowledge that if the miner submits a false statement he will be fired and if he tells the truth he will be fired. Seemingly if MSHA is not involved in an incident, Mr. Zugel’s recollection of the circumstances and results will be severely dimmed to say the least.

(Sec’y Br. 8) (emphasis in original).

#### B. Frontier Kemper

Frontier-Kemper does not deny that Fletcher engaged in protected activity when he talked to an MSHA inspector or that he was suspended and then terminated a few days thereafter. It argues, however, that his termination was solely based on his failure to comply

with the most basic safety rule in underground mining. The evidence demonstrates that Frontier-Kemper encouraged Fletcher to talk to MSHA and advised him to tell the truth. It argues that there is no evidence that Frontier-Kemper showed any animus or hostility toward Fletcher's protected activity. Fletcher informed MSHA that he helped paint the face while standing in the basket under unsupported roof. This violation of the roof control plan was already obvious from the physical evidence that was present when the inspectors arrived.

Frontier-Kemper also argues that mere coincidence in time is insufficient to sustain the application for temporary reinstatement in this case because Frontier-Kemper, as well as MSHA, became aware of the violation of a critical safety standard at the same time Fletcher confessed to the MSHA inspector. "It is common sense that Fletcher would be disciplined and terminated after a serious safety violation that also happened to involve an MSHA investigation." (FK Br. 13-14). Frontier-Kemper also maintains that Fletcher was not treated disparately. Every employee who was involved in the unsafe practice was terminated, whether or not they talked to MSHA, and other crew members who talked to MSHA but were not involved were not terminated. The evidence clearly establishes that Fletcher was terminated because of his unsafe actions and his lack of candor with his employer.

### **III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("Legis. Hist.").

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "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 established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that 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 scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990). Courts and the Commission have equated the "not frivolously brought"

standard contained in section 105(c)(2) of the Mine Act with the “reasonable cause to believe standard” at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with “not insubstantial.” *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” (*Legis. Hist.* at 624-25). The Commission has held that the judge should not undertake to resolve disputes of fact or credibility that arise in a temporary reinstatement hearing. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717,719 (July 1999); *Sec’y of Labor on behalf of Stahl v. A & K Earth Movers, Inc.*, 22 FMSHRC 323, 325-26 (2000).

A key issue is whether there was any kind of causal nexus between the protected activity and the adverse action. The Commission has frequently acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). I find that there is no evidence of a causal nexus between Fletcher’s discussion with an MSHA inspector and his suspension and subsequent termination. Inspector Wilson saw what he believed to be a violation of the roof control plan as soon as he arrived at the face. As part of his investigation, he talked to everyone who might have any information about the conditions he observed. Because Knowlton was not present and Fletcher was the senior miner on that crew, the inspector understandably wanted to talk to Fletcher. Inspector Wilson would have had sufficient evidence to issue the order even if he had not talked to Fletcher. Given the physical evidence that was present, neither Fletcher nor the other miners would have been able to credibly lie about what happened or establish a scenario in which there was no violation.<sup>6</sup>

The Secretary’s claim of disparate treatment was also not established. All three miners who were involved in the work of painting the face on April 30 were discharged. Although MSHA subsequently talked to Knowlton, no MSHA officials talked to him until after Inspector Wilson issued the order and he had been terminated from his employment. (Tr. 208). Inspector Wilson talked to other miners at the slope on May 1 and only the three miners responsible for the unsafe practice were disciplined by Frontier-Kemper. Apparently, Fletcher did not know that Theriac and Knowlton had also been terminated when he filed his discrimination complaint. (Tr. 49, 70).

The Commission has held that a showing of hostility toward the protected activity is not required to support an order for temporary reinstatement. *A & K Earth Movers*, 22 FMSHRC 323, 325 n. 2 (March 2000). Nevertheless, it is clear that the Secretary did not establish animus or hostility toward Fletcher’s protected activity. As stated above, everyone involved knew that Inspector Wilson would want to talk to Fletcher, including Frontier-Kemper management and safety officials. The evidence makes clear that Fletcher was not treated any differently than he

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<sup>6</sup> One of the questions the inspector undoubtedly asked was whether it was possible to paint the face from a distance of 7.5 feet so that the miners were under roof support. Once that question was answered in the negative, a violation of the roof control plan was clearly established.

would have been if he had not talked to the inspector. In her argument on this issue, set forth above, the Secretary is trying to make the point that if Knowlton and Fletcher had proceeded under the unsupported roof on April 30 but the MSHA inspection team had not arrived at the slope on May 1, the discipline might not have been termination or the entire matter might have been swept under the rug and nobody would have been disciplined. Consequently, Fletcher's conversation with Inspector Wilson was one factor that led to his termination. This argument is beside the point because, even if I accept the Secretary's argument that Fletcher would not have been terminated if MSHA had not arrived, it does not establish any animus or hostility toward Fletcher's protected activity. The fact of the matter is that MSHA did arrive on May 1 and Frontier-Kemper terminated everyone who was involved in the unsafe practice whether or not they spoke to MSHA.

I find that the Secretary has not established that there is reasonable cause to believe that Fletcher was terminated, even in part, because he spoke to Inspector Wilson about the events of April 30. Based on the evidence presented at the hearing, I find Applicant's discrimination claim is completely lacking in merit. The only factor in the Applicant's favor is the temporal proximity between the protected activity and the adverse action. Under the facts of this case, that is simply not enough. I have not attempted to resolve disputes of fact or credibility in reaching this conclusion. Although there are some disputes as to what was said during Fletcher's interviews with Zugel, the important, relevant facts are not in dispute.

#### **IV. ORDER**

For the reasons set forth above, I find that the Applicant did not establish that there was reasonable cause to believe that Jeffery Fletcher was terminated from his employment with Frontier-Kemper Constructors, Inc., for engaging in activities protected under the Mine Act. The "not frivolously brought" standard has not been met. As a consequence, the Secretary of Labor's application for the temporary reinstatement of Jeffrey Fletcher is **DENIED** and this case is hereby **DISMISSED**.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

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August 16, 2012

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA), on	:	
behalf of JUSTIN SLATON,	:	Docket No. KENT 2012-1298-D
Complainant,	:	MSHA Case No. MADI-CD-2012-15
	:	
v.	:	
	:	
STAR MINE SERVICES, INC.,	:	Mine ID: 15-17216 A4634
Respondent.	:	Mine: Cardinal Mine

**DECISION AND ORDER**  
**REINSTATING JUSTIN SLATON**

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, United States Department of Labor, 211 7<sup>th</sup> Avenue North, Suite 420, Nashville, Tennessee for the Secretary and on behalf of Complainant

J. Todd P'Pool, Esq., P'Pool & Riddle, PLLC, 220 North Main Street, Madisonville, Kentucky for Respondent

Before: Judge Steele

Pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor ("Secretary") on July 10, 2012, filed an Application for Temporary Reinstatement of miner Justin Slaton ("Slaton" or "Complainant") to his former position with Star Mine Services, LLC, ("Star" or "Respondent") at the Cardinal Mine ("the Mine") owned by Warrior Coal, LLC ("Warrior"), pending final hearing and disposition of the case.

On June 5, 2012, Mr. Ward filed a Discrimination Complaint alleging, in effect, that his termination was motivated by his protected activity.<sup>1</sup> In the Secretary's Application, she

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<sup>1</sup> 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).

represents that the complaint was not frivolously brought and requests an Order directing Respondent to reinstate Slaton to his former position as an outby support worker at the Mine.

Respondent's filed a request for hearing on July 30, 2012. An expedited hearing was held in Madison, Kentucky on August 8, 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. 29 C.F.R. § 2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Justin Slaton.

## LAW AND REGULATIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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 the 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 Res., 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. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.<sup>2</sup> *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.

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<sup>2</sup> "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 U.S. 197, 229 (1938)).

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 (April 1981).

However, in the instant matter, Complainant 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). The Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

## **CONTENTIONS OF THE PARTIES**

The Secretary contends that the discrimination complaint filed by Slaton is not frivolously brought. She identifies Slaton’s safety complaints in informing his crew leader and other management personnel of unsafe working conditions and refusing to work overtime when not given the required advance notice as the actual reason that Slaton was suspended, and effectively terminated. She further states that these activities are protected by section 105(c) of the Act.

Respondent contends that Slaton was not terminated for his complaints about unsafe conditions in the mine. To the contrary, Respondent argues that Slaton was never asked to work in unsafe conditions. Rather, it argues that Slaton was terminated due to issues with his work performance, insubordination and refusal to work overtime when asked by Respondent.

## **JOINT STIPULATIONS**

The parties have stipulated to the following:

1. At all relevant times herein, Star Mine Services is a Kentucky corporation and that they are an independent contractor performing services at Warrior Coal,

LLC's Cardinal Mine; therefore, Star Mine Services is an operator as defined in Section 3(d) of the Mine Act. Tr. 5.<sup>3</sup>

2. At all relevant times herein, Star Mine Services was an independent contractor providing services to a coal mine whose products entered commerce or whose operations affected commerce within the meanings of Sections 3(b) and 4 of the Mine Act. Tr. 5.
3. At all relevant times herein, Justin Slaton was employed by Star Mine Services as an outby support worker at the Cardinal Mine, and, therefore, Mr. Slaton meets the definition of a miner, the meaning of Section 3(g) of the Mine Act. Tr. 6.

## **TESTIMONY AND EVIDENCE AT HEARING**

### **A. Prehearing Submissions**

On May 29, 2012, Slaton executed a Summary of Discrimination Action, filed with his Discrimination Complaint. In his statement, he wrote:

I along with my crew was asked to place timbers in a crosscut that had unsupported top. I felt uncomfortable doing this and offered an alternative measure and the supervisor denied this alternative and I refused to do this job. After that date I also reported unsafe conditions and practices to my crew leader with Star Mining Services. On May 16, 2012 I was asked to work overtime and I informed my crew leader that I had a meeting after work and could not work overtime. The Employee Handbook stated that an employee had to be advised at start of shift if any overtime was required of them and they did not advise me until almost the end of the shift. I refused to work and told by Warrior Coal's outby supervisor to take my things and go home and I would be notified when they needed me to work again.

I have tried on numerous occasions to contact Lee Bowles to inquire about my work schedule to no avail. I am in limbo as to whether I am still employed at this date.

I am requesting reinstatement to my position with Star Mine Services and back pay from May 1, 2012 until such time as this can be resolved.

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<sup>3</sup> Note that "Tr." references the hearing transcript.

Submitted with the Secretary's Application for Temporary Reinstatement was the July 5, 2012, Declaration of Curtis Hardison, a Special Investigator employed by MSHA. Under oath, the Special Investigator made the following statement:

1. I am a Special Investigator employed by the Mine Safety and Health Administration, United States Department of Labor (MSHA), and I am assigned to the MSHA District 10 office in Madisonville, Kentucky.
2. As part of my responsibilities, I review and investigate claims of discrimination by miners filed under Section 105(c) of the Mine Act. In this capacity, I investigated the discrimination complaint of Justin Slaton. The investigation disclosed the following:
  - a. Justin Slaton began working for Star Mine Services, Inc., in February 2012, as an outby support worker at Warrior Coal, LLC's Cardinal Mine in Nebo, Kentucky. As an outby support worker, Slaton's duties included shoveling belt lines, setting timbers, lapping belt, rock dusting, and other cleanup work.
  - b. On or around May 16, 2012, Slaton was to set timbers around crosscut 23 on the 5-54 beltline. He informed his crew leader, Ben McLeavin, that he felt the area was unsafe to work in and that he did not feel comfortable working there. Slaton told McLeavin that the top was in bad condition, with slips, cracks, and other openings. Slaton suggested that they scale the top and that his crew go around the back side and timber it out first, then flag it so that no one could get in the intersection. Slaton was told by McLeavin, "If you can't work under this top, you don't need to be here." Slaton had also informed Warrior Coal outby foreman, Levi Knight, of the unsafe conditions of the top. Knight told Slaton, "If you don't like it, you can go home." Slaton went ahead and worked as directed, setting the timbers with the rest of his crew.
  - c. On May 17, 2012, near the end of his shift, McLeavin told Slaton to stay and work overtime shoveling belts. Slaton told McLeavin that he had other things to do and was not able to work overtime that day. As he was leaving, Knight told Slaton that he was suspended for refusal to work. On or about May 29, 2012 Slaton went to Star Mine Services, Inc.'s office. He was told by Star Mine Services, Inc.'s President, Lee Bowles, that he would be called if any work was available. Slaton has not worked since May 17, 2012.
  - d. On May 29, 2012, Slaton filed a formal complaint of discrimination seeking temporary reinstatement.
3. Based upon the foregoing facts and other facts gathered during my investigation, I have concluded Star Mine Services, Inc.'s termination of Justin Slaton was

motivated, at least in part, by his protected activities. Accordingly, Mr. Slaton's complaint is not frivolous.

## **B. Testimony of Justin Slaton**

Slaton began working for Star in either February or March 2012. Tr. 11. He began his mining career after receiving his mining card in June 2011 with independent contractor David Stanley Consultants where he began as outby support and worked his way inby until he left in December 2011 to take a job with an independent contractor with Patriot's Freedom Mine. Tr. 9-10. His position with the Freedom Mine lasted for less than a month, however, because the contracts with the particular independent contractors were switched from GMS to Star, both of which had a connection to Lee Bowles ("Bowles").<sup>4</sup> Tr. 11, 46. At this point, he was hired by Star. Tr. 11. Other than his certification as an underground coal miner, Slaton has also received certifications as a scoop operator, a forklift operator and a rock duster. Tr. 12. He further received his certification as a firefighter when he was seventeen years old. Tr. 12. He is currently nineteen years old. Tr. 9.

Slaton's position with Star was outby support. Tr. 13. His job duties included shoveling the belt, setting cribs and timbers, rock dusting the belt and other tasks of this nature. Tr. 13. Slaton testified that he worked straight day shift<sup>5</sup> for forty hours a week at a rate of pay between eighteen and nineteen dollars an hour. Tr. 13. He worked some overtime, but Respondent had explained that overtime was being cut, so the men were not supposed to work it often. Tr. 13-14. Slaton further explained that the miners were available for insurance after ninety days, but he was terminated prior to that time. Tr. 14.

Slaton worked in the Nebo Portal section of the Cardinal Mine. Tr. 15. On May 15, 2012, he observed unsafe conditions including a hoist located under the beltline that had approximately twenty pins out across the crosscut. Tr. 15-16, 18. He also testified that he observed cracks, slips and multiple loose rocks. Tr. 15. Further, he noted that there was a squeeze on the cribs<sup>6</sup> that had caused most of them to snap and the I-beams were stretched and bending. Tr. 15-16. In his mind, these were hazards and should be considered dangerous because the rock could fall and kill someone without warning. Tr. 16-17, 27. Slaton suggested

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<sup>4</sup> Bowles was the office manager at GMS and left to start Star. Tr. 46.

<sup>5</sup> Day shift works from 7:00 am until 2:30-3:00 pm. Tr. 13.

<sup>6</sup> Slaton explained that cribs are wooden beams stacked on top of one another. Tr. 16. The Hacettepe University Department of Mining Engineering defines a "crib" as, "A construction of timbering made by piling logs or beams horizontally one above another, and spiking or chaining them together, each layer being at right angles to those above and below it." "Crib." Hacettepe University Department of Mining Engineering. [www.maden.hacettepe.edu.tr/dmmrt/](http://www.maden.hacettepe.edu.tr/dmmrt/).

to crew leader Ben McLeavain (“McLeavain”)<sup>7</sup> and Levi Knight (“Knight”), outby foreman for Warrior that they go in, timber off the back side and flag off the section to prevent any miners from entering the area.<sup>8</sup> Tr. 15, 17, 26. Slaton admitted that, at times, he did not agree with the methods used by McLeavain and Knight; although, Knight had approximately thirty years experience in the mining industry. Tr. 31. Both responded that if Slaton did not like the working conditions, he did not have to work at the Mine. Tr. 25.

Although Star sent the crew to the Mine, Knight gave the crew their directions everyday. Tr. 19-20. Slaton’s crew was composed of five miners including himself and McLeavain. Tr. 18. Of the crew members, three of the miners were experienced<sup>9</sup> and two were inexperienced. Tr. 18. Slaton believed that all of the men, including the experienced miners, observed the hazardous conditions, but he did not know whether they would admit that they observed them. Tr. 18. Slaton further testified that he had expressed concerns about hazardous conditions to Knight and past crew leaders. Tr. 25.

The next day, Slaton was asked to work overtime near the end of his shift. Tr. 20. Slaton explained that he was not able to work the overtime because he had a meeting to get his truck license, which had expired in May. Tr. 21. He further believed that he was to be asked near the beginning of his shift if overtime was needed. Tr. 37; Summ. Of Disc. Compl. Slaton further stated that he had observed other miners request to leave early in order to get to appointments or run errands that needed to be done before 4:00. Tr. 21. He stated that he had never noticed that his crew leader had a problem with these requests; and, in fact, the crew leader himself had left early on a few occasions. Tr. 22. However, on this day, Knight refused Slaton’s request and responded, “[...] no, you work for Warrior, you are going to go work overtime for us.” Tr. 22. Slaton countered that he worked for Star, not Warrior, and that was who he would “answer to.” Tr. 22. Slaton testified that he completed his shift and left the Mine; however, on cross-examination, he admitted that he could not recall the exact time that he left, but it was near the end of his shift. Tr. 22, 40-41. On cross-examination, Slaton recognized that his belief that he must be asked at the beginning of the shift was false, but he stated that he had a meeting to get his truck license and that was an “important reason” as stated in the employee manual. Tr. 37, 38; Ex. A. He also admitted that he had the entire month of May to get his registration in line and chose to do it on this particular day which was in the middle of the month. Tr. 40.

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<sup>7</sup> McLeavain is an orange hat with less than one year underground – the same position as Slaton.

<sup>8</sup> Slaton testified that this was only one way that the situation could have been handled. Tr. 27-28. Alternatively, Warrior could have brought a roof bolting machine in to correct the issue. Tr. 28. He stated that Warrior seemed as if it wanted to just ignore the problem and move on instead. Tr. 28.

<sup>9</sup> “Experienced” miners have been underground more than forty-five days and have received their experienced mining card. Tr. 18. However, Slaton stated that most mines will not allow a miner to switch from an orange “training” hat to a black hat until he or she has completed a year underground. Tr. 18. Slaton had been underground for almost a year. Tr. 18.

Slaton's last day with Star was on May 17, 2012. Tr. 19. He reported to work as scheduled and was told to go home approximately thirty minutes later by Knight. Tr. 19. Knight informed Slaton that he was suspended and was not to return to work until "further notified by somebody." Tr. 19. To this date, Slaton has not returned to work for Star. Tr. 19. He further testified that the only warning or reprimand he had received related to his job duties was a "write-up" issued to him because he had refused to work the overtime the day before. Tr. 20. He further had never called in sick or took any time off. Tr. 23-24. The only time that he had missed from work was half a day that was excused by a doctor. Tr. 23.

After May 17, 2012, Slaton attempted to reach Bowles. Tr. 24. He was unsuccessful for almost two weeks, but, on May 29 or 30, 2012, he had a conversation with Bowles in which Bowles told Slaton that "people" were talking about his work performance and Bowles would try to get him on the next available project. Tr. 24, 43. Slaton then explained to Bowles that he was being asked to work in unsafe working conditions, to which Bowles replied that he would "look into it." Tr. 43-44. Slaton believes that he was, in effect, terminated on May 17, 2012 because he was asked to return all of his equipment and pick up his paycheck. Tr. 25. Further, he did not receive any offers for work until two days before the hearing, in which he was offered a job in Illinois that was to start the day of the hearing. Tr. 24. He testified that he believes he was terminated from Star because he refused to work in unsafe conditions and Star and Warrior did not like being told that they were not handling unsafe conditions correctly. Tr. 28.

On cross-examination, Slaton admitted that some employees of Star are on a rotating mine-by-mine basis; however, Slaton testified that he did not believe that he was in one of those job categories. Tr. 35-36. He further stated that while he did not accept the job in Illinois, he had already started this proceeding and it was his understanding that he would be returned to the job that he had prior to his termination. Tr. 35-36. He further stated that he lives close to the Mine and did not think he should have to drive four or five hours to a different mine, nor was he aware of any other miners from Madisonville that had to make this drive. Tr. 36-37. He recognized, however, that if his contract was up and he was moved to a different mine, he would have to go. Tr. 37.

### **C. Testimony of Ben McLeavain**

McLeavain began working at Warrior's Cardinal Mine about a year ago with GMS and his contract was converted to employment with Star in February 2012. Tr. 51-52. Currently, he is employed as a pinner, but his previous job title during the time at issue was crew leader. Tr. 52. As a crew leader, McLeavain's duties were to take care of his men and to take and document time and records. Tr. 52. Basically, anything that Warrior asked, McLeavain's job was to make sure that it was done correctly. Tr. 52. At Star, McLeavain reported directly to Bowles and he reported to Knight at Warrior. Tr. 52-53.

As the crew leader, Knight usually asked McLeavain to shovel the belts and set timbers. Tr. 53. Based on McLeavain's experience and training, he testified that neither Knight nor Bowles ever asked him to perform work in unsafe conditions. Tr. 53, 55-56. Further, McLeavain testified that he has never asked his crew to work in unsafe conditions. Tr. 53, 55-56. On the contrary, McLeavain stated that when he approached conditions that appeared to be

unsafe and he could not find a way around it, he typically went to Knight to get an experienced opinion. Tr. 56. He testified that he had never worked under unsupported roof and had never seen a crosscut with over twenty pins missing. Tr. 58.

During the relevant time, McLeavain was Slaton's crew leader. Tr. 53. McLeavain described his time with Slaton as the following, "[Slaton] didn't really want to follow our orders. He always caused conflict, you know, other crew members, you know, this one and that one, you know, just causing, you know, verbal conflict, you know, and stuff." Tr. 54. He testified that Slaton never offered a suggestion for making the working area safer on May 15, 2012. Tr. 56.

On May 16, 2012, McLeavain stated that the crew was told to shovel 254 and to stay over as long as was necessary to finish it. Tr. 57. McLeavain told the crew that if they could get it done by 3:00, they could leave. Tr. 57. Otherwise, they would have to stay over and finish the work. Tr. 57. At this point, McLeavain testified that Slaton stated that he was not staying over and offered no explanation; instead, he just continued to the "bottom" to prepare to leave. Tr. 57. The rest of the crew continued to their work area, but, upon realizing that Slaton had the tools they needed, McLeavain had to return to the bottom to retrieve them. Tr. 57. He found Slaton sitting there waiting to leave, so McLeavain directed him to go home at approximately 2:30. Tr. 57. McLeavain testified that he felt that Slaton left the crew in an unsafe position because "the belt, you actually need your buddy there [...] to watch your back [...] in case you step off a piece of [...] rock that might be loose or something that you didn't catch." Tr. 57-58.

#### **D. Testimony of Zac Arnold**

Zac Arnold ("Arnold") is an underground coal miner who has worked with Star at Warrior's Cardinal Mine for about six months. Tr. 59-60. Although the span of his employment has been relatively short, he did have occasion to work with Slaton. Tr. 60. Arnold testified that during the time of his employment that he worked with Slaton, he was never asked to work under unsupported roof and had never heard complaints from Slaton that the working conditions were unsafe. Tr. 60. He did, however, testify that Slaton had a lot of alternative suggestions for how things should be done. Tr. 60. According to Arnold, if things were not done Slaton's way, Slaton was not happy with it. Tr. 61.

#### **E. Testimony of Lee Bowles**

Bowles is the President and part owner of Star Mine Services. Tr. 62, 64. He testified that he terminated Slaton for laziness and insubordination. Tr. 62. He explained that he did not communicate with Slaton for several days because he was discussing what could be done with Warrior. Tr. 62-63. In order to do this, Bowles had to contact Knight, McLeavain and someone named Eric Anderson, but Bowles stated that the final determination of whether to terminate Slaton rested with him. Tr. 63. He also stated that, at this time, there is no spot for a new employee at the Mine. Tr. 64.

Bowles testified that he never asked Slaton to work in unsafe conditions. Tr. 63. In fact, he stated that it is company policy that if the conditions are unsafe, the men are not to work in the area. Tr. 63. He stated that Slaton never said anything about his safety concerns until he was

laid off. Tr. 63. He further explained that Star's policy manual states infractions for dismissal concerning safety violations. Tr. 63; Ex. A. This policy delineates the infractions between minor or severe. Tr. 63; Ex. A. If crew leaders are caught putting an employee in an unsafe position, they are to be immediately terminated. Tr. 63; Ex. A.

Although Bowles testified to Slaton's laziness and insubordination, he admitted during cross-examination that Slaton only had one written reprimand in his employee personnel file. Tr. 67. This reprimand was the one testified to by Slaton concerning the refusal to work overtime. Tr. 67. He also admitted that Slaton was replaced after he was sent home on May 17, 2012. Tr. 67-68.

## 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 any other mine subject 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 C.F.R. § 815(c)(1)(Emphasis added).

Slaton testified that his crew as assigned to work in an area where he observed a hoist located under a beltline that had approximately twenty pins missing across the crosscut. Tr. 15-16, 18. He further testified that he noticed cracks slips and loose rocks in this same area. Tr. 15. Finally, he testified that a squeeze was occurring at the ribs, causing the cribs to snap and the I-beams to bend. Tr. 15-16. These conditions are certainly hazard and, as Complainant testified, they could result in a fatality without moment's notice.

Respondent contends and its witnesses testified that there were generally no unsafe conditions in the mine and its policy is not to allow men to work in unsafe conditions. This conflict in testimony is more appropriately addressed in a discrimination proceeding rather than in this initial proceeding. Viewing the evidence in the light most favorable to the Complainant, the undersigned finds that there was protected activity.

### B. Nexus between 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. *Phelps Dodge*, 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 (8<sup>th</sup> 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).

Here, Slaton communicated his concerns about hazardous conditions in a particular crosscut to McLeavain and Knight. Tr. 15, 17. He testified that both men seemed to want to ignore the situation, rather than correct it. Tr. 28. He further stated that both men responded by telling him that he did not need to work in the Mine if he did not like the conditions. Tr. 26. In light of the foregoing, the undersigned finds that Respondent displayed some hostility or animus toward the protected activity.

## **2. Knowledge of the Protected Activity**

Slaton testified that, particularly on May 15, 2012, he explained his concerns about the hazardous conditions in the mine to McLeavain and Knight. Tr. 15, 17. He further testified that they both responded by basically telling him that he did not have to work at the Mine if he did not like the conditions. Tr. 26. While Knight is an employee of Warrior, McLeavain testified that he is an employee of Star. Tr. 52. Moreover, this was not the first time that Slaton had complained about the conditions in the Mine. Tr. 25. This testimony indicates that Respondent was aware of Slaton’s concerns. In light of this, the undersigned finds that Respondent had knowledge of Complainant’s protected activity.

Respondent argues that its agents have stated that they had no knowledge of Slaton’s complaints. However, the Commission had repeatedly instructed that it is not the judge’s duty nor is it appropriate to resolve conflicts in testimony or to make credibility determinations at this preliminary stage of the proceedings. *Proppant Specialist, LLC*, 33 FMSHRC at 2385; *CAM Mining, LLC*, 31 FMSHRC at 1088; *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. According to the case law, it is more appropriate for credibility issues to be addressed during the discrimination proceedings. For the foregoing reasons, the undersigned finds that Respondent had knowledge of the Complainant’s protected activity.

## **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 the subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time. *All American Asphalt*, 21 FMSHRC at 47 (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.

There is no dispute that there is a coincidence in time between the protected activity and the adverse action. On May 15, 2012, the complaint about the hazardous conditions was made to McLeavain and Knight. Tr. 18. He was suspended and effectively terminated on May 17, 2012. Tr. 19. Given this evidence, the undersigned finds that there was certainly a coincidence in time.

#### **4. Disparate Treatment**

As stated above, the Commission has also viewed disparate treatment as evidence of discrimination. 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 (8<sup>th</sup> Cir. 1990)).

There is some evidence of disparate treatment in this case. Slaton testified that several men, including McLeavain, had requested to leave early in order to make to appointments or to run errands that had to be completed prior to 4:00 pm. Tr. 21. According to Slaton, he had never observed that Warrior or Star generally had any problem with this. Tr. 22. However, when Slaton made this request, the day after he had complained of safety hazards, Knight refused the request and told him that he worked for Warrior and had to work overtime. Tr. 22. Given that employee requests to leave early were typically granted and Slaton was only requesting that he not work overtime due to a need to renew his truck registration, the undersigned finds that there is some evidence of disparate treatment.

#### **CONCLUSION**

I have reviewed the entire record in this case and have carefully considered the testimony, evidence and contentions of the parties. Based on the foregoing, the undersigned finds that the Complainant's Application for Temporary Reinstatement is not frivolously brought.

**ORDER**

Based on the foregoing, it is hereby **ORDERED** that Complainant's Application for Temporary Reinstatement is **GRANTED**. Accordingly, Star Mine Services, Inc., is **ORDERED** to **REINSTATE** Complainant Justin Slaton to his former position as Outby Support Worker at Warrior Coal, LLC's Cardinal Mine at the same rate of pay and with the insurance benefits that he would have received but-for his discharge.

/s/ William S. Steele  
William S. Steele  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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WASHINGTON, D.C. 20001  
TELEPHONE: 202-434-9953 / FAX: 202-434-9949  
August 17, 2012

C. W. ELECTRIC,	:	CONTEST PROCEEDING:
Contestant,	:	
	:	Docket No. KENT 2007-570-R
v.	:	Citation No. 6645403;08/06/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID: 15-05275 KFW
ADMINISTRATION, MSHA,	:	Mine: Long Fork Preparation Plant
Respondent.	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-494
Petitioner,	:	A.C. No. 15-05375-13003 KFW
	:	
v.	:	Docket No. KENT 2008-908
	:	A.C. No. 15-05375-144058 KFW
C. W. ELECTRIC,	:	
Respondent.	:	Mine: Long Fork Preparation Plant
	:	
LONG FORK COAL COMPANY,	:	CONTEST PROCEEDING:
Contestant,	:	
	:	Docket No. KENT 2007-350-R
v.	:	Citation No. 6644489;05/28/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID: 15-05375
ADMINISTRATION, MSHA,	:	Mine: Long Fork Preparation Plant
Respondent.	:	
	:	

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

v.

RICHARD CYFERS, employed by  
LONG FORK COAL COMPANY,  
Respondent.

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

v.

WALTER MIMS, employed by  
LONG FORK COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. KENT 2009-374  
A.C. No. 15-05375-169703A

Mine: Long Fork Preparation Plant

CIVIL PENALTY PROCEEDING:

Docket No. KENT 2009-375  
A.C. No. 15-05375-169704A

Mine: Long Fork Preparation Plant

### **DECISION**

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise out of a serious electrical accident that occurred at Long Fork Coal Company's ("Long Fork's") Long Fork Preparation Plant ("prep plant" or "the plant").<sup>1</sup> The plant is a coal processing facility that is located in Pike County, Kentucky. On May 28, 2007, Ora L. Murphy, an employee of Long Fork's electrical contractor, CW Electric, Inc. ("CW Electric" or "the contractor") was repairing the motor control center ("MCC") on the plant's seventh floor. Murphy was installing new components for the electrical start system of the plant's conveyor belt. The electrical circuit powering the system was energized and Murphy's metal drill contacted an exposed and uninsulated part of the circuit.

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<sup>1</sup> At the time of the events in question Long Fork was owned and controlled by Massey Energy Company. Subsequently, Massey and its various companies were acquired by Alpha Natural Resources ("Alpha").

An arc and explosion resulted. Murphy was severely burned. He was rushed to a hospital where he remained in serious condition for several months. Long Fork timely reported the accident to the Secretary's Mine Safety and Health Administration ("MSHA"). The agency investigated and issued several citations, some to Long Fork and some to its contractor. The citations charged both companies with violations of various mandatory safety standards. The companies contested the citations.

Some time later the Secretary petitioned for the assessment of civil penalties for the violations alleged in the contested citations and for violations alleged in other citations issues as a result of her investigation. Long Fork and CW Electric denied the allegations. The Secretary also petitioned for the assessment of individual civil penalties against two agents of Long Fork whom the Secretary charged knowingly committed one of the alleged violations. Like the companies, the agents denied the charges.

The various cases were assigned to the court. They were consolidated for hearing and decision. Before the cases could be heard, Murphy died and discussions ensued between counsels and the court concerning the best way to resolve the issues. As it happened, prior to his death Murphy and others were deposed in several civil suits arising in Kentucky. In addition, a substantial collection of written materials concerning the accident had been assembled by the parties. Counsels concluded that a written record existed upon which a decision resolving of the issues could be rendered. They agreed to file a joint motion for summary decision supported by stipulations and briefs, and the court agreed to issue a decision disposing of the pending cases.

### **THE SETTLEMENTS**

Counsels filed the joint motion. Shortly thereafter Alpha purchased the plant as part of its acquisition of Massey. Alpha then reached an agreement with the Secretary to withdraw the contests previously filed by Massey and its subsidiaries in numerous cases, including the captioned Long Fork dockets (KENT 2008-609, KENT 2008-633 and KENT 2007-350-R). On March 07, 2012 Chief Administrative Law Judge Robert J. Lesnick and Administrative Law Judge Margaret A. Miller issued an order approving the "Massey" settlement and dismissing the affected dockets. *Performance Coal Co.*, WEVA 2011-1934 et al. The Secretary and CW Electric also reached an agreement regarding Docket Nos. KENT 2007-570-R, KENT 2008-908 and KENT 2008-494. On April 5, 2012, I approved the settlement and closed the cases. *CW Electric*, Kent 2009-908, etc. (*Decision Approving Settlement*) ( April 5 2012). As a result of the settlements the only cases that remained to be decided are those against the individuals (KENT 2009-374 and KENT 2009-375), and they are the subject of this decision which is entered on the basis of the parties' motion and stipulations.

## **CASES INVOLVING LONG FORK'S AGENTS**

### **KENT 2009-374**

### **KENT 2009-375**

In these dockets the Secretary petitions for the assessment of individual civil penalties against two Long Fork supervisors for the alleged violation of 30 C.F.R. § 77.501 set forth in Citation No. 6644489. The citation was issued pursuant to section 104(d)(1) of the Act. In the citation the Secretary alleges that Murphy worked on equipment powered by an energized electrical circuit that was neither locked out nor suitably tagged as required by the standard.<sup>2</sup> In Docket No. Kent 2009-374 the Secretary alleges that Richard Cyfers, an electrical engineer and supervisor at the plant, knowingly authorized, ordered, or carried out the violation. In Docket No. Kent 2009-375 she charges that Walter Mims, a maintenance supervisor, likewise violated the standard.

## **THE FACTS**

### **THE FIRE, THE REPAIR WORK, AND THE SELECTION OF THE CONTRACTOR**

The plant where the events occurred is attached to and processes coal from a nearby underground bituminous coal mine. Stipulation of Material Facts (Statement") II 5, 6 at 4. Coal is transported by conveyor belt from the mine to the plant. On May 24, 2007 a fire damaged wiring and other electrical components inside one of the plant's motor control cabinets

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<sup>2</sup> Section 77.501 states in part:

No electrical work shall be performed on electric distribution circuits of equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons.

(“MCCs”).<sup>3</sup> The affected cabinet was located inside the motor control cabinet room (the “MCC room”) on the plant’s seventh floor. *See* Exh. 21 at 22-24; Statement II 9, 10 at 4.

Plant superintendent, David Compton, was called at home about the fire. Exh. 21 at 24. Compton immediately went to the plant to assess the damage. After reviewing the situation he determined that “outside” electricians were needed to make necessary repairs.<sup>4</sup> Exh. 21 at 24. Compton explained, “I’m no electrician, but I knew we needed . . . help.” *Id.* As a result, Long Fork contracted with CW Electric. *See* Statement, IV D 16 at 19. Long Fork chose CW Electric because the company had worked for Long Fork and other Massey companies in the past.<sup>5</sup> Statement IV H 11 at 31.

The sole owner and the president of CW Electric is Shannon Wells. Statement IV D 2 at 18. After CW Electric was hired, Wells began to select a work crew. As part of this process Wells called Murphy. Wells explained to Murphy that there had been a fire at the plant and that Long Fork had contracted with CW Electric to make repairs and to replace damaged equipment. Wells asked Murphy if he wanted to work on the project. Murphy said that he did, and Wells told Murphy that they would go to the plant the next morning, Sunday, May 27. Statement IV 11 at 10.

**THE QUALIFICATIONS OF CW ELECTRIC’S EMPLOYEES**  
**AND**  
**THE EMPLOYEES FIRST DAY ON THE JOB**

Although plant superintendent Compton did not know for a fact if the electricians hired by Wells were qualified to do the electrical work that was required by the contract (Statement IV10 at 10), in general he and other Long Fork management personnel assumed Murphy and the others were properly licensed and certified. *See e.g.*, Statement IV H 10 at 31; *See also* Statement IV H 21 at 33. In fact, however, Murphy was not qualified as required by section

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<sup>3</sup> The damaged motor control cabinet contained electrical components that regulated the operation of the plant’s conveyor belt. The cabinet measured 90 inches high by 90 inches long by 19 inches wide. It housed several smaller compartments. Some of the compartments contained removable “buckets” that held components for specific circuit breakers and line starters. Other compartments contained mounted electrical components that were not removable. Statement II 11, 12 at 4.

<sup>4</sup> Compton and maintenance supervisor Mims agreed that the work – such as running conduit and replacing major electrical components – was outside the expertise of most Long Fork employees. Statement IV F 5 at 24; Statement IV G 5 at 26.

<sup>5</sup> In fact, CW Electric had worked for Massey companies for at least eight years before the fire. Statement IV D 6 at 18.

77.103(a), although he had been at one time.<sup>6</sup> Nonetheless, Murphy had considerable practical experience. He had worked as an electrician since 1975 and he had spent the last 6 or 7 years working on and off for CW Electric. Statement III A 7 at 9. In his more than 30 years of experience as an electrician Murphy had wired or repaired approximately fifty MCCs. *Id.* at 9-10.

Murphy went to the plant with Wells on the morning of May 27. After being given a brief overview of the project, Murphy, along with CW Electric employee Richard Williamson, whom Murphy described as his boss (Statement IV 16 at 11), and fellow CW Electric employees Gabriel Martin and Mark Hall, began repairing the damage caused by the fire.

### **THE SUPERVISION OF THE CONTRACTOR'S EMPLOYEES**

All of CW Electric's employees described Williamson as the supervisor of their three man work crew. Williamson did not disagree. He stated that as the leader of the crew he probably had the authority to direct Murphy and the others concerning where to work and what to do. Exh. 18 at 19-20; Statement IV E 6 at 21. But Long Fork's managers also directed the work of CW Electric's employees. The contractor's employees maintained in the statements they gave to MSHA after the accident that Cyfers and Mims were "giving us instructions each day as to what needed to be done" (Exh. 19 at 2), and Martin stated that while he reported to Williamson, he "was taking orders . . . from . . . Cyfers and . . . Mims." Exh. 20 at 2. In fact, although the record reveals a blurring of supervisory responsibilities at the plant, in general the contractor's employees maintained that their overall supervisors were Long Fork's managers, Mims and Cyfers. Shannon Wells stated that he believed Cyfers was primarily responsible for overseeing work performed at the plant. Statement IV D 21 at 20. Murphy agreed with Wells. According to Murphy, although Williamson was his CW Electric supervisor, Cyfers was "superior" in authority to Williamson. Statement IV 17, 18 at 11-12. Mark Hall also felt that although Williamson was the employees' titular supervisor, in reality Mims and Cyfers told Williamson what to do. Statement IV B 4 at 15. Gabriel Martin agreed. He stated that although he reported to Williamson, he (Martin) took orders from Mims and Cyfers about what he had to do. Statement IV C 2 at 17.

Williamson denied that he had total supervisory authority over Murphy. He maintained that the work assignments at the plant were given directly to Murphy by Cyfers and Mims. Statement IV E 24 at 23; *See also* Statement IV E20 at 23. Williamson also stated that in general the task of replacing damaged electrical components was directed by Mims because "Mims knew what the equipment was, what it operated and how it was wired." Statement IV E 10 at 22.

Mims stated that he had no supervisory role as far as CW Electric's employees were concerned. Statement IV G 6 at 26. Cyfers too stated that he did not supervise the contractor's

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<sup>6</sup> Section 77.103(a) states the requirements an individual must meet to be "qualified" as a coal mine electrician. 30 C.F.R. §77.103(a).

employees, that it was up to CW Electric to implement the repair plans that Long Fork devised. Statement IV H 20 at 32. Mims also believed that it was the contractor's responsibility to ensure its employees worked in a safe manner (Statement IV G 6 at 26), and in fact, an agreement between CW Electric and Long Fork required CW Electric to supply adequate supervision. *Id.*

**THE EMPLOYEES' HAZARD TRAINING**  
**AND**  
**THE EVENTS OF MAY 27**

On May 27, 2007 Compton met with Murphy and the others. Exh. 21 at 29; Statement III 1 at 6. Compton stated that shortly after the group arrived, he gave the employees hazard training. In his view the training was consistent with the requirements of section 48.31.<sup>7</sup> Statement IV F 9 at 24. Compton handed the employees a one page form to read and sign. He asked if they had questions. Compton assumed the men read the form because each signed his copy and handed it back to Compton. Statement IV F 9, 13 at 25. No other hazard training and/or hazard recognition and avoidance instructions were provided to the employees by Compton or by any other Long Fork employees. Statement IV F 10 at 25. Mark Hall described the training as "standard training that we get at every mine." Exh. 18 at 20. According to Williamson the training lasted no more than ten to fifteen minutes. Statement IV E 12 at 22; *See also* Statement IV F 9 at 25. After retrieving the signed forms, Compton left the plant and the crew went to work. The employees worked a full shift, in which they completed all of their assigned tasks without any incidents. *See* Exh. 13 at 6.

**MURPHY'S WORK ASSIGNMENT ON MAY 28**  
**AND**  
**THE EVENTS OF THAT DAY**

Murphy and the others returned to the plant around 7:00 a.m. on May 28. Statement III, 1 at 6. Upon arriving Murphy went to the seventh floor. There he discussed the day's assignments with Mims and Cyfers. The MCC located on the seventh floor was badly damaged by the fire and it had to be extensively repaired. Statement IV E 11 at 22; *See also* Statement III 2 at 6.

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<sup>7</sup> Section 48.31(a) states in part:

Operators shall provide . . . miners . . .  
a training program before such miners  
commence their work duties.

Section 48.31(a)(1) through (5) list the applicable instructions that shall be included in the program.

Murphy remembered that Williamson and Cyfers showed him the MMC room. Murphy suggested to Williamson and Cyfers where he thought some of the MCC's new electrical components should be placed. Williamson and Cyfers agreed with Murphy's suggestions. Statement IV 19 at 12; *See also* Exh 12 at 2. The cabinet on which Murphy was to work was located above an energized 400 amp circuit. Murphy told Cyfers that as part of the job he needed some additional tools, a drill and a bit to drill a hole in the metal cabinet. He also needed a thread chaser to thread the hole. Once he drilled the hole and threaded it, Murphy intended to install some of the needed components. Cyfers gave the tools and tool parts to Murphy. Statement IV 20 at 12.

Murphy began working. He installed two of the needed components successfully. However, because the mounting holes on the third component did not conform to those on the base of the cabinet, Murphy drilled into the base to make them align. *See* Statement III 6 at 6. Murphy did not look to see if there were electrical components beneath where he was drilling. IV 23 at 13.

### **THE FAILURE TO DEENERGIZE OR OPEN THE CIRCUIT**

The circuit providing electricity to the components of the cabinet and the circuit underneath was not de-energized. Murphy stated that he asked Cyfers and Williamson twice about de-energizing the circuit by throwing the breaker, and he was told first by Cyfers and then by Williamson that if the power was turned off, the lights, the fan and the power of the plant would be lost. *See* Exh. 13 at 7. According to Murphy, both Cyfers and Williamson were present in the room when the statements were made.<sup>8</sup> *Id.*

Murphy stated that he knew he was drilling where there were "live" electrical components and that he was subjecting himself to the risk of electrocution, but he believed if he refused to drill he would not be asked again to work for CW Electric on a Massey-related job. He added that he liked the Massey jobs because the money was good. Statement IV A 24 at 13.

Mims maintained that he told Murphy, "If you need to knock the breaker, knock the breaker" (Exh. 13 at 7), but Murphy could not recall whether or not Mims told him he could turn off the power if he needed to. Statement IV A 25 at 13. According to Murphy, he hoped that the

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<sup>8</sup> Mark Hall was certain he never heard either Williamson or Cyfers refuse to turn off the power or see them ignore a request to do so. Statement IV B 15 at 16. He also stated that he never heard Murphy ask for the power to be turned off although it was "very possible" that Murphy had asked when Hall was not present. Exh. 18 at 22, 27. Hall noted that Murphy had "plenty of experience" (*Id.*) and that he "pretty much" was working by himself. *Id.* 21-22. In Hall's view, Murphy had to know that the circuit was energized because "the power was on . . . [and] . . . [u]ntil you throw [the] main breaker, everything in that section . . . is energized." *Id.* at 16.

supervisors “would change their minds,” but when he overheard one of them ask, “[I]s he going to drill it or not[?],” he decided to start drilling.<sup>9</sup> Exh. 13 at 7.

According to Mark Hall and Williamson, earlier that morning the power in the plant had been turned off for three to four minutes. Exh. 18 at 14-15; Statement IV E 18 at 22-23. Then it was turned back on. Hall did not know who turned it off or why it was turned off. Exh. 18 at 14-15; *See also* Statement IV B 11 at 16. However, Mims stated that he was the one who turned off the power. He maintained that Murphy was going to do some preliminary work before drilling the holes (Statement IV G 10 at 27), and when he saw that Murphy was not going to de-energize the circuit that powered where he was working, Mims said to Murphy, “No. Let me knock the breaker. I’m not going to be part of this.” Statement IV G 12 at 27. Mims then disconnected all of the power to the plant’s main circuit. *Id.* Cyfers stated that when Mims de-energized the power he did not lock out the circuit because the motor control center breaker was a 1970 model and it did not have a locking mechanism. Statement IV H 17 at 32. Therefore, Mims physically manned the circuit breaker while it was de-energized to make sure no one reconnected the circuit while Murphy was working. Statement IV H 17 at 32. When Murphy finished the preliminary work, the power was turned on again. Statement IV F 13 at 27; *See* Statement IV H 17 at 32. Mims maintained that he told Murphy that Murphy could similarly knock the power when Murphy installed the MCC’s new components. Statement IV F 15 at 28

### **THE ACCIDENT**

As Murphy drilled the metal bottom of the cabinet, the drill’s bit passed through the bottom and contacted an energized metal phase lead located one inch below the surface of the cabinet. Exh. 13 at 9. An arc and explosion followed, and power was immediately lost to the control room lights and fan. Statement III 9 at 6, 8. Murphy was in front of the open doors of the MCC at the time of the blast. Statement III, 16 at 8. In seconds Murphy was severely burned over his body and face. *Id.* His injuries were horrific and permanently disabling. Statement III, 17 at 8.

Mims, Cyfers and others working just outside the MCC room and elsewhere on the 7<sup>th</sup> floor saw a bright flash of light and heard an explosion. *See* Exh. 18 at 11; *See also* Statement IV F 16 at 28. (Williamson was about 50 feet from the MCC room. Cyfers and Mims were about 20 feet away. Statement IV E 19 at 23. ) They also heard Murphy yelling that he was on fire. *Id.* Mims grabbed a fire extinguisher, and the men ran to the door of MCC room. Smoke filled the room. Mims stated that Murphy was rolling on the ground. Murphy’s clothes were burning. Exh. 18 at 12; *See also*, Statement IV B 9 at 15-16. Mims turned the fire extinguisher on Murphy. Mims then radioed Compton and asked for medical assistant. After speaking with Compton, Mims ran to the 4<sup>th</sup> floor control room to get water to apply to Murphy’s burns while

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<sup>9</sup> Cyfers denied he made the statement, nor did he remember anyone else doing so. Statement IV H 19 at 33.

the others attempted to help Murphy down the stairs. Meanwhile, Mim's headed back up the stairs. He met Murphy and the others on the 5<sup>th</sup> floor where he began applying water to Murphy. Murphy's clothing was almost totally burned away. He was scorched on his back and along and under his arms. There was a red tint to his legs and face, and the top layer of skin on his hands was burned off. Statement IV F 19 at 28. The only thing that Mark Hall remembered Murphy saying was that "he had screwed up."<sup>10</sup> Exh. 18 at 13.

Compton stated that after he was called and advised of the accident, he jumped in his truck and went to the security office where he called 911. Shortly thereafter Murphy arrived at the office, and Compton described what he saw. "[H]is clothes was [*sic*] nearly gone. There was skin hanging from his hands. . . . We . . . tried to keep him as comfortable as we could." Exh. 21 at 30. Compton remembered Murphy stated, "It was just plumb stupid. I knowed [*sic*] better." *Id.* Compton speculated that Murphy was "just mad at himself." *Id.* At 34. The ambulance came and Murphy was transported to a hospital in Huntington, West Virginia. *Id.* 30-31.

### **MSHA'S INVESTIGATION**

MSHA was promptly notified, and MSHA Inspector Kenneth Fleming was assigned to investigate the accident. Around 12:00 p.m. on May 28, he arrived at the prep plant accompanied by his field office supervisor and an MSHA electrical supervisor.<sup>11</sup> First, Fleming closed the accident site with an order issued pursuant to section 103(k) of the Act.<sup>12</sup> 30 U.S.C. §814(k); Exh. 1. Then, over the next several days, Fleming and other MSHA personnel took photographs, made measurements and interviewed Long Fork and CW Electric personnel.

Fleming concluded that the accident could have been prevented if the circuit supplying power to the area where Murphy was working had either been locked out or the plant had been de-energized. He found that the accident occurred "because . . . management failed to

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<sup>10</sup> Cyfers also heard Murphy make the statement, but Cyrfer's version of what Murphy said differed from Hall's. Cyfers remembered Murphy saying: "I'm sorry guys. I did a stupid thing. Actually made a stupid mistake [*sic*]. I'm sorry. It's my fault." Statement IV H 25 at 34.

<sup>11</sup> Commonwealth of Kentucky investigators also came to the plant.

<sup>12</sup> Section 103(k) of the Act provides in part that "In the event of any accident occurring in a coal or other mine . . . [an inspector] may issue such orders as he deems appropriate to ensure the safety of any person in the . . . mine." 30 U.S.C. §820(k). The order, which was modified several times to allow limited work to resume, was finally terminated on June 4, 2007. Statement VI 6 at 36-37.

de-energize electrical circuits in the area where work was being performed.” Exh. 12 at 7. In addition, Fleming found that:

[N]either . . . [Long Fork nor the contractor] provided adequate hazard recognition training for contractor employees. Management also did not ensure that electrical training, and/or certifications were adequate prior to the performance of electrical work.

*Id.*

On May 28, 2007 Fleming issued the subject 104(d)(1) Citation No. 664489 to Long Fork. The citation charged a violation of section 77.501 in that the circuit on which Murphy was working was not locked out and that Long Fork management failed to take steps to prevent the accident. Statement VI 7 at 37-38. Subsequently, Cyfers and Mims were placed on notice that based on MSHA’s investigation of the circumstances surrounding the issuance of Citation No. 6644489, MSHA determined that they knowingly authorized, ordered or carried out the alleged violation. *Id.* at 38.

Fleming also issued other citations to Long Fork and CW Electric charging them with additional violations of the mandatory safety standards for surface coal facilities. As previously noted, all issues relating to the civil penalty aspects of these violations have been settled and the settlements have been approved.

## **THE ISSUES**

- I. Whether Cyfers and Mims knowingly violated section 77.501;
- II. If so, the amounts of the civil penalties that must be assessed taking account the civil penalty criteria set forth in section 110(i) of the Act.

### **I.**

#### **WHETHER CYFERS AND MIMS KNOWINGLY VIOLATION SECTION 77.501**

Under section 110(c) of the Mine Act the Secretary may cite individuals in certain circumstances for violations of the Act or regulations promulgated thereunder. Section 110(c) states in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly

authorized, ordered or carried out such violation . . . shall be subject to the same civil penalties, fines and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. §820(c).

The Commission has set out a legal analysis to follow when determining whether a corporate agent is liable:

The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F. 2d 632 (6<sup>th</sup> Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co., v. FMSHRC*, 108 F.3d 353, 362-64 (D.C. Cir. 1997). To establish 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individuals knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (*citing United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. [*Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).]

*Maple Creek Mining, Inc.*, 27 FMSHRC 567 (August 2005).

The court concludes that the Secretary established the agents' liability. Long Fork is a corporation. Cyfers and Mims are company supervisors and therefore agents. While Cyfers and Mims maintain they had no direct supervisory role over CW Electric's employees (*see e.g.*, Statement IV G 6 at 26), the record reveals a different story. Murphy described Cyfers as his Long Fork supervisor, and Murphy thought that Cyfer's authority was "superior" to that of his CW Electric supervisor, Williamson. Statement IV 17, 18 at 11-12. The court understands that Murphy was the person most directly responsible for the accident, and that his statement can be seen as an attempt to "share the blame," but the court is convinced that Murphy's view of Long

Fork's agents as having authority over the tasks he was assigned reflects the situation as it existed on May 28. The court notes that Murphy's belief is corroborated by the statement of Murphy's co-worker, Hall, who believed that Mims and Cyfers directed the work done at the plant and who asserted that they told Williamson what to do. Statement IV B 4 at 15. Hall had no apparent axe to grind, and it makes sense that Mims and Cyfers would have shared direct responsibility for the work because although they and Long Fork's workers did not have the expertise to do the work, they understood the mechanics of the plant and what needed to be done to ensure the plant could resume operations. *See* Statement IV E 10 at 22. The court also notes that Cyfers stated that he left it up to CW Electric's employees to implement the details of the repair plan he devised (Statement IV H 20 at 32), and the court concludes that this unfortunately reflects what actually went on in Murphy's situation.

The court recognizes that Murphy was grossly negligent. He fully understood that he was engaging in a highly dangerous practice when he began replacing the needed parts of the MCC without first opening and tagging the circuit. Despite this, he chose to proceed under great risk to himself. But Murphy was not the only person whose conduct failed to meet the standard of care required. The situation clearly called for someone to act with reasonable care to prevent Murphy from being shocked, and no one did. As is so often the case when viewing events through a rear view mirror, indications of trouble were everywhere. For example, Shannon Wells, Murphy's employer, knew when hiring Murphy that Murphy did not have the necessary qualifications for underground and surface electrical work, that his qualifications had expired. Statement IV E 19 at 23. Further, although the contract CW Electric entered into allowed CW Electric to retained the right of control over the details of the work its employees performed (Statement IV D 5 at 18) and required CW Electric to ensure the adequate licensing and supervision of its employees as well as their compliance with applicable health and safety regulations (Statement IV D 22 at 20), the record confirms that despite what the contract stated, the *de facto* direction and supervision of CW Electric's work force was actually a confused affair in which there were no clear demarcations of authority and responsibility. Williamson, CW Electric's crew leader and Murphy's ostensible supervisor, agreed that as the supervisor of the CW Electric work he had the authority to direct Murphy as to where he should work and as to what he should do. Exh. 18 at 19-2; Statement IV E 6 at 21. However, Williamson maintained that at the time of the accident it was actually Cyfers and Mims who were telling Murphy what to do and that Mims was in fact supervising Murphy. *See* Statement IV E 10 at 22, 24 at 23. Shannon Wells, CW Electric's president, believed that Cyfers was responsible for overseeing the work performed at the prep plant. Statement IV D 21 at 20. Hall and Martin indicated that Cyfers and Mims were both giving instructions and orders to CW Electric's employees about what to do. Exh. 19 at 2; Exh. 20 at 2. And Cyfers maintained that although he devised the overall repair plan for the plant, it was up to the contractor's employees to be responsible for implementing it. Statement IV H 20 at 32. The court finds the statements of the contractor's employees to be credible and it concludes Cyfers and Mims shared supervisory authority with Williamson.

Cyfers' and Mims' responsibility is evidenced by what took place on May 28. On that morning Murphy discussed his work assignment with Cyfers and Mims. Statement IV E 11 at 22. Cyfers showed Murphy where he wanted the work to be done. Statement IV 19 at 12. He

discussed the project with Murphy. *Id.* Cyfers clearly understood what Murphy would be doing and where he would be doing it. *See* Exh. 12 at 2; *see also* Statement IV H at 32-33. Mims also understood what Murphy would be doing. Statement IV III 5 at 6. Moreover, shortly before the accident, Mims voluntarily opened a circuit for Murphy because Murphy was going to work without first de-energizing it. Statement IV G 12 at 27; *see also* Exh. 18 at 22. Thus, Mims, although forewarned of what was to come (Statement IV F 15 at 28), made no attempt to ensure that Murphy complied with section 77.501, aside from ineffectually telling Murphy that Murphy could knock the main breaker if he had to. *Id.*; *see also* Exh. 13 at 7. Nor did Cyfers make any effort to ensure that Murphy complied with the standard. Yet it was a situation in which Long Fork’s agents had good reason to believe direct, proactive supervision of Murphy was needed. They knew the danger in which Murphy would place himself if he conducted the work they assigned without first opening the circuit. As previously noted, neither Cyfers nor Mims even took it upon himself to protect Murphy from the hazard prior to the accident. Statement IV G 12 at 27. Despite their knowledge, when the situation arose, neither Cyfers nor Mims intervened to ensure the circuit was de-energized before Murphy began to drill. Cyfers even stated that although he knew Murphy was going to drill, it never crossed his mind to see if the circuit on which Murphy was working was de-energized (Statement IV H 19 at 33). Thus, Mims and Cyfers failed to give effective supervision to Murphy when he most needed it, despite the dangers inherent in the task he was assigned, despite their knowledge of what he was assigned to do, and despite the fact that Murphy had exhibited a propensity to “cut corners.” The court concludes the agents’ omissions constituted more than ordinary negligence and therefore that both agents knowingly violated section 77.501.

## II.

### WHAT CIVIL PENALTIES MUST BE ASSESSED TAKING INTO ACCOUNT THE CIVIL PENALTY CRITERIA SET FORTH IN SECTION 110(i) OF THE ACT

#### HISTORY OF PREVIOUS VIOLATIONS

There is no indication that either Cyfers or Mims knowingly violated any mandatory safety standards prior to May 28, 2007, and the court concludes that neither individual has a history of previous violations. The court will consider this a positive factor when assessing penalties against the individuals.

#### SIZE OF BUSINESS

Further, the court holds that since Cyfers and Mims are individuals, the size of business criteria is irrelevant to them and will not be considered.

### **ABILITY TO CONTINUE IN BUSINESS**

The court concludes from the lack of evidence offered that any penalties assessed against Cyfers and Mims will not affect their abilities to meet their day-to-day financial obligations and will be appropriate in light of their incomes and net worth. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997); *Ambrosia Coal and Construction Co.*, 18 FMSHRC 819, 824 (May 1997).

### **NEGLIGENCE AND GRAVITY**

The courts has found that the failure of both individuals to meet the standard of care required was high and more than ordinary. Obviously, given the consequences of the violation, its gravity was extremely serious.

### **GOOD FAITH ABATEMENT**

The agents were not responsible for abatement of the violation and the court finds that criteria is irrelevant to them and will not be considered.

#### **KENT 2009-374**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>
6644489	5/28/07	77.501	\$15,000

The court has found that Richard Cyfers knowingly violated section 77.501, and that Cyfers's negligence was more than ordinary. The court also has found that the violation was very serious. Given these findings and the court's finding regarding other relevant civil penalty criteria, the court will assess Cyfers a civil penalty of \$12,000.

#### **KENT 2009-375**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED PENALTY</u></b>
6644489	5/28/07	77.501	\$15,000

The court has found that Walter Mims knowingly violated section 77.501 and that Mims's negligence was more than ordinary. The court also has found that the violation was very serious. Given these findings and the court's finding regarding the other relevant civil penalty, criteria the court will assess Mims a civil penalty of \$12,000.

**ORDER**

Within 30 days of the date of this decision Richard Cyfers shall pay a civil penalty of \$12,000 and Walter Mims shall pay a civil penalty of \$12,000. 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. Richard Cyfers payment should reference Docket No. KENT 2009-374 (A.C. No. 15-05375-169703A). Walter Mims payment should reference Docket No. KENT 2009-375 (A.C. No. 15-05375-169704A). Upon payment of the civil penalties, Docket Nos. KENT 2009-374 and KENT 2009-375 **ARE DISMISSED**.

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

Distribution: (Certified Mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 17, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2011-1002
Petitioner,	:	A.C. No. 15-02013-251780
	:	
v.	:	
	:	
HOPKINS COUNTY COAL, LLC,	:	
Respondent.	:	Mine: East Volunteer

**ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION**  
**ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”). The case involves two 104(a) citations issued to Hopkins County Coal on February 23, 2011.

In February of 2012 the parties represented to the court that this matter could be determined on cross-motions for summary decision. On April 5, 2012, Hopkins County Coal, LLC (“HCC”) filed a Motion for Summary Decision (“HCC Motion”) pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. The following day, on April 6, 2012, the Secretary of Labor (the “Secretary”) filed a Motion for Summary Decision (“Secretary’s Motion”) and Memorandum of Law in support of such (“Secretary’s Memo”). On April 13, 2012 both parties filed response briefs (“HCC Response” and “Secretary’s Response” respectively). For reasons set forth below, HCC’s Motion for Summary Decision is **DENIED**, and the Secretary’s Motion for Summary Decision is **GRANTED**.

**I. BACKGROUND**

On February 23, 2011, Inspector Ray Cartwright with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 8503195 and 8503196 under section 104(a) of the Act. Each citation alleges that HCC violated Section 77.412(a) of the Secretary’s regulations, which requires that “[c]ompressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gages<sup>1</sup>, and drain valves.” 30 C.F.R. § 77.412(a).

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<sup>1</sup> While the regulation uses the spelling “gage”, this decision uses the alternate spelling “gauge” when not quoting from another document, to mean the same.

Citation No. 8503195 alleges, in pertinent part, that “[t]he Air compressor, mounted on the International 4300 mechanic truck (Co #60), was equipped with a pressure gage mounted in the compressed-air receiver. The tank was not in use at the time of inspection.” Citation No. 8503196 alleges, in pertinent part, that “[t]he Air compressor, mounted in the bed of the Top Kick Mechanic’s Truck (Co #37), was equipped with a pressure gage mounted in the compressed-air receiver. The Air Compressor was not in use at the time of inspection.”

Inspector Cartwright determined that, with regard to both citations, an injury or illness was unlikely to occur, but that any injury would result in lost workdays or restricted duty, that the violations were not significant and substantial (“S&S”), that one person would be affected, and that the violations were a result of moderate negligence on the part of the operator. The Secretary has proposed a penalty of \$100.00 for each citation, for a total penalty of \$200.00.

## II. STIPULATIONS

The parties submitted Joint Stipulations of Fact on March 9, 2012. Those stipulations are as follows.

1. HCC was the operator of a surface facility for the processing of mined coal, called East Volunteer, with the designated Federal Mine Identification Number 15-02013 on February 23, 2011 and at all times relevant to the above-captioned mater.
2. The East Volunteer facility is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. HCC’s East Volunteer facility produced 0 tons of coal in 2011 and recorded 104,781 man hours in 2011. HCC, as a whole, produced approximately 3,335,001 tons of coal in 2011 and recorded approximately 994,805 man hours in 2011.
4. On or about February 23, 2011, products of the East Volunteer facility entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.
5. HCC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (“Commission”) and the presiding Administrative Law Judge (“ALJ”) has the authority to hear this case and issue a decision regarding said case.
6. The above-captioned mater involves MSHA Citation Nos. 8503195 and 8503196.
7. Copies of MSHA Citation Nos. 8503195 and 8503196 were served upon HCC by an authorized representative of the Secretary.
8. HCC timely contested MSHA Citations Nos. 8503195 and 8503196.

9. The proposed total civil penalties of \$200.00 (\$100.00 for MSHA Citation No. 8503195 and \$100.00 for MSHA Citation No. 8503196) will not affect HCC's ability to remain in business.
10. On February 23, 2011, at approximately 1:00 P.M., MSHA Coal Mine Inspector ("CMI") Ray Cartwright ("Cartwright") issued MSHA Citation No. 8503195 to HCC's East Volunteer facility.
11. Box 8, Condition or Practice, of MSHA Citation No. 8503195 alleged as follows:

Compressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gages, and drain valves.

The Air compressor, mounted on the International 4300 mechanic truck (CO #60), was equipped with a pressure gage mounted in the compressed-air receiver. The tank was not in use at the time of inspection.<sup>2</sup>

12. CMI Cartwright evaluated MSHA Citation No. 8503195 as "Unlikely" to result in an injury or illness, that the injury or illness that could reasonably be expected would be "Lost Workdays or Restricted Duty," that the number of persons affected by the alleged condition would be "1," that the alleged condition was "Not Significant or Substantial" (Non-S&S"), and that the alleged condition was the product of "Moderate" negligence on the part of HCC.
13. Box 17, Action to Terminate, of MSHA Citation No. 8503195 stated as follows:  
A pressure gage was mounted in the compressed air-receiver.
14. On February 23, 2011, at approximately 1:15 P.M., MSHA CMI Cartwright issued MSHA Citation No. 8503196 to HCC's East Volunteer facility.
15. Box 8, Condition or Practice, of MSHA Citation No. 8503196 alleged as follows:

Compressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gages, and drain valves.

The Air compressor, mounted in the bed of the Top Kick Mechanic's Truck (CO #37), was equipped with a pressure gage

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<sup>2</sup> The Secretary, in the Joint Stipulations, moved to modify the wording of the Condition or Practice section of Citation No. 8503195 to reflect that the equipment was *not* equipped with a pressure gage mounted in the compressed air-receiver. While HCC disputes this fact, it does not object to the modification for purpose of correcting the obvious typographical error. Jt. Stip. p. 3 n. 1. The Secretary's motion to modify is **GRANTED**.

mounted in the compressed-air receiver. The Air Compressor was not in use at the time of inspection.<sup>3</sup>

16. CMI Cartwright evaluated MSHA Citation No. 8503196 as “Unlikely” to result in an injury or illness, that the injury or illness that could reasonably be expected would be “Lost Workdays or Restricted Duty,” that the number of persons affected by the alleged condition would be “1,” that the alleged condition was “Not Significant or Substantial” (“Non-S&S”), and that the alleged condition was the product of “Moderate” negligence on the part of HCC.

17. Box 17, Action to Terminate, of MSHA Citation No. 8503196 stated as follows:

A pressure gage was mounted in the compressed air-receiver.

18. MSHA Citation Nos. 8503195 and 8503196 both alleged a violation of 30 C.F.R. § 77.412(a). 30 C.F.R. § 77.412(a) states:

Compressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gages, and drain valves.

### III. BRIEF SUMMARY OF THE PARTIES’ ARGUMENTS

#### a. HCC Motion for Summary Decision

HCC argues that it is entitled to summary decision as a matter of law and that Citation Nos. 8503195 and 8503196 should be vacated. The subject air compressors and compressed air receivers were “equipped” with pressure gauges and, therefore, were in compliance with the Secretary’s cited regulation. HCC Mot. 2. Specifically, “[i]n both cases, the air compressor systems were equipped with pressure gages via pressure rated hoses approximately seven (7) feet in length.” *Id.* The hoses were undamaged, and no devices “capable of isolating the pressure gages from the air compressor systems existed, or were otherwise installed, between the air compressor systems and the pressure gages.” *Id.* at 3, 9. Moreover, the issuing inspector never asked the company to activate the system or test the pressure gauges. *Id.* at 5, 10.

HCC argues that the cited standard is clear and unambiguous regarding the requirement that compressors and compressed-air receivers be “equipped” with automatic pressure-relief valves, pressure gauges. *Id.* at 7-8. Deference to the Secretary’s interpretation is due only when the meaning of a term is ambiguous. *Id.* at 7. Here, there is no ambiguity and the court need only enforce the plain meaning of the standard. *Id.* at 7-8. “In determining and applying the plain

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<sup>3</sup> The Secretary, in the Joint Stipulations, moved to modify the wording of the Condition or Practice section of Citation No. 8503196 to reflect that the equipment was *not* equipped with a pressure gauge mounted in the compressed air-receiver. While HCC disputes this fact, it does not object to the modification for purposes of correcting the obvious typographical error. *Jt. Stip.* p. 3,4 n. 2. The Secretary’s motion to modify is **GRANTED**.

meaning, the Commission relies upon the ordinary meaning of terms not defined by statute or regulation.” *Id.* at 8 (citing *Nolichucky Sand Co.*, 22 FMSHRC 1057 (Sept. 2000)).

HCC argues that ordinary definition of “equip,” set forth in both general and legal dictionaries,<sup>4</sup> supports its contention that the mine was in compliance with the cited standard. *Id.* at 8. “[T]he ‘key to these definitions [of the word ‘equip’] is not whether items are attached to one another . . . but whether the items stand in relation one to the other that makes them ready for efficient service to meet a particular need or exigency.’” *Id.* at 10 ((omission and addition in original) (citing *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994)). HCC asserts that “equipped” is a “far more expansive term than ‘attached’ or ‘affixed[.]’” *Id.* at 11. By providing pressure gauges for the compressor systems via pressure rated hoses, HCC “equipped” the compressor systems in accordance with the cited standard. *Id.* at 8-9. The gauges were attached via pressure rated hoses in order to allow the miners to read them while they stood on the “side of the truck used during operations, rather than the side of the truck where the air compressor system is mounted.” *Id.* at 9.

While the “Secretary alleges that HCC had not ‘equipped’ the air compressor systems with pressure gauges simply because of the approximately seven (7) foot distance between the pressure gauges and the air compressor systems. . . [she] can offer no evidence or information to suggest that the pressure gauges were not functioning or providing appropriate and necessary pressure readings for the air compressor systems[.]” *Id.* at 10.

Finally, HCC argues that the current case is distinguishable from Judge Zielinski’s decision in *Cemex Construction Materials of Florida*, 34 FMSHRC 170 (Jan. 2012)(ALJ). *Id.* at 11. Unlike the case at hand, in *Cemex* a gate valve, which was capable of isolating the gauge from the compressor system, was installed in the line between the air compressor system and the pressure gauge. *Id.* In the present case, there was no such instrument on the line that could isolate the gauge from the air compressor system. *Id.* at 11-12.

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<sup>4</sup> HCC cites a federal district court case in which the court relied upon a traditional dictionary definition of “equip.” The court stated as follows.

“Equip” is generally understood to mean “to provide with what is necessary, useful, or appropriate,” or to “fit out,” whether “with material resources,” or “clothing or ornament,” or even “with intellectual or emotional resources” . . . . It is also understood to mean “to make ready or competent for service or action against a present need.”

HCC Mot. 8 (citing *United States v. Rodriguez*, 841 F. Supp. 79 (E.D.N.Y. 1994) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 768 (1971))). HCC also cites Black’s Law Dictionary as defining “equip” to mean “[t]o furnish for service or against a need or exigency; to fit out; to supply with whatever is necessary for efficient action.” HCC Mot. 8 (citing *Black’s Law Dictionary* 558, 7<sup>th</sup> ed. (1999)).

b. Secretary's Motion for Summary Decision

The Secretary argues that there are no genuine issues as to any material fact and that the subject citations should be affirmed given that “[t]he compressed air receivers were not ‘equipped’ because the pressure gages were not directly mounted into the compressed air receivers.” Sec’y Mot. 1; Sec’y Memo 3.

The Secretary’s regulations do not define the word “equipped”. Sec’y Memo 4. Moreover, the definition of “equip” provided by Black’s Law Dictionary (see n. 3) is “open to interpretation.” *Id.* Accordingly, the word “equipped,” as used in the cited standard, is ambiguous and deference should be given to the Secretary’s reasonable interpretation. *Id.* at 1.

The Secretary argues that the word “equipped,” as used in this standard, should be interpreted to “mean[] that the pressure gages are required to be directly mounted into the compressed air-receivers.” *Id.* at 3, 4. The subject pressure gauges were tied to rubber hoses that were connected to the compressed-air receivers. *Id.* “Thus, the compressed-air receivers were no longer equipped with pressure gages, but rather rubber hoses at the end of which pressure gages were attached.”<sup>5</sup> *Id.*

c. HCC’s Response

HCC avers that the Secretary’s arguments that the term “equipped” is ambiguous and that her interpretation is entitled deference are without merit. HCC Resp. 1. Rather, the term “equipped” is unambiguous and its plain and everyday meaning should be given effect. *Id.* at 2-3. Moreover, the inspector was “utterly unqualified to pass judgment on the actual functionality of the pressure gages that had been in place before he arrived.”<sup>6</sup> *Id.* at 3. The Secretary cannot “unilaterally” deem the plain meaning of a word “ambiguous” when the “plain meaning highlight’s the inspector’s mistakes or otherwise vitiates the Secretary’s claim that a violation existed.” *Id.*

HCC further avers the Secretary’s assertion that HCC’s proposed interpretation would lead to an absurd result is also without merit. *Id.* at 4. It is the Secretary, not HCC, who seeks modification of the plain meaning of the term “equipped.” *Id.* at 4. It is “irrelevant” “whether a pressure gage is mounted directly on an air compressor receiver or via hose some thousand feet away . . . [as long as the gage provides] functional air pressure readings to the miners using the air compressor systems.” *Id.* “[P]roximity is irrelevant, while the relationship between the pressure gage and air compressor system (and the ability of the pressure gage to serve the other) is vital within the context of the regulation.” *Id.*

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<sup>5</sup> The Secretary asserts that the operator’s interpretation of “equipped” would be “contrary to law and, possibly, lead to an absurd effect . . . [where a]n operator could tie a pressure gage to a hose some thousand feet away from the compressed-air receiver and argue that the tank is nevertheless ‘equipped’ with a pressure gage.” Sec’y Memo. 4.

<sup>6</sup> HCC asserts, based on the inspector’s declaration, that the inspector “questioned the accuracy” of the gages in place, but did not activate or test the system. HCC Resp. 3.

d. Secretary's Response

The Secretary again asserts that the meaning of the term “equipped” is vague and ambiguous and, accordingly, the “Commission must defer to the Secretary’s interpretation because it ‘fits . . . within the terms of [the standard] and is compatible with its purpose.’” Sec’y Resp. 2 (omission and addition in original). HCC cites no Commission cases in support of the plain meaning of the term “equipped,” and the *Rodriguez* case cited by HCC is distinguishable from the case at hand. *Id.* at 3. The “plain meaning of a word must be viewed in context.” *Id.* In *Rodriguez* “equipped,” as contemplated by the statute at issue, was used in the context of firearm silencers being proximately positioned near firearms so that the firearm could be “equipped” with the silencer within seconds. *Id.* at 3-4. HCC’s interpretation, based on *Rodriguez*, would only require that a pressure gauge “be in close proximity to the compressed-air receiver to ensure that within seconds the pressure gage would be readily available for use.” *Id.* at 4. HCC’s interpretation suggests that an operator could be in compliance even when a pressure gauge’s intended function, i.e., to display the amount of air pressure in the compressed air-receiver at all times, is not being carried out. *Id.* The *Rodriguez* case, as it relates to the case at hand, “underscores the ambiguity in the meaning of the word ‘equipped.’” *Id.* Moreover, other Commission judges have not been persuaded by whether or not the cited gauge has been accurate, and have instead focused on the location of the gage. *Id.* 4-5 (citing *Cemex Constr. Materials of Florida, LLC*, 34 FMSHRC 170 (Jan. 2012) (ALJ)).

#### IV. DISCUSSION

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

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67.

Each of the subject citations was issued for alleged violations of Section 77.412(a) of the Secretary’s regulations, which requires that “[c]ompressors and compressed-air receivers shall be equipped with automatic pressure-relief valves, pressure gages, and drain valves.” 30 C.F.R. § 77.412(a). It is undisputed that the subject pressure gauges were connected to hoses which were in turn connected to the air compressors. With regard to the fact of violation, the only issue that remains is a dispute over the meaning of the term “equipped” as used in the cited standard. I find that there are no genuine issues as to any material fact on this question, and that, for the reasons set forth below, the Secretary is entitled to summary decision as a matter of law.

With regard to interpreting the language of a regulation, the Commission has stated the following:

[T]he “language of a regulation ... is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). 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. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference ... is not in order if the rule's meaning is clear on its face.” (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

*Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010). Further, “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).

Neither the Act nor the Secretary’s regulations define the term “equipped.” Accordingly, the court looks to the ordinary plain meaning of the word. The dictionary defines the verb “equip” as “to furnish for service or action: make ready by appropriate provisioning.” *Webster’s New Collegiate Dictionary* 383 (1979). *Black’s Law Dictionary* defines “equip” to mean “to furnish for service or against a need or exigency; to fit out; to supply with whatever is necessary to efficient action in any way. Synonymous of furnish.” *Black’s Law Dictionary* 482 (5<sup>th</sup> ed. 1979). Hence, the plain meaning of the term “equipped,” as used in the context of the subject regulation, would seem to require that compressors and compressed-air receivers be furnished for service, fitted out, or made ready by appropriate provisioning, with automatic pressure-relief valves, pressure gauges, and drain valves.

Each of the plain meaning dictionary definitions set forth above do little to clear up the meaning of “equipped.” If anything, the definitions make it clear how ambiguous a term “equipped” actually is in the context of this particular standard. On one hand, HCC may have interpreted the plain meaning of the term such that they considered pressure gauges attached to the hoses, which were in turn attached to the compressor, to satisfy the standard given that the gauges seemingly were capable of providing an accurate reading of the pressure in the

compressors and compressed-air receivers.<sup>7</sup> However, on the other hand, the same interpretation would lead to the absurd result suggested by the Secretary where a gauge is placed some thousand feet away from the compressor and connected via hose.

The plain meaning interpretation suggested by HCC ignores the effect of the mining environment and the protective purposes of this particular standard. The purpose of this particular standard is to provide miners with a display that shows the amount of pressure *in* compressors and compressed-air receivers *at all times*. While HCC asserts that proximity of the gage to the compressor or compressed-air receiver is irrelevant, I find to the contrary. The condition of hoses can be compromised during the course of normal mining activity. For example, in the event of a kinked hose in which fluid<sup>8</sup> is restricted or totally prevented from moving past the kink, the pressure reading at the end of the hose, i.e., where HCC had located their gages, may be, and more than likely would be, different than the reading of a gage mounted in the compressor or compressed-air receiver. In such a situation, the gauge at the end of the hose would be unable to fulfill its intended purpose. Accordingly, I find that the plain meaning of the term “equipped” set forth above, and advocated for by HCC, would lead to the absurd results suggested by the Secretary. *See Central Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001). Further, I find that the term is ambiguous.

The next inquiry that must be made is whether the Secretary’s interpretation of the cited standard is reasonable. “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.’” *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted)). The Secretary argues that the word “equipped,” as used in this standard, should be interpreted to “mean[] that the pressure gauges are required to be directly mounted into the compressed air-receivers.” Sec’y Mot 3, 4. As stated above, the purpose of this particular standard is to provide miners with a display of the amount of *pressure in compressors and compressed-air receivers at all times*. It is plainly obvious that the only surefire way a gauge can provide the amount of pressure in compressors and compressed-air receivers at all times is when the gauge is mounted, or connected, directly to the subject compressor or compressed-air receiver. Any object that exists between the gauge and the compressor or compressed-air receiver, whether that object be a valve hose, poses a potential threat to the gauge’s ability to accurately display the amount of pressure *in* the compressor or compressed air receiver. I find that the Secretary’s interpretation of “equipped,” i.e., mounting of the gauge directly into to the object that it is supposed to be taking a pressure reading of, is entirely reasonable and logically consistent with both the language and the intent of the regulation. Accordingly, I defer to the Secretary’s interpretation of the regulation.

Given that there is no dispute of fact that the subject gauges were not mounted directly into the air compressors, I find that Secretary has met her burden of proving a violation of the

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<sup>7</sup> I take judicial notice of, and do not dispute, the fact that pressure in a closed and uninterrupted fluid system is uniform throughout. *American Geological Institute, Dictionary of Mining, Mineral, and Related Terms* 392 (2d ed. 1997) (defining “Pascal’s Law”).

<sup>8</sup> “Fluid” may exist in either a liquid or gaseous state.

cited standard. Other commission judges have reached the same conclusion in the context of a violation of a similar standard.<sup>9</sup> See *Cemex Construction Materials of Florida*, 34 FMSHRC 170 (Jan. 2012)(ALJ).

I find that the violations as alleged are affirmed. The negligence is cited as moderate, and the violations are not S&S. Therefore, the Secretary has proposed a penalty of \$100.00 for each violation. The penalty seems appropriate in the circumstances and unless the Secretary is prepared to propose a higher penalty, this motion should be dispositive of all matters. However, the parties did not agree to the penalty amount, and therefore the parties are **ORDERED** to submit a stipulation to the penalty amount, or an argument as to why the penalty is not appropriate within ten days of the date of this decision.

## V. ORDER

HCC's Motion for Summary Decision is **DENIED**. The Secretary's Motion for Summary Decision is **GRANTED**. Citation Nos. 8503195 and 8503196 are **AFFIRMED** as issued. The parties are ordered to address the penalty as discussed above within ten days.

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

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<sup>9</sup> While I am not bound by the decisions of other Commission judges, in appropriate circumstances their decisions may provide guidance. In *Cemex*, Judge Zielinski addressed an alleged violation of Section 56.13011 which also requires that compressors and air receivers be "equipped" with gages. In affirming a violation of the standard, Judge Zielinski focused on the fact that the gage was "not located on the tank." Instead, the gage was some 10 feet away from the tank and connected via a line with a gate valve. HCC attempts to distinguish *Cemex* from the case at hand based on the fact that there was no gage valve on its line. I disagree and find that Judge Zielinski focused on the location of the gage, which was not on the tank, in holding that the tank was not "equipped" with a gage. While Judge Zielinski mentions the valve and takes note of the fact that, even with the valve it appeared that the gage reading was accurate when the valve was open, he qualifies that statement by saying that "[h]owever, that does not alter the fact that the tank was not equipped with a gage." 34 FMSHRC at 172.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, DC 20001-2021  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 20, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-396-M
Petitioner	:	A.C. No. 10-02004-203306
	:	
v.	:	
	:	Mine: Crusher # 1
THUESON CONSTRUCTION CO.,	:	
and/or THUESON	:	
CONSTRUCTION, INC.,	:	
Respondent	:	

**DECISION AND ORDER**

Appearances: Pamela Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

Lance Thueson, *pro se*, Nampa, Idaho for Respondent

Before: Judge McCarthy

**I. Statement of the Case**

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 (the Mine Act). The petition charges Respondent, Thueson Construction Co., and/or Thueson Construction, Inc.,<sup>1</sup> with nineteen section 104(a) violations of mandatory safety standards, eleven

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<sup>1</sup> The Respondent at issue in this proceeding is Thueson Construction Company and/or Thueson Construction, Inc., which Respondent’s owner, Lance Thueson, admits is the same legal entity. Tr. 19. Accordingly, I granted the Secretary’s motion to amend the citations at issue to plead in the alternative, Thueson Construction Company and/or Thueson Construction, Inc. (Thueson Construction), as the Respondent. Tr. 20.

On August 16, 2012, the Secretary filed an unopposed Motion for Leave to Amend the Petition to read that the respondent operator is “Theueson Construction Company and/or Thueson Construction, Incorporated.” I grant the Secretary’s Motion for Leave to Amend the Petition, noting that although the Commission’s procedural rules do not address amendment of pleadings, a motion to amend a pleading should be freely granted in the interest of justice pursuant to the guidance contained in rule 15(a) of the Federal Rules for Civil Procedure. Cyprus Empire, 12 FMSHRC 911, 916 (May 1990).

of which involved guarding violations under 30 C.F.R. § 56.14107(a), eight of which were designated as significant and substantial,<sup>2</sup> and twelve of which were designated as high negligence, for a total proposed civil penalty of \$91,309.

The parties stipulated to all material jurisdictional facts. The parties further stipulated that in all 19 citations, Respondent violated the standards cited, as written; that the gravity and negligence in each citation was correctly assessed; and that Respondent exercised good faith in terminating all citations in a timely manner. *See* Jt. Ex. 1, Stip. 1-28; Tr. 8-10.<sup>3</sup> Respondent challenges the amount of the proposed penalties and claims that it is unable to pay such penalties and they will adversely affect Respondent's ability to remain in business.

The Secretary was unsuccessful in negotiating any agreement with Respondent as to what it could pay. The Secretary advised that MSHA does not retain a certified accountant or sophisticated technical expert to advise on a respondent's ability to pay a proposed civil penalty. Tr. 51, 61-62.

Accordingly, an evidentiary hearing was held in Boise, Idaho on June 19, 2012. The parties introduced documentary evidence<sup>4</sup> and Respondent presented narrative testimony from its *pro se* owner, Lance Thueson, and from its Certified Public Accountant (CPA), Buckner Harris.

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<sup>2</sup> A violation is S&S "if, based on 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).

<sup>3</sup> In this decision, "Tr." refers to the hearing transcript; "J. Ex. #" refers to the parties' joint exhibits; "P. Ex. #" refers to the Secretary's exhibits; "R. Ex. #" refers to the Respondent's exhibits; "Sec'y Br." refers to the Secretary's Post-Hearing Brief; and "Resp't Br." refers to the Post-Hearing Brief of Highland Enterprises, LLC.

<sup>4</sup> Jt. Ex. 1, P. Exs. 1-6, and R. Exs. 1-11 were received in evidence. At the close of the hearing, the record was kept open for receipt of a *certified* copy of Respondent's violation history for the past 15 months. A non-certified copy was received at the hearing as P. Ex. 1. On July 12, 2012, the Court received a *certified* copy of Respondent's violation history. I have marked this exhibit and receive it into the record as P. Ex. 1A. The record was also kept open for receipt of a complaint and a description of related court activity in a civil suit that Pipe, Inc., a Thueson Construction affiliate, has filed against multiple defendants for breach of contract, *quantum meriut*, unjust enrichment and/or lien foreclosure with a prayer for judgment of \$689,756, with interest and attorney fees. I have received this documentation into the record and marked it as R. Ex. 12. For further description of Pipe, Inc., see note 7 below.

The issues before me are whether the proposed penalty assessment of \$91,309 would adversely affect Thueson's ability to continue in business, and the amount of an appropriate penalty assessment. Under well-settled Commission precedent, it is presumed that a proposed penalty assessment will not adversely affect an operator's ability to continue in business. *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997). Consequently, the burden is on Thueson to prove that the proposed penalty assessment will adversely affect its ability to continue in business. *Id.*; see also Tr. at 13-14.

For the reasons that follow, I conclude that Thueson has not satisfied its burden of proving that imposition of the total proposed civil penalty would adversely affect its ability to continue in business. Applying the remaining civil penalty criteria under section 110(i) of the Mine Act, however, I find that a total proposed penalty of \$25,028 is appropriate. On the entire record, including my observation of the demeanor of the witnesses,<sup>5</sup> and after considering the post-hearing briefs,<sup>6</sup> I make the following:

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<sup>5</sup> In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

<sup>6</sup> In its post-trial brief, Respondent attached two documents. Attachment 1 is a January 19, 2012 Notice of Default and Notice of Acceleration from collection attorneys representing Wells Fargo Equipment Finance, Inc. This document was available at the time of the June 19, 2012 hearing and Respondent has offered no explanation as to why it was not offered at the hearing so that counsel for the Secretary could inquire about it. Accordingly, I do not consider it herein. Attachment 2 is a July 25, 2012 letter from Zions Bank's Credit Management Department addressed to Americrete Ready-Mix Concrete, Inc., Americrete Land Holding, Inc., Pipe, Inc., River Rock Sand and Gravel, LLC, Triple Crown Development, LLC, Triple Crown Leasing, LLC, Thueson Construction, Inc., Lance Thueson, and Janel Thueson, as borrowers and guarantors, in which a revolving line of credit for \$975,000 with a principal balance of \$971,718 is declared in default thereby triggering cross defaults on other loans and obligations from Americrete, and demand is made for payment in full for \$982,167, or for an alternative written proposal, by August 10, 2012. The letter further advises that as a result of the default, Zions Bank is unwilling to extend further credit to any of the related parties. Since counsel for the Secretary also has not had an opportunity to question Respondent about this newly submitted evidence, I reject it and place it in a rejected exhibit file. I further note that even were I to consider Respondent's new evidence, it would not affect my decision, as it was the banks and not MSHA's proposed penalty, which affected Respondent's ability to remain in business.

## II. Findings of Fact and Summary of Testimony

### A. Thueson Construction and Its Web of Affiliated Businesses

Lance Thueson holds 100% ownership interest in several interrelated, integrated and affiliated businesses treated as combined entities for accounting purposes. Tr. 38. Thueson Construction, Inc.'s affiliates all operate out of Nampa, Idaho, a community property state, and include Pipe, Inc., Americrete, Inc., Americrete Land Holding, River Rock Sand and Gravel, LLC, Triple Crown Development, Triple Crown Leasing, and Lance Thueson, LLC, all 100% owned by Lance Thueson and/or his wife. Tr. 22-27, 106.<sup>7</sup>

Thueson Construction, Inc. is a construction contractor specializing in excavation primarily for residential developers and governmental entities. R. Ex. 11, note 1. Pipe, Inc. is a contractor specializing in underground water and sewer excavation, primarily for residential developers and governmental entities. *Id.*<sup>8</sup> River Rock Sand and Gravel, LLC, owns several gravel pits in Ada and Canyon counties, Idaho, where gravel is extracted and crushed to produce various types of sand and gravel mixtures that are sold primarily to local real estate developers, contractors and residential and commercial

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<sup>7</sup> I note that three other existing legal entities (Castleton Place Homeowner's Association, Inc., Centerpoint Properties, LLC, and Eagle Rock Partners, LLC), and one dissolved corporation (Precision Pipeline Excavation, Inc.), are registered with the Idaho Secretary of State and share the same address (455 S. Kings Road, Nampa, ID 83687) as all other Thueson affiliates, except Americrete Land Holding, LLC and Americrete Ready-Mix Concrete, Inc., which share an address at 6701 E. Flamingo Avenue, Nampa, ID 83687. Online Business Entity Search, Idaho Secretary of State, <http://www.accessidaho.org/public/sos/corp/search.html> (search "Registered Agent Name" for "Lance Thueson;" then follow "View Details" hyperlink).

<sup>8</sup> Pipe, Inc., is a moribund business, in good standing in the State of Idaho, that installed underground wet utilities. Tr. 23. Thueson testified that he stopped performing work under Pipe, Inc. because of large losses sustained. Tr. 39. He testified that Pipe's work is currently performed by Thueson Construction. Tr. 23. Pipe, Inc. is owed approximately \$700,000 for three phases of underground utility work performed for a local developer, who went "broke" and apparently filed for bankruptcy. Tr. 42, 46-47. American West Bank apparently foreclosed on the property and sold it to a Canadian company. Tr. 42, 82-83. Pipe, Inc. is in litigation to recover under its construction lien on the property, but owes \$647,143 in attorney fees incurred on a contingency fee basis. Tr. 40, 44-45, 46-47, 55-56. Thueson testified, quite tellingly, ". . . But it all comes back to me. All these entities refer back to me." Tr. 40. He further acknowledged that any money recovered by Pipe, Inc. could "possibly be distributed" to Thueson Construction. Tr. 84.

builders. *Id.*<sup>9</sup> Americrete Ready Mix Concrete, Inc., d/b/a G&B Ready Mix Concrete (Americrete), specializes in manufacturing and selling concrete primarily to residential and commercial builders. *Id.*<sup>10</sup> Triple Crown Development, LLC, develops and sells land for residential subdivisions. *Id.*<sup>11</sup> Triple Crown Leasing, LLC, owns and leases commercial real estate. *Id.*<sup>12</sup> Lance Thueson, LLC, also develops and sells land for residential subdivisions. *Id.*<sup>13</sup> Americrete Land Holding, LLC, leases land. *Id.*<sup>14</sup>

The Secretary has not alleged that any of these legal entities operate as a unitary operator, joint operator, alter ego, and/or successor operator with Respondent.<sup>15</sup> Nor

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<sup>9</sup> River Rock Sand and Gravel, LLC (River Rock), has a separate mine ID and its own crusher, Portable Mine 2, which is smaller than the crusher operated by Thueson Construction. Thueson testified that River Rock has been cited previously by MSHA. Tr. 24, 72-73; R. Ex. 3, Schedule C. River Rock supplies aggregate to Americrete Ready Mix Concrete, Inc., d/b/a G&B Ready Mix Concrete (Americrete), and to Thueson Construction, and River Rock used to supply piping, presumably to Pipe, Inc. Tr. 24.

<sup>10</sup> Thueson testified that Americrete, Inc. is a going concern incorporated in 2005 to supply concrete to different job sites, including Thueson Construction projects. Tr. 24, 29. I take public notice of the fact that the corporation is registered with the Idaho Secretary of State as Americrete Ready-Mix Concrete, Inc.

<sup>11</sup> Triple Crown Development, LLC, which originated in 2001, is in the business of developing subdivision lots, although Thueson testified that no current work is being performed in that business. Tr. 24-24.

<sup>12</sup> Triple Crown Leasing apparently registered in December 2006 with the Secretary of State of Idaho as Triple Crown Investments, LLC. It holds and leases real estate to Thueson Construction, Pipe, Inc., and Americrete. Tr. 25.

<sup>13</sup> Thueson testified that Lance Thueson, LLC was established [in May 2005] to acquire real estate to be developed in the future. It acquired a Castleton subdivision that was sold to Triple Crown Development, Inc. about 2007. Tr. 26-28.

<sup>14</sup> Thueson testified that Americrete Land Holding, LLC, originated in 2006 to hold real property, including the land on which Americrete (G&B) runs its concrete operation. Tr. 28-29.

<sup>15</sup> *See, e.g., Berwind*, 21 FMSHRC 1284, 1316-17 (Dec. 1999) (where the Commission considered the following factors in determining whether entities will be treated as a unitary operator for purposes of the Mine Act: (1) interrelation of operations, (2) common management, (3) centralized control over mine health and safety, and (4) common ownership).

has the Secretary attempted to pierce the corporate veil of Thueson Construction, Inc. and attach individual liability to Lance Thueson and/or his wife.<sup>16</sup>

Respondent, Thueson Construction, Inc., is a going concern that bids site work for various construction projects. Tr. 34, 96.<sup>17</sup> It currently has about 15 employees, but when the instant citations were written at Portable Crusher 1 Mine on October 14, 2009, it employed only three miners. Tr. 34-36. The mine produces native sand and gravel, which is separated and crushed into different sizes and washed and sold to some of Respondent's affiliated companies, including Pipe, Inc. and Americrete, Inc. Income generated by the mine is reported as income to Thueson Construction. Tr. 37.

The mine received a Certificate of Honor from the Holmes Safety Association, signed by the former Assistant Secretary of Labor for Mine Safety and Health, for working 50,553 work hours from July 1, 2001 through September 30, 2008 in the metal/non-metal industry without incurring a lost workday injury. Tr. 17; R. Ex. 2. Prior to the instant inspection, from December 12, 2001 until March 24, 2009, Thueson Construction received 46 section 104(a) citations, 9 of which were S&S, and one section 104(g)(1) S&S citation. All 47 citations over this eight-year period were paid; one for \$1,200, and the remaining 46 citations for \$360 or significantly less.

During the instant inspection, proposed fines increased exponentially.<sup>18</sup> Thueson contacted a national law firm in Washington, D.C. to represent Respondent in this matter, but could not afford the \$10,000 retainer to initiate representation. Tr. 16; R. Ex. Thereafter, consultant Kim Redding represented Respondent during initial conference calls with the undersigned, but Respondent could not afford his representation either. Tr. 61, 63. In several pre-hearing conference calls with the parties, the undersigned requested that Thueson

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<sup>16</sup> See, e.g., *White Oak Coal* 318 NLRB 732 (1995), piercing the corporate veil where (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

<sup>17</sup> Thueson testified that MSHA had inspected Respondent as recently as two weeks prior to the hearing. Tr. 95-96.

<sup>18</sup> For example, the proposed penalty for the guarding violation in Citation 6483267, designated as S&S (fatal) with high negligence, is \$31,988 or 15 times the statutory minimum for an unwarrantable failure violation, for which Respondent has never been cited. Another proposed penalty for a guarding violation in Citation 6483279, designated as S&S (fatal) with moderate negligence, is \$9,634. Citation Nos. 6483273, 6484275, 6483280 and 6483281, designated as S&S (fatal) with moderate negligence, each have proposed penalties of \$6,458.

Construction provide audited financial records at the hearing , but Thueson explained, as further confirmed by testimony from Thueson and Harris below, that Thueson could not afford to provide audited financial statements.

R. Exs. 3, 4, and 5 represent unsigned joint individual income tax returns filed by Thueson and his wife, M. Janel Thueson, for tax years 2011, 2010, and 2009, respectively, including, inter alia, Schedule C profit or loss statements from Triple Crown Development, LLC (engaged in construction and development) and River Sand and Gravel, LLC (engaged in rock crushing/sales), both of which list the same business address as Thueson Construction, Inc. Tr. 17-18. R. Exs. 7, 6, and 8, respectively, represent 2011, 2010, and 2009 unsigned income tax returns for S corporation Thueson Construction, Inc., the Respondent herein. Tr. 19-21.

R. Ex. 9, 10, and 11, respectively, represent Thueson Construction, Inc. and Affiliates' combined financial statements and accountants review report for the years ended December 31, 2009 and 2008, December 31, 2010 and 2009, and December 31, 2011 and 2010. Tr. 21-22. The Independent Accountants' Review Reports were prepared by B. A. Harris and Associates, P.A., a CPA firm in Boise, Idaho, which is owned by sole shareholder Buckner Harris, witness for Respondent. Tr. 98-99.<sup>19</sup> Those review reports state, inter alia, that review was made of the accompanying combined balance sheets of Thueson Construction, Inc. and affiliates and the related combined statements of operations, changes in stockholder's equity, and cash flows.<sup>20</sup>

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<sup>19</sup> Thueson testified that he has used B. A. Harris and Associates for tax and accounting services for about eight or nine years and “. . . at one time we were grossing \$55 million annually - - and the bank has never required audited financial statements.” Tr. 84; *see also* Harris' testimony at Tr. 125-26. Thueson further explained that it would cost about \$20,00 - \$30,000 per company to conduct a four to six-week audit and he “. . . was confident that if it was audited, the financial record wouldn't change.” Tr. 85.

Harris testified that an audit for the Thueson's companies with substantial operating activity, i.e., Thueson Construction, Inc., River Rock, and Americrete, would cost about \$15,000 to \$20,000 for each company. He estimated that it would cost another \$20,000 to \$30,000 to audit the other companies in an audited combined statement, thus totaling about \$80,000 to \$90,000. Tr. 115-116. Harris testified that audits are generally done by public companies with an overall debt load much larger than Respondent's, and the financial burden on small businesses to have audits undertaken is the biggest reason that the banks don't require them, relying instead on review statements, which expose CPA firms to less risk. Tr. 114-15. In essence, Harris opined that “. . . the fact that there's not an audit shouldn't reflect poorly on Mr. Thueson. The banks that have extended millions of dollars of credit to him have accepted a review statement.” Tr. 115.

<sup>20</sup> Harris explained that Thueson entities would provide internal financial statements to  
(continued...)

The 2011 report, for example, provides as follows:

. . . . A review is substantially less than an audit, the objective of which is the expression of an opinion regarding the combined financial statements as a whole. Accordingly, we do not express such an opinion.

Management is responsible for the preparation and fair presentation of the combined financial statements in accordance with principles generally accepted in the United States of America for designing, implementing and maintaining internal control relative to the preparation and fair presentation of the financial statements.

Our responsibility is to conduct the review in accordance with Statements on Standards or Accounting and Review Services issued by the American Institute of Certified Public Accountants. Those standards require us to perform procedures to obtain limited assurance that there are no material modifications that should be made to the combined financial statements. We believe that the results of our procedures provide a reasonable basis for our report . . . .

R. Ex. 11, Independent Accountants' Review Report.

For the year ending December 31, 2009, Thueson Construction, Inc. had a net loss of \$1,391,335. R. Ex. 9, Schedule 8. For the year ending December 31, 2010, Thueson Construction, Inc. had a loss of \$846,208. R. Ex. 10, Schedule 8. For the year ending December 31, 2011, Thueson Construction, Inc. had a net loss of \$16,394. R. Ex. 11, Schedule 8.<sup>21</sup>

### **B. Lance Thueson's testimony**

Lance Thueson testified that Thueson's business outlook was "slowly" getting better, but "[i]t's not looking very good," and "it's just a matter of trying to keep our doors open at this point." Tr. 32-33, 86. "We've sustained some huge losses and our working capital is upside down. I owe property taxes for the last three years . . . they are getting ready to have a sheriff's sale. . ." on properties held by Triple Crown and Americrete Land Holding. Tr. 33. Thueson

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<sup>20</sup> (...continued)

his firm to be put into a combined financial statements after review, inquiry and reconciliation against bank, loan, and account receivable statements, etc. Tr. 127-28. Although B. A. Harris and Associates does not assess job-by-job profitability, it does review work-in-progress schedules, which track job costs using specific software. Tr. 132.

<sup>21</sup> The combined losses for the affiliated business entities was \$3,432,594 for 2009, \$1,942,986 for 2010, and \$1,304,648 for 2011. Tr. 32; R. Exs. 9-11, Schedule 8.

further testified that he has maxed out a \$983,000 line of credit with Zion's bank, and that line of credit has not been renewed. Tr. 53-55.<sup>22</sup> Thueson testified, "I'm not sure what my future brings until I know that the bank is going to renew my line [of credit]. I could be out of business tomorrow. . . ." Tr. 86.

Thueson testified that he pays Zion's Bank \$54,000 a month from Americrete Ready Mix, and a debt restructuring agreement has been negotiated with regard to 5 of the 10 million owed Zion's Bank. Tr. 92-93.<sup>23</sup> Thueson further testified, "I owe another bank [Wells Fargo] \$2.8 million that we have been selling equipment to, to try to - - it's in foreclosure too." Tr. 56-57, 91.<sup>24</sup> Thueson testified that he has not taken any wages from Thueson Construction since 2008, and his covenant with Zion's Bank precludes withdrawal of more than \$60,000 annually, which he may elect to take from Americrete, d/b/a G&B Ready Mix. Tr. 65-67. In 2011, however, Thueson and his wife reported a \$166,258 distribution from Thueson Construction. Tr. 69; R. Ex. 7, 2011 Tax return for an S Corporation, page 6, Sch. K-1, line 12.

R. Ex. 4, page 3, Schedule A, lines 16-19 of the joint individual income tax return filed by Thueson and his wife for 2010, show a gift to charity of \$14,148 in 2010 and a charitable contribution carryover from a prior year of \$49,324 for a total amount of disallowed charitable contributions of \$63,472.<sup>25</sup> Thueson testified that the contributions represent periodic tithing to his church. Tr. 66, 69. In 2011, Thueson gave \$12,721 to his church, increasing the disallowed charitable contributions to \$76,193. R. Ex. 3, page 3, Schedule A, lines 16-19.

R. Ex. 3, joint individual tax return for 2011, page 9, Schedule E (Supplemental Income and Loss from real estate), shows that after deduction for expenses, the Thuesons had rental income of \$15,737 from property A located at Kings Road, Nampa, ID, 83686, and rental income of \$168,342 from property B located in Canyon County, ID, 83686. Total rental income

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<sup>22</sup> Land and equipment, including pickup trucks for Thueson superintendents, help secure Zion's note. Tr. 82, 93.

<sup>23</sup> Subsequently, however, Thueson testified that he has been making payment to Wells Fargo, who has foreclosed, prompting the sale of assets. Tr. 137-38.

<sup>24</sup> On cross, Thueson conceded that he had sold 1.3 million dollars worth of equipment during the past year to meet to secured obligations to Wells Fargo, but has not paid MSHA. Tr. 89, 92, 94. Thueson testified, "the assets that I have I can't go out and do work without them, so it hinders my ability to generate income." Tr. 90. He further testified that it does not look like Wells Fargo is going to take every piece of equipment, although he just sold another piece of equipment "last month," and he has two or three more pieces of equipment to sell to reduce the Wells Fargo debt to \$2.5 million. Tr. 94.

<sup>25</sup> R. Ex. 5, the joint individual income tax return for 2009, contained no schedule A because the Thuesons opted for the standard deduction. Tr. 118-19.

was \$184,179. See Tr. 74-76.<sup>26</sup> Triple Crown Development, LLC, which Thueson testified owned the land on which the properties were located, did not report any rental income. Tr. 76; R. Ex. 3, joint individual tax return for 2011, page 5, Schedule C (Profit or Loss from Business (sole proprietorship), Triple Crown Development, LLC; but see Schedule E (Supplemental Income and Loss from real estate), showing rental for two properties, which Harris attributed to Triple Crown Leasing. Tr. 108-09; see note 26 above. Thueson reluctantly acknowledged that Triple Crown Development also holds 15 investment lots worth about \$20,000 per lot, for a total of \$300,000, and Intermountain Community Bank holds a mortgage for about that amount. Tr. 77-79. I note that the total value of land held for sale by Triple Crown Development is \$1,905,955. R. Exs. 9, 10, and 11, Schedule 7.

Thueson testified that he personally borrowed about \$800,000 against his residence, which he “infuse[d] into the corporations to keep them afloat.” Tr. 80-81.

When asked by the undersigned what he thought could be paid MSHA over an eight 8-year installment period, Thueson testified as follows:

Well, if you ordered me to pay the \$91,000 over eight year[s], I’d just have to do the math on it. And if that’s the court order, I guess that’s what I have to do.

....  
....

Well, You Honor, if I felt that I had the financial whereabouts to do it, I’d pay the \$91,000. And so to answer your question, I don’t think I can pay anything over the next eight years at the point I’m at.

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<sup>26</sup> Thueson had trouble remembering the source of the rental income from property B, but testified that the Thueson Construction office was the source of rental income from property A. Tr. 75-76, 85-86.

CPA Harris explained that the Internal Revenue Code allows a rental activity in an LLC which is owned 100 percent by a husband and wife to be reported on their individual joint return, rather than on a separate return of the entity. He further testified that Americrete, d/b/a G&B Ready Mix Company, pays rent to Triple Crown Leasing for Property B, and Thueson Construction pays rent to Triple Crown Leasing for Property A. Both properties are owned in Triple Crown Leasing, and rental income is only reported on the Thuesons’ joint return, since Triple Crown Leasing doesn’t have to file its own separate tax return, thereby saving Thueson some tax preparation fees. Tr. 108-09.

I mean, if it's a court order, it's a court order. But if you are asking me what do I think I can pay, it's based off of what my abilities are to stay in business. If I have the money, then I ought to be paying the \$91,000.

Tr. 87.

....

I think the answer's the same, nothing at this point.

Tr. 89.

### **C. Buckner Harris' testimony**

CPA Harris also testified in narrative form, and then was cross examined by counsel for the Secretary. Tr. 97 et seq., 116 et seq. Harris testified that Thueson owns a complicated business structure involving lots of different entities, whose finances are reflected in Combined Financial Statements, which the banks requested in order to evaluate the overall financial picture. Tr. 100. Harris testified as follows:

"I think whether you focus on Thueson Construction by itself or if you look at it on a combined basis, or if you even pull into that picture Mr. Thueson, and his wife, as well, I don't think the conclusion is any different. You know, I understand my role here today is to give testimony on whether Mr. Thueson has the ability to pay. And in my opinion, if you need to conclude that someone has the ability to pay is a function of does he have assets that he can sell to generate the cash to pay, and that's usually measured from an accountant's standpoint as does he have any equity.

The other way you can make that determination is whether or not he's got sufficient cash flow.

Well, I can tell you if you look at Thueson Construction by itself it does not have any equity. It's -- I think the common term is "it's underwater."

....

You could liquidate that company today and you would still be \$1- or \$2 million short when you look at the money that he owes.

Over the last four years Thueson Construction has lost a cumulative of \$3.6 million. So from a standpoint of Thueson Construction, there's no equity, meaning there's no assets he can sell, and he has lost money. Now, earlier I remember a comment about 2011 looking better, and I think in 2011 Thueson Construction lost \$16,000.<sup>27</sup>

But if you look at the detail on that financial statement, that was only after having sold equipment that generated a \$200,000 gain. So if he hadn't sold that equipment, he'd have had a loss in excess of \$200,000. And on top of that that equipment had to be sold so he could make payments to Wells Fargo that has an overall loan on all of his companies covering the equipment. So he was selling Thueson Construction equipment so he could generate cash to Wells Fargo.

He draws no salary. His salary, which is limited to \$50-, \$60,000 a year comes from a different company.

But the financial statements and the tax returns do show distributions. Distributions from Thueson Construction is not cash flow which goes into Mr. Thueson's pocket for discretionary spending purposes. It's funds that if they're ever available, because maybe one of his customers pays a bill, he takes those funds and shifts it to another entity so a lender can be paid. But from an accounting standpoint that type of transaction shows up as a distribution.

On the surface it looks like Mr. Thueson is taking \$150,000 a year out of the company, and that's not the case, so that's very misleading. If you look at the company by itself, I don't see any way that you can conclude that it has the ability to pay anything.

If you look at the company on a combined basis -- if you really look at the value of the assets of all of the entities, the value of the companies -- on a combined basis it would be my opinion that it's underwater, to use that term, \$4- to \$5 million.

If you could liquidate everything the companies own, you would still not satisfy the lenders by \$3- or \$4 million.

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<sup>27</sup> I note that Thueson Construction lost \$1,391, 135 in 2009 and \$846,208 in 2010. See R. Exs. 9 and 10, Schedule 8.

Over the past three or four years -- and I don't have an exact number, I could add them up off the financial statements -- on a combined basis, the losses have probably been \$6- or \$7 million.

Now, from a gross revenue standpoint, I think, in 2011 the combined companies did generate \$11 million in gross revenues. And if Mr. Thueson had no expenses, if he didn't have to pay for labor and payroll taxes and insurance and all the costs of business that have to occur to operate, he'd have made \$11 million, and we wouldn't be sitting here right now.

What's happening in this economy in the past three and four years revenues have shrunk and the margins on which Mr. Thueson operates have virtually disappeared.

He might go bid a job for Thueson or Pipe, and he might do a job for \$10,000, and it might cost him \$9,500 of direct operating expenses to carry out that job, which leaves him a net profit of \$500 to go towards his general and administrative expenses, which -- I mean -- and it's not just Mr. Thueson's companies, it's been happening throughout the country, and people are unable to make a profit these days.<sup>28</sup> I think everybody hopes that if they can find a way to keep operating for another year, another five years, another ten years, they might be able to get back on their feet.

Three years ago I had no optimism at all that Mr. Thueson would still remain in business today. I'm quite surprised he's been able to do it. But he's been able to do it through extremely hard work, probably more so than that out of some amazing cooperation from the banks. The banks really control Mr. Thueson's future. Everything he owns is due to them, literally due, d-u-e, due to the banks.

He has no net worth. The companies have no equity. But they don't come in and foreclose on all of his equipment, because if they take it away right now they know that when they liquidate it they're going to lose \$5- or \$6 million.<sup>29</sup>

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<sup>28</sup> On cross examination, Harris based this testimony on his professional opinion and experience working with construction contractors. Tr. 131-32.

<sup>29</sup> On cross examination, Harris confirmed that the banks were unlikely to repossess his equipment because if Thueson used the equipment to generate cash flow, the creditors would  
(continued...)

They have a hope that if they can keep Mr. Thueson operating, that in three, four, five years from now they might only lose \$2 million or \$3 million.

And I would venture to guess if we had one of the bankers sitting here today, he would tell you that they don't have any expectation of ever getting repaid completely.

But the banks aren't shutting people down and putting them out of business because, number one, it looks bad, and number two, they think we're good operators. And if they can keep them operating for a few more years maybe they can collect more than if they just shut someone down and liquidated them today.

That's the situation that Mr. Thueson is in. Whether it's him personally, Thueson Construction or the companies on a combined basis.

Tr. 101-06.

When asked by the undersigned how MSHA's proposed penalties of \$91,309, would affect the ability of Thueson Construction (or Mr. Thueson) to stay in business, Harris testified as follows:

You know, I think over a period of time Mr. Thueson probably has the ability to find some way to shift some cash flow around from other companies which aren't liable on this penalty.

My understanding is the penalty is Thueson Construction, so there's probably some way that he has it that he could pay something on a payment plan. But my bigger concern is that I don't think Mr. Thueson, right now, has let the bank know, and that would have to be disclosed as a liability on the financial statement.

And I'm more concerned about how the bank would react to something like that, and there's no guarantee the bank is going to continue allowing Mr. Thueson to operate. And if they see something like that happen, it suddenly pops up, it's on his financial statement, Mr.

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<sup>29</sup> (...continued)  
have a better chance of recovering more on their loans. Tr. 124.

Thueson says, I've entered into some payment plan, the bank would most likely start getting a little nervous about deals Mr. Thueson's making. It might be cutting into the 100 grand, or the millions, that he owes them.

Personally, I think a good solution to this – and I -- excuse me, Mr. Thueson, but I haven't even mentioned this to him -- but if Mr. Thueson can stay in business and get the bank paid over the next seven, eight years, nine years, ten years and –

.....

Get the bank paid what they're due. And then I think Mr. Thueson would be more than happy to pay \$91,000.

But right this minute that could very likely be the straw that breaks the camel's back. Not from the standpoint that he might be able to find a way to generate some cash flow from someplace. You know, who knows, he might be able to sell some equipment and not tell the bank about it, even though they have a lien on everything.

But if he can stay in business for ten years and get the bank paid off, I think he'd agree that, yep, have the ability to pay them. Does he today? I would say no way.

Tr. 109-111.

When asked to recommend to the undersigned, what he thought Thueson Construction could pay on an installment basis for MSHA's proposed civil penalty, Harris opined:

I would tell you Thueson Construction, Inc., has no ability to pay and can't pay anything. I would tell you that Mr. Thueson is under agreement with the bank right now where he can draw \$60,000 a year to live on and support his family.

If there's some amount of that \$60,000 a year that he could loan to Thueson Construction to pay over a period of time, it's probably not as much as a car payment. I mean, a couple hundred bucks a month, and I could probably work the math.

Tr. 111-112.

After proposing a resolution akin to an IRS "Offer in Compromise," whereby Thueson Construction would make a monthly payment of \$100 under a 10-year installment plan, with the balance wiped clean after 10 years, both Thueson and Harris testified that Thueson could

make such payments totaling about \$12,000. Tr. 112-14. In fact, on further questioning from the undersigned, Thueson testified that he could pay MSHA \$200 per month for 10 years if that is what the Court orders, although he was more equivocal given the uncertainty surrounding the future state of the economy and whether the bank would call his note. Tr. 137-38.

Harris further testified that the debt on Thueson Construction's balance sheet at the end of 2011 slightly exceeded \$4.1 million, including three types of debt: accounts payable from daily operations, typically owed within 30 days, without payment terms attached; revolving bank lines of credit, which may be drawn upon, but require that interest, at a bare minimum, be paid every month; and term debt, such as a car loan or a mortgage, which is paid down every month. Tr. 120-21, 123-24. Harris testified that Thueson currently owed term debt to Wells Fargo and Cat Financial for equipment financing, and owed accounts payable to other creditors. Tr. 121.

Thueson testified that he owes CAT Financial \$30,000 per month and is 60 days in arrears, and that he has not been making payment to Wells Fargo, who has foreclosed, prompting the sale of assets. Tr. 137-38. Harris confirmed that the source for a lot of the payments has been from the sale of equipment, as Thueson is not generating enough cash flow through operations to make monthly payments. Tr. 122.

On redirect, in response to a leading question from Mr. Thueson, Harris testified that Thueson Construction does not have the ability to pay the MSHA fine of \$91,309. Tr. 135. On recross, Harris testified that Mr. Thueson personally has less ability to pay than Thueson Construction. He explained that this is because Lance Thueson is more “underwater” than his companies, given the size of his personal debt to the banks. Tr. 135.

### **III. Legal Principles**

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violations, the size of the operator, the gravity of the violation, whether the violation was abated in good faith, and whether the penalties would affect the ability to continue in business. 30 U.S.C. § 820(i). The determination of the proper civil penalty is committed to the judge’s discretion, as circumscribed by the statutory criteria of section 110(i) and the deterrent purpose of the Mine Act’s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984). The legislative history establishes that the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards, and the penalty amount should be sufficient to make it more economical for an operator to comply with the Act’s requirements than to continue to operate in noncompliance. See S. Rep. No. 95-181, at 37–38 (1977). Penalties may not be eliminated because the Mine Act requires that

a penalty be assessed for each violation. *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 699 (April 1994), citing 30 U.S.C. 820(a); *Tazco, Inc.* 3 FMSHRC 1895, 1897 (Aug. 1981).

Absent proof that the imposition of authorized penalties would adversely affect a respondent's ability to continue in business, it is presumed that no such adverse effect will occur. *Spurlock Mining*, 16 FMSHRC at 700; *Sellersburg Stone*, 5 FMSHRC at 294; *Peggs Run Coal Co.*, 1 FMSHRC 350, 351-52 (May 1979). Rather, the operator must introduce specific evidence to show how the proposed civil penalty would adversely affect its ability to continue in business. *Broken Hill Mining*, 19 FMSHRC at 677-78. Past unaudited financial records showing net losses are not necessarily dispositive, particularly where the operator's documentation is unreliable or other evidence, such as future business prospects or assets, including those of an alter ego, contradicts the operator's assertions about its inability to pay. See *Ember Contracting Corp.*, 33 FMSHRC 2742, 2751-52 (Nov. 2011)(ALJ), citing *Spurlock Mining*, 16 FMSHRC at 700 (citing *Peggs Run Coal Co.*, 3 IBMA 404, 413-14 (Nov. 1974)); *Heritage Res., Inc.*, 21 FMSHRC 626, 638 (June 1999) (ALJ) (finding no effect on ability to continue in business in light of operator's substantial assets); *L&T Fabrication & Constr.*, 21 FMSHRC 71, 73-74 (Jan. 1999) (ALJ) (discrediting reliability of unaudited financial records); *Kennie-Wayne, Inc.*, 16 FMSHRC 2441, 2442-44 (Dec. 1994) (ALJ) (finding no effect on ability to continue in business in light of operator's future business prospects). See also *Apex Quarry, LLC*, 33 FMSHRC 3158, 3163 (Dec. 2011) (ALJ) (operator failed to sustain its burden of proof, particularly in absence of audited financial statements); *Johnco Materials, Inc.*, 33 FMSHRC 1331, 1433-34 (June 2011 (same)).<sup>30</sup>

In addition, the Commission has expressed concern about creating an economic incentive for operators to avoid a penalty by going out of business and reincorporating under a different name, and has noted that even operators who are leaving the mining business for ordinary commercial reasons will have little incentive to comply with safety regulations prior to their exodus, if monetary penalties can be evaded once the business quits altogether. See *Unique Electric*, 20 FMSHRC 1119, 1123 (Oct. 1998), relying on *Reich v. OSHRC*, 102 F.3d 1200, 1203 (11th Cir. 1997)). Cf. *Granite Mountain Crushing*, 26 FMSHRC 126, 130 (Feb. 2004)(ALJ) (imposing reduced penalty based, in part, on finding no evidence that the operator's decision to liquidate assets was based on the Secretary's proposed penalty).<sup>31</sup>

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<sup>30</sup> In *Ember, supra*, the judge recognized that the respondent's downward trend in recent financial performance suggested that a reduction in the Secretary's proposed penalty of \$226,508 would be appropriate, but in light of the respondent's past profitability, opportunities available to it, self-proclaimed positive reputation in the industry, and disguised continuance as an alter ego in an effort to evade the proposed penalty assessment, the judge rejected respondent's claim that it could not continue in business if it paid the proposed civil penalty of \$226,508. 33 FMSHRC at 2754-55, 2756, 2742, and 2758-59.

<sup>31</sup> In *Granite Mountain Crushing*, the operator auctioned off its equipment and ceased  
(continued...)

#### IV. Legal Analysis and Conclusions of Law

Respondent, Thueson Construction, is a going concern, small in size, with a diminutive history of prior violations, all of which were paid for relatively modest penalties.<sup>32</sup> There is no dispute that the violations herein were abated in good faith. The gravity and negligence of the 19 section 104(a) violations at issue, eight of which were designated as significant and substantial, and twelve of which involve high negligence, have been admitted by Respondent.

Respondent claims that the civil penalties are excessive, and if imposed as proposed by the Secretary, they would adversely affect its ability to remain in business. This Commission has held that the mine operator has the burden of proving such a claim. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1985).

The Respondent convinced me herein that it had good cause for failure to produce audited financial statements, as requested, based on its inability to pay and the fact that the banks it deals with have relied on its Combined Financial Statements and Independent Accountants' Review Reports in extending millions of dollars of credit to Respondent and its affiliated entities. See note 19, above. Nevertheless, the corporate and joint individual income tax returns and Combined Financial Statements and Accountants' Review Reports that Respondent did produce fall short of establishing that MSHA's proposed civil penalty of \$91,309 would affect Thueson Construction's ability to remain in business. Rather, those

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<sup>31</sup> (...continued)

mining activities because of high operational expenses. 26 FMSHRC at 127. At hearing, the operator had high debt relative to asset value. *Id.* The operator acknowledged the possibility that it could resume its mining activities with new equipment, new contracts, and a better market for its products. *Id.* Finding no evidence that the operator's decision to cease mining and liquidate its assets was motivated by the Secretary's proposed penalty, the judge concluded that the proposed penalty would have a negative effect on the operator's ability to continue in business. *Id.* at 130.

<sup>32</sup> As noted herein, prior to the instant inspection, from December 12, 2001 until March 24, 2009, Thueson Construction received 46 section 104(a) citations, 9 of which were S&S, and one section 104(g)(1) S&S citation. All 47 citations over this almost eight-year period were paid; one for \$1200, and the remaining 46 citations for \$360 or significantly less. During the instant inspection, proposed fines increased exponentially. For example, the proposed penalty for the guarding violation in Citation 6483267, designated as S&S (fatal) with high negligence, is \$31,988 or 15 times the statutory minimum for an unwarrantable failure violation, for which Respondent has never been cited. Another proposed penalty for a guarding violation in Citation 6483279, designated as S&S (fatal) with moderate negligence, is \$9,634. Citation Nos. 6783273, 6484275, 6483280 and 6483281, designated as S&S (fatal) with moderate negligence, each have proposed penalties of \$6,458.

reports in conjunction with Thueson's and Harris' testimony, establish that the banks control the ability of Thueson Construction to remain in business, not MSHA's proposed \$91,309 civil penalty for admitted operation of its mining business in contravention of mandatory safety standards. Thueson testified, "I'm not sure what my future brings until I know that the bank is going to renew my line [of credit]. I could be out of business tomorrow. . . ." Tr. 86. As Harris put it, "The banks really control Mr. Thueson's future. Everything he owns is due to them, literally due, d-u-e, due to the banks . . . That's the situation that Mr. Thueson is in. Whether it's him personally, Thueson Construction or the companies on a combined basis." Tr. 105-06. MSHA's proposed penalty is small change compared to the millions owed the banks.

Harris' testimony further establishes that the banks are unlikely to repossess collateralized equipment used to generate cash flow and enhance their chances of recovering more on their outstanding loans. Tr. 105, 124. Moreover, Thueson himself recognizes the need to stay in business with the assets he can maintain in order to generate income to pay off his creditors, one of which is MSHA. ". . . The assets that I have I can't go out and do work without them, so it hinders my ability to generate income." Tr. 90.

In addition, Thueson acknowledged that Thueson Construction's business outlook is "slowly" getting better, but "[i]t's not looking very good," and "it's just a matter of trying to keep our doors open at this point." Tr. 32-33, 86. As noted, Thueson Construction lost \$1,391, 135 in 2009, \$846,208 in 2010, and only \$16,394 in 2011. R. Exs. 9, 10, and 11, Schedule 8.<sup>33</sup> Total assets for Thueson Construction increased from \$1,869,325 in 2010 to \$2,686,615 in 2011. R. Exs. 10, and 11, Schedule 7. Contracts receivable more than doubled from \$760,450 in 2010 to \$1,619,666 in 2011. *Id.* Although total current liabilities increased from 2010 to 2011, total long-term debt was reduced considerably from \$1,245,980 to \$45,189. R. Exs. 10, and 11, Schedule 7. Moreover, total salaries paid out by Thueson Construction increased from 2010 to 2011 by \$48,577. R. Exs. 10, and 11, Schedule 8. In 2011, Thueson and his wife reported a \$166,258 distribution from Thueson Construction. Tr. 69; R. Ex. 7, 2011 Tax return for an S Corporation, page 6, Sch. K-1, line 12. Thueson could not explain what he did with that distribution, although Harris postulated, without specificity, that the distribution was shifted to another entity so a lender could be paid. Tr. 103. I further note Thueson's testimony that any money recovered by Pipe, Inc. in its litigation to recover approximately \$700,000 plus attorney fees under its construction lien on developed property, could "possibly be distributed" to Thueson Construction. Tr. 84.

In these circumstances, I find that Respondent has not met its burden to prove that MSHA's proposed civil penalty of \$91,309 would affect Thueson Construction's ability to

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<sup>33</sup> Similarly, I note that the total net loss for Thueson Construction and affiliates on a combined basis was reduced from \$3,432,594 in 2009 to \$1,942,986 in 2010 and further reduced to \$1,304,648 in 2011. R. Exs. 9, 10 and 11, Schedule 8.

remain in business.<sup>34</sup> As noted, the present ability of Thueson Construction to continue in business depend on the banks' willingness to continue to extend credit and refrain from foreclosing on its loans. Thueson Construction has failed to establish that it even disclosed MSHA's contingent liability to its banks. As Harris testified, "But my bigger concern is that I don't think Mr. Thueson, right now, has let the bank know, and that would have to be disclosed as a liability on the financial statement." Tr. 110. Respondent failed to show otherwise. Moreover, I note that the Commission has declined to reduce proposed penalties based on the operator's mere speculation that the penalties would result in imposition of judicial liens that would foreclose financing. *See Spurlock Mining, supra*, 16 FMSHRC at 700.<sup>35</sup>

Finally, I agree with Judge Paez's observations in *Ember Contracting* that it is not enough to show that a proposed civil penalty could have a substantial negative impact on profits since a civil penalty is designed to make compliance with the Mine Act, and the protection of miners, more profitable than noncompliance. 33 FMSHRC at 2760. The fact that an operator must spend money to bring its operations into compliance with MSHA's safety and health standards, or neglects to budget money for paying civil penalties, provides no basis for setting aside civil penalty assessments for proven violations. *See United Energy Servs.*, 15 FMSHRC 2022, 2085 (Sept. 1993) (ALJ), *aff'd sub nom. United Energy Servs. v. FMSHRC*, 35 F.3d 971 (4th Cir. 1994). Here the violations were stipulated to be proven, as written.

Based on the foregoing, I reject Respondent's claim that it cannot continue in business if ordered to pay MSHA's proposed penalty of \$91,309. Rather, I conclude that Thueson Construction has not met its burden of establishing that the proposed civil penalty would adversely impact its ability to continue in business.

Nevertheless, applying the remaining civil penalty criteria under section 110(i) of the Mine Act, I find that a reduction in the proposed penalty is appropriate. The gravity and negligence of the 19 section 104(a) violations at issue, eleven of which involved guarding

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<sup>34</sup> As noted, the Secretary has not alleged that Thueson is playing lying fast and loose with the corporate veil, nor operating affiliated businesses as a unitary operator. Accordingly, I need not resolve these issues.

<sup>35</sup> If Respondent truly is unable to operate and meets its obligations it can file for bankruptcy, but the civil penalty at issue is likely non-dischargeable in bankruptcy. Section 523(a)(7) of the Bankruptcy Code prevents the discharge of an obligation "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). *See, e.g., Randall & Blake of Oklahoma, In.*, 6 FMSHRC 253 (Feb. 1984)(ALJ), *citing In Re Tauscher*, 7 B.R. 918 (D.Wisc. 1981).

violations under 30 C.F.R. § 56.14107(a), eight of which were designated as significant and substantial, and twelve of which involve high negligence, have been admitted by Respondent. However, Thueson Construction is small in size. It currently has only 15 employees in the construction industry, and when the instant citations were written at Portable Crusher 1 Mine on October 14, 2009, it employed only three miners. Tr. 34-36.

In addition, Thueson Construction has a relatively diminutive history of prior violations, all of which were paid for relatively modest penalties. As noted above, the mine received a Certificate of Honor from the Holmes Safety Association, signed by the former Assistant Secretary of Labor for Mine Safety and Health, for working 50,553 work hours from July 1, 2001 through September 30, 2008 in the metal/non-metal industry without incurring a lost workday injury. Tr. 17; R. Ex. 2. Prior to the instant inspection, from December 12, 2001 until March 24, 2009, Thueson Construction received only 46 section 104(a) citations, 9 of which were S&S, and one section 104(g)(1) S&S citation. All forty-seven citations over this eight-year period were paid; one for \$1,200, and the remaining forty-six citations for \$360 or significantly less. Additionally, there is no dispute that the violations admitted herein were abated in good faith.

In calculating the penalty under the 30 CFR § 100.3 criteria, the Secretary has proposed a penalty of \$91,309. *See* Appendix A. The point-based assessment criteria in section 100.3, awards each citation a predetermined number of points corresponding to the gravity, negligence, and the operator's size and violation history. Although the Commission is not bound by the Secretary's proposed penalty or the section 100.3 point scheme, examination of the rationale behind the proposed penalty provides valuable insight into assessing the proposed penalty's reasonableness under the criteria set forth in section 110(i) of the Act.

MSHA's proposed assessment allocated *twenty-five points per citation* for the operator's history of violations. This allocation dramatically increased the proposed penalty. In fact, 86.29% of the total proposed penalty can be attributed to the points awarded for the operator's history of violations. Had the Secretary not factored in the operator's history, the proposed penalty would have been assessed at \$12,514. As noted above, Respondent's citation history in the fifteen months prior to the instant inspection does not appear to warrant a \$78,795 premium. Respondent was issued only three citations in the fifteen months preceding the instant inspection. Twelve older citations were settled and became final orders of the Commission during that time. The timing of Respondent's settlement inflated Respondent's history of violations (calculated as VPID, Violations Per Inspection Day) and obscured the fact that the Respondent's fifteen-month violation history was relatively benign.

In light of this relatively small history of violations, the small size of Respondent, and Respondent's good-faith abatement of the instant violations, I find that a total penalty of \$25,028 is appropriate. Such a penalty is twice what section 103 would prescribe if the violation history were not taken into account and the assessed penalty provides adequate deterrence against repeat violations of the mandatory safety standards, particularly guarding

violations.<sup>36</sup> In consideration of the bleak financial outlook facing Respondent, the penalty will be made payable on a five-year installment plan outlined below.

## V. ORDER

The nineteen citations at issue herein are **AFFIRMED, AS WRITTEN**, and Thueson Construction Co., and/or Thueson Construction, Inc., is **ORDERED** that the operator pay a total penalty of \$25,028 in fifty-nine (59) consecutive monthly installments of \$417 each, and a sixtieth (60) and final payment of \$425, with the first payment due within thirty days of the date of this decision and each subsequent payment due every thirty days thereafter until paid in full. Upon receipt of final payment, this case is **DISMISSED**.

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

Distribution: (E-Mail and Certified Mail)

Pamela Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800 Denver, Colorado 80202-5708

Lance Thueson, Thueson Construction, Inc., 455 South Kinds Road, Nampa, Idaho 83687

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<sup>36</sup> I note also that Respondent is *pro se*, and convinced me that it could not afford legal representation to contest the gravity and negligence characterizations that it admitted.

Appendix A

Citation	30 C.F.R.	Repeat Violations	S & S	VPID	RPID	Negligence	Likelihood	Injury Type †	Persons Affected	Proposed Penalty	Assessed Penalty
6483267	56.14107(a)	8	Yes	25	20	High	RL	Fatal	1	\$31,988	\$8,658
6483268	56.14107(a)	8	No	25	20	High	UN	PD	1	\$2,901	\$784
6483269	56.14107(a)	8	No	25	20	Moderate	UN	PD	1	\$873	\$234
6483270	56.14107(a)	8	No	25	20	High	UN	PD	1	\$2,901	\$784
6483271	56.14107(a)	8	Yes	25	20	Moderate	RL	PD	1	\$4,329	\$1,170
6483272	56.14107(a)	8	No	25	20	Moderate	UN	PD	1	\$873	\$234
6483273	56.11027	1	Yes	25	0	High	RL	Fatal	1	\$6,458	\$1,746
6483274	56.14107(a)	8	No	25	20	Moderate	UN	PD	1	\$873	\$234
6483275	56.11003	0	Yes	25	0	High	RL	Fatal	1	\$6,458	\$1,746
6483276	56.14107(a)	8	No	25	20	High	UN	PD	1	\$2,901	\$784
6483277	56.14107(a)	8	No	25	20	High	UN	PD	1	\$2,901	\$784
6483278	56.14107(a)	8	No	25	20	High	UN	PD	1	\$2,901	\$784
6483279	56.14107(a)	8	Yes	25	20	Moderate	RL	Fatal	1	\$9,634	\$2,608
6483280	56.11027	1	Yes	25	0	High	RL	Fatal	1	\$6,458	\$1,746
6483281	56.12032	0	Yes	25	0	High	RL	Fatal	1	\$6,458	\$1,746
6483282	56.14100(b)	0	Yes	25	0	Moderate	RL	PD	1	\$873	\$234
6483283	56.4201(a)(1)	1	No	25	0	High	UN	Fatal LW/R	1	\$1,304	\$352
6483284	56.14100(b)	0	No	25	0	Moderate	UN	D	1	\$117	\$200
6483285	56.18002(a)	0	No	25	0	High	NO	NO	0	\$108	\$200
<b>TOTAL</b>										\$91,309	\$25,028

†. “Reasonably likely” is abbreviated as “RL.” “Unlikely” is abbreviated as “UN.” “No likelihood” is abbreviated as “NO.”

‡. “Permanently disabling” is abbreviated as “PD.” “No lost workdays” is abbreviated as “NO.” “Lost workday or restricted duty” is abbreviated as “LW/RD.”

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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August 21, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2011-649
Petitioner,	:	A.C. No. 46-09105-240779
	:	
v.	:	
	:	
FRASURE CREEK MINING, LLC,	:	
Respondent.	:	Mine: Surface No. 5
	:	
FRASURE CREEK MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2011-338-R
v.	:	Order No. 8114384; 11/01/2010
	:	
	:	Docket No. WEVA 2011-339-R
SECRETARY OF LABOR,	:	Citation No. 8114385; 11/01/2010
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 46-09105
Respondent.	:	Mine: Surface No. 5

**DECISION**

Appearances: Benjamin D. Chaykin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor

Christopher D. Pence, Esq. and Eric L. Silkwood, Esq., Betts, Hardy and Rodgers, for Frasure Creek Mining LLC

Before: Judge Harner

This case is before me on Notices of Contest filed by Frasure Creek Mining, LLC and a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Frasure Creek Mining LLC. Both the Contest and Civil Penalty proceedings involve Frasure Creek Mining's Surface No. 5 mine. The case involves one imminent danger order and one citation. The parties presented testimony and documentary evidence at the hearing held in South Charleston, West Virginia, on June 5, 2012.

Additionally, all parties presented oral argument before the hearing was closed and their positions and arguments have been duly considered.

## **I. BACKGROUND AND SUMMARY OF EVIDENCE**

Frasure Creek Mining, LLC (hereinafter “Frasure Creek”) is engaged in the operation of a surface coal mine in Fayette County, West Virginia. The mine is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter the “Mine Act”). 30 U.S.C. 813(a). In 2011, the mine produced 818,533 tons of coal.<sup>1</sup>

At the hearing, the parties entered into the following stipulations (Tr. 7-9)<sup>2</sup>:

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 Miners Act. 30 U.S.C. 815 and 823.
2. Frasure Creek is the owner of Surface Mine No. 5.
3. Frasure Creek is an “operator” as defined in Section 3(d) of the Mine Act, at the mine at which the citation and order at issue in this proceeding was issued
4. The products of the mines at which the order and citation at issue in this proceeding entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act.
5. Operations of Frasure Creek at the mine which the order and citation at issue in this proceeding were issued are subject to the jurisdiction of the Mine Act.
6. The maximum penalty which could be assessed for these violations pursuant to 30 U.S.C. 820(a) will not affect Frasure Creek’s ability to remain in business.
7. The individual whose signature appears in Block 22 of the order and citation that are at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when each order and citation was issued.
8. The parties stipulated to the authenticity of all exhibits.

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<sup>1</sup> This information is located on MSHA’s Mine Data Retrieval System and is available to the public. <http://www.msha.gov/drs/drshome.htm>.

<sup>2</sup> Tr. followed by a number(s) indicates a reference to the appropriate page numbers of the official Transcript. The Secretary’s exhibits are designated by numbers and Frasure Creek’s exhibits are designated by letters.

9. True copies of each order and citation at issue in this proceeding, with any and all modifications and abatements, were served on Frasure Creek or its agents as required by the Mine Act.
10. Exhibit A of the Secretary's Petition for Assessment of Civil Penalty accurately sets forth the number of inspection days, size of mine, mine operator and history of violations at issue in this proceeding.
11. The order and citation at issue in this proceeding was timely abated, and Frasure Creek demonstrated good faith in achieving rapid compliance.

The dockets at issue contain one imminent danger order (No. 8114384) issued under §107(a) of the Mine Act and one citation (No. 8114385) that is alleged to be a violation of the Secretary's mandatory health and safety regulations.

#### **A. The Order**

On November 1, 2010, MSHA Inspector Vincent L. Nicolau issued a section 107(a) Order (Exhibit 6) for an activity described below in the citation which he believed constituted an imminent danger at Frasure Creek's Surface No. 5 mine.<sup>3</sup> Order No. 8114384 states, at Section 8:

This order is written to confirm the imminent danger order that was orally issued to Jeff Taylor, Plant Foreman on 11/1/2010 at 9:50 at the maintenance area across the road from the mine office for guiding a hoisted concrete barrier onto the bed of a truck without the use of a tagline with the assistance of another employee. Citation No. 8114385 is being issued in conjunction with this order. This condition is an imminent danger.

#### **B. The Citation**

On November 1, 2010, Inspector Nicolau also issued a 104(d)(1) citation - Citation No. 8114385 (Exhibit 7) - to Frasure Creek for a violation of Section 77.210(c) of the Secretary's regulations. The citation alleges that:

A foreman and an employee were found guiding a concrete barrier by hand that was being hoisted onto the bed of a tire truck. The barrier is 12' long and weighs about 5000 lbs. The foreman stated

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<sup>3</sup> An imminent danger order is issued pursuant to Section 107(a) of the Mine Act. 30 U.S.C. §817(a). The term "imminent danger" is defined in Section 3(j) of the Mine Act to mean the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. §802(j).

that he and the other employee were just helping to guide the corner of the barrier onto the truck. The foreman stated that he and the other employee were not beneath the hoisted load and were in the clear. The foreman engaged in an aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This violation is a factor cited in imminent danger order No. 8114384 dated 11/01/2010, therefore, no abatement time was set. Taglines shall be attached to hoisted materials that require steadying or guidance.

The inspector found that an injury was highly likely to occur, that the injury could reasonably be expected to be permanently disabling, that the violation was significant and substantial, that two persons were affected, and that the violation was the result of high negligence on the part of the operator. The Secretary proposes a civil penalty in the amount of \$7,774.00.<sup>4</sup>

The regulation alleged to be violated is 30 C.F.R. §77.210(c) which provides as follows:

**Hoisting of materials**

...

(c) Taglines shall be attached to hoisted materials that require steadying or guidance.

On November 1,, 2010, the citation was terminated by MSHA following “[a] safety talk to both employees concerning the importance of using taglines for guiding hoisted loads and proper hoisting procedures.”

**C. The Parties’ Evidence**<sup>5</sup>

Testimony was received at the hearing from Vincent L. Nicolau, the MSHA inspector who issued the imminent danger order and the subsequent citation, and from Jeff Taylor, the Frasure Creek foreman and from Mike Dorsey, an employee, who were involved in the incident in question.

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<sup>4</sup> Civil penalties are not imposed for imminent danger orders issued pursuant to section 107(a) of the Mine Act.

<sup>5</sup> For the most part, the events described herein are not factually in dispute. If the parties differ in their interpretation of the facts, such will be noted. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses in this matter, the inherent probabilities in light of other events, corroboration or lack thereof, and consistencies or inconsistencies with each witness’ testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied specifically on his demeanor and make my findings accordingly.

Mr. Nicolau testified to his educational background and his work history prior to becoming an MSHA inspector in May 2007. He is a high school graduate and obtained an associate's degree in drafting and design engineering technology from the West Virginia University Institute of Technology (Tr. 17-18). Following graduation from high school in 1994, he began working on an intermittent basis at his father's construction business, where he had the experience of operating various types of equipment, including cranes, dump trucks, endloaders, bull dozers, and backhoes (Tr. 18). His work with his father included rebuilding and serving of heavy equipment, maintenance work, road construction and coal preparation plant demolition (Tr. 18). In addition to working at his father's business until he was hired by MSHA in May 2007, Nicolau owned and operated his own excavation company from November 2003 to May 2007 (Tr. 19). In the course of operating his own company, Nicolau utilized heavy equipment to excavate, construct and build roads, install coal refuse areas and clean pumps and ponds (Tr. 19). Nicolau has further work experience at two consulting engineering firms, where his duties included coal reserve mapping and civil property development, and at a metal fabrication shop, involving structural steel fabrication (Tr. 19).

Nicolau was hired by MSHA in May 2007 as a surface coal mine inspector and received his authorized representative status in June 2008, following training at the National Mine Academy in surface mining (Tr. 24-25). This training consisted of, *inter alia*, ground control, rigging and hoisting, and examination of haulage and loading equipment (Tr. 25-26). He has also been trained as an accident investigator by MSHA (Tr. 26).

Specifically, Nicolau testified in detail as to his training and extensive work experience in lifting or hoisting various types of materials with truck-mounted cranes. His experience has included operating the controls of the truck and operating the boom which physically lifts the materials as well as working on the ground in rigging or hooking up the load that is to be hoisted with the use of taglines (Tr. 20-21). He testified that a tagline should be a non-conductive rope or strap that is attached to one or both ends of the object to be hoisted for guidance or steadying as the material to be hoisted has a natural tendency to rotate (Tr. 22, 61-62). By using a tagline, the person(s) on the ground can specifically place the material without physically touching it (Tr. 22). Nicolau testified that use of a tagline limits the exposure of the person(s) on the ground should there be a failure of the rigging<sup>6</sup>, an inadvertent movement of the equipment by the crane operator, or even wind currents (Tr. 22-23, 61-62). Nicolau testified that a tagline is required when the hoisted material presents a hazard, either by the nature of its weight, its size, or by the effect that can be produced on it by other forces and when guidance or steadying is necessary to be put the hoisted material in a precise or proper location (Tr. 62-63).<sup>7</sup>

On November 10, 2010, Nicolau arrived at the Frasure Creek mine at approximately 9:00 AM to begin a regular E01 inspection. Upon arriving at the mine, Nicolau met with mine

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<sup>6</sup> This is a reference to the mechanical failure of the chains or straps used to hoist the materials (Tr. 22).

<sup>7</sup> According to Nicolau, a tagline would not be required if the hoisted material did not have to be placed in a specific location and where no persons are exposed to the hazard of having the material fall or roll onto them (Tr. 63).

management (Day Shift Foreman Rick Moody and Superintendent Philip Marsh) in the mine office for a pre-inspection conference (Tr. 28-29). After looking over the on shift record book, Nicolau got into a pickup truck with Foreman Moody to perform an imminent danger run, which Nicolau routinely does at each inspection (Tr. 29-30). Almost immediately Nicolau observed two individuals “straining and pushing” against a Jersey barrier that was being loaded onto a truck in the storage area on the other side of the haulage road from the mine office (Tr. 30-32). These two individuals were Jeff Taylor, a shift foreman at Frasure Creek’s Deep Water Prep Plant (Tr. 32-33, 127-128), and Mike Dorsey, an hourly employee at the Prep Plant supervised by Taylor (Tr. 34, 132, 141).<sup>8</sup> Taylor testified that he was pushing on the barrier where it begins to narrow (Tr. 182), but when asked if he had to use force to push, Taylor replied “No, not really” (Tr. 184).<sup>9</sup> Dorsey testified that he “leaned into, pushed into” the barrier at its middle point where it started to narrow (Tr. 154-157). When Nicolau first observed this activity he was adjacent to the mine office in the truck, about 25-30 yards away (Tr. 31). Nicolau immediately got out of the truck and walked quickly toward Taylor and Dorsey, telling them to remove themselves from what Nicolau considered to be a dangerous situation as he was issuing an imminent danger order (Tr. 31). By the time Taylor and Dorsey heard Nicolau, the barrier was almost “sat down” on the truck bed (Tr. 31).

Nicolau testified that the Jersey barriers were being loaded onto the truck for transport to another location up the hill for use there (Tr. 35-37, 133). These Jersey barriers weighed about 5,000 pounds apiece and were 12 feet in length and 32 inches high (Tr. 42, 65). The truck being utilized to lift the Jersey barrier was a tire truck with a boom with a grapple attachment used to grasp large tires (Tr. 66, 129). A chain was looped around a protrusion on the boom and the chain was then attached to the Jersey barrier in two places with a double spreader chain from a center link (Tr. 66, 142, 148). At the hearing, I asked Nicolau if the use of the boom and chain to hoist the barrier was a “jerry-rigged” operation and Nicolau replied in the affirmative (Tr. 38).<sup>10</sup>

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<sup>8</sup> At the hearing, Jeff Taylor testified to his work experience at Frasure Creek, which has included operating truck mounted cranes and hoists in the Deep Water Prep Plant, which is located about one mile up the hill from the office and storage area (Tr. 128-129). He explained that he has operated each type of equipment “hundreds of times (Tr. 130-131). He also testified that he was familiar with taglines and “almost always” has to use a tagline when hoisting materials to different floors in the Prep Plant (Tr. 131-132). Finally, he endorsed the concept that taglines are used to prevent employees from reaching out over elevated walkways and to limit the risk from pinch point hand injuries (Tr. 132).

<sup>9</sup> I do not credit this testimony as pushing a 5,000 pound barrier that was “wedged in” and whose front end was positioned on the truck bed obviously requires force. See in this regard footnotes 12 and 13, *infra*.

<sup>10</sup> “Jerry-rigged” is a description of something that is constructed in an improvised or haphazard manner. It is clear that the rigging arrangement used to lift the Jersey barriers was not the purpose for which the tire truck boom was intended (Tr. 67).

Nicolau testified that when he issued the imminent danger order Taylor and Dorsey were pushing the barrier<sup>11</sup> with effort as their heads were down, and their feet were digging into the ground in order to force the rear end of the barrier that was elevated 6-8 inches and hanging over the truck bed, onto the truck (Tr. 38).<sup>12</sup> The boom operator had difficulty placing the third barrier on the truck bed and after trying two or three times to get it correctly situated on the truck bed, he asked Taylor for help (Tr. 137-138, 149-151, 179).<sup>13</sup> Taylor testified that he was asked by the boom operator if he could “finish shoving” the Jersey barrier onto the truck bed as the barrier was hanging about two feet over the edge of the truck (Tr. 135-136). Taylor also testified that after the incident, he was asked by the vice president of Frasure Creek to write up a report of the incident and that report and his drawing have been admitted into evidence (Tr. 127, 177-178, Exhibits A and B). Exhibit B, page 2 shows that while the portion of the rear third barrier closest to the middle barrier (already loaded on the truck) was overhanging the truck bed by two feet, there were six or more feet of the outside portion of the barrier off the truck bed. Taylor also testified that he received no discipline over this incident (Tr. 135).

Nicolau testified that he believed the two men were in danger because of the magnitude of the load and the potential for failure, either by failure of the rigging, inadvertent movement of the crane operator, or the two individuals losing their footing or their handhold on the barrier (Tr. 38-39). Nicolau believed that there was the potential for the two individuals to have their hands end up underneath the barrier or between two barriers and their hands being smashed which, by nature, would be a permanently disabling injury (Tr. 39-40, 64).<sup>14</sup> Nicolau explained that the use of a tagline would have eliminated the possibility of such an injury (Tr. 39). Also of concern to Nicolau was the fact that the boom operator at the front of the truck could not see the location of Taylor’s and Dorsey’s hands and because of the noise created by the operation of the hydraulics, he could not communicate orally with them (Tr. 41-42). Nicolau testified that it was obvious to him that the barrier needed guidance to be placed completely and squarely on the truck bed as otherwise the two individuals would not have been pushing it (Tr. 64). Because of the need for guidance, a tagline was necessary (Tr. 63-64, 75).

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<sup>11</sup> Their respective locations from which they were pushing near the back of the truck are notated on Exhibit 3 (Tr. 49-51).

<sup>12</sup> Nicolau explained that because of the position of the barrier, with the rear end raised 6-8 inches and the front end positioned down on the truck bed, it would have been more difficult to push the barrier into place than if the entire barrier were raised off the truck bed (Tr. 42-43).

<sup>13</sup> Taylor opined that the reason the boom operator could not get the Jersey barrier completely on the truck was because the front end of the barrier was wedged against the second barrier (Tr. 180).

<sup>14</sup> Both Taylor and Dorsey testified that they did not believe that pushing the barrier created a pinch point position for their hands (Tr. 159, 183).

As soon as Nicolau issued the imminent danger order, both Taylor and Dorsey backed away.<sup>15</sup> Taylor protested and stated that they were in the clear as they were not underneath the barrier and that they had just been pushing to get the last bit of barrier onto the truck (Tr. 44-45, 87). When Nicolau asked Taylor if he realized that the pushing created a hazardous condition, Taylor replied that yes he did, and he should not have been doing that (Tr. 45, 86, 88). Taylor's testimony was to the effect he did not recall saying that (Tr. 187) While Nicolau and Taylor were discussing this matter, Nicolau handed Taylor two MSHA Fatalgrams that he believed established the need to use taglines, as he believed Taylor as a foreman should be aware of these situations (Tr. 55, 88, Exhibits 4 and 5).<sup>16</sup> Finally, Nicolau testified that Taylor stated that there were no mitigating circumstances concerning the event (Tr. 88).

Nicolau testified at the hearing that in issuing the citation he believed that an accident was highly likely (Tr. 72-73). Nicolau's inspection notes were introduced into evidence as Exhibit 1 and fully corroborate all of his testimony at the hearing with the exception of his notation, on page 7, that there was a "reasonable" likelihood of injury. At the hearing he explained this variation as being a mistake occasioned by the fact that more "reasonably likely" citations are written than "highly likely" citations. I accept his testimony that it was an error on his part in writing the notes because he completely and on numerous occasions during the hearing testified that he believed an accident was highly likely to occur and gave the reasons for his conclusion.

## **II. CONCLUSIONS OF LAW**

### **A. Summary of the Parties' Arguments**

#### **1. Secretary of Labor**

The Secretary argues that inspector Nicolau did not abuse his discretion in issuing the imminent danger order when he observed Taylor and Dorsey strenuously pushing a 5,000 pound concrete barrier onto the truck bed to be transported to another area of Frasure Creek's operations. His conclusion that an imminent danger existed was based on his extensive experience and training involving operating cranes and using taglines.

The Secretary further argues that the activity in question was highly likely to cause a permanently disabling injury as the activity exposed both Taylor and Dorsey to pinch point hand injuries (crushed hands) that could have occurred by having Taylor and Dorsey push the barrier

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<sup>15</sup> As previously noted, by the time Taylor and Dorsey heard Nicolau, the barrier was almost set down properly on the truck bed. See Exhibit 2 which is a photograph taken by Nicolau after the issuance of the imminent danger order (Tr. 46-48).

<sup>16</sup> At the hearing, Frasure Creek's counsel objected to the admissibility of these two exhibits on the basis that the Fatalgrams did not involve the same circumstances as were involved in the instant matter. The exhibits were admitted only for the limited purpose of showing the danger if taglines were not utilized (Tr. 57-59).

onto the truck bed instead of guiding it with a tagline, or by the barrier shifting position because of instability of the chain holding the barrier, or by crane operator error.

Finally the Secretary argues that Frasure Creek's negligence was at least high negligence and, in addition, aggravated conduct. It is argued that the negligence approaches "reckless disregard" as foreman Taylor's testimony at the hearing established that he believed there was nothing wrong or unsafe about pushing the barrier onto the truck. The conduct is aggravated because the violation of 30 C.F.R. § 77.210(c) was obvious, it exposed Taylor and Dorsey to a high degree of danger and Taylor as foreman directly participated in and supervised the violation himself. In this regard, the Secretary argues that the penalty should be increased to \$25,810.00 because the evidence shows reckless disregard, or the absence of the slightest degree of care.

## **2. Frasure Creek**

Frasure Creek's primary argument is that there is no violation of a mandatory safety standard as the Jersey barrier was not a hoisted load within the meaning of 30 C.F.R § 77.210(c) so as to require the use of a tagline. It then argues that even if the conduct was violative, it was not substantial or significant under the *Mathies*<sup>17</sup> formula because the conduct was not reasonably likely to lead to an injury of a reasonably serious nature. In this regard, it argues that if anything would have happened, the barrier would simply have fallen back onto the truck and the evidence shows that Taylor's and Dorsey's hand were not exposed to a pinch point injury.

Frasure Creek also argues that even if I find a significant and substantial violation, I should not find an unwarrantable failure under the factors set forth in *IO Coal Company, Inc.*, 31 FMSHRC 1346 (Dec. 2009). Frasure Creek also asserts that the imminent danger order does not meet the criteria of the case law, particularly *Wyoming Fuel Company*, 14 FMSHRC 1282 (Aug. 1992), under section 107(a) as the practice could not reasonably have been expected to cause death before it was ceased.

In sum, Frasure Creek argues that no violation exists. In the alternative, it argues that I should conclude that the violation was a non-significant and substantial section 104(a) violation with low to moderate negligence and dismiss the imminent danger order.

### **B. The Legal Framework**

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. As a general rule, a violation is properly designated as significant and substantial ("S & S") in nature, if based upon the particular facts surrounding a violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, Nat'l Gypsum*, 3 FMSHRC 822 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC at 3-4, the Commission explained that:

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<sup>17</sup> *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. (footnote omitted)

See also *Austin Power v. Secretary*, 861 F. 2d 99, 103-04 (C.A. 5 1988), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 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 (Aug. 1984).

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); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The unwarrantable failure terminology if taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The term “unwarrantable failure” is defined as aggravated conduct, constituting more than ordinary negligence. *Emery Mining Corporation*, 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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of these factors may be irrelevant to a particular factual scenario, but all of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal*, 22 FMSHRC at 353.

Section 3(j) of the Mine Act defines an imminent danger as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death

or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). In *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159 (Nov. 1989), the Commission reviewed the precedent analyzing this definition and noted that “the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. The Commission also noted that the legislative history of the Mine Act establishes that the focus of an imminent danger is on the potential of the risk to cause serious physical harm at any time as the intention is to give inspectors the necessary authority to take action to remove miners from risk. In *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991) the Commission stated that the inspector must determine if an imminent danger exists without considering the “percentage of probability that an accident will happen.” In both of these cases, the Commission concluded that an inspector must be accorded considerable discretion in determining whether an imminent danger exists because an inspector must act with dispatch to eliminate conditions that create an imminent danger. *Rochester & Pittsburgh Coal*, 11 FMSHRC at 2164; *Utah Power & Light*, 13 FMSHRC at 1627. The above principles are affirmed by the Commission in *Wyoming Fuel Company*, 14 FMSHRC 1282 (Aug. 1992), cited by Frasure Creek.<sup>18</sup>

### **C. Analysis of the Issues and Findings**

#### **1. The Violation (No. 8114385)**

Section 77.210(c) requires that “[t]aglines shall be attached to hoisted materials that require steadying or guidance.” “Tagline” is not defined in the MSHA regulations, but MSHA inspector Nicolau described a tagline as a non-conductive rope or strap that is attached to one or both ends of the object to be hoisted for guidance or steadying. He further noted that material that is hoisted has a natural tendency to spin or rotate and a tagline permits miners to steady or guide the hoisted material while limiting their exposure to safety hazards.

I find that Taylor and Dorsey, by pushing on the Jersey barrier, were attempting to guide the barrier onto the truck bed. And it is clear that the barrier was a hoisted material within the meaning of the standard as the truck operator had the barrier raised off the bed of the truck. The testimony established that the tire truck operator made several attempts to correctly place the barrier onto the truck bed, but could not do so. And that is when Taylor and Dorsey stepped in to complete the process by pushing the barrier into place. When they had done so, the truck operator lowered the barrier. I find that the barrier was a hoisted load that required guidance.<sup>19</sup> It is undisputed that there was no tagline attached to the concrete Jersey barrier that the Frasure Creek employees (Taylor, Dorsey and the tire truck operator) were attempting to place on the bed of the truck. Therefore I find a violation of the cited standard.

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<sup>18</sup> Contrary to the assertion of Frasure Creek’s counsel during his closing argument, Section 3(j) of the Mine Act and all pertinent case law make clear that an imminent danger can exist when there is a threat of “serious physical harm”

<sup>19</sup> The dictionary defines “guidance” as the act or process of guiding. *Merriam-Webster Dictionary Online*, m-w.com. It is clear that dictionary definitions can be used to find plain meaning to a regulation. See e.g. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (2010).

## **2. Significant and Substantial Violation**

Turning now to the question of whether this violation was S & S, I find that it is under the *Mathies* formula. First, there has been a violation of a mandatory safety standard as noted above. Inspector Nicolau testified that he observed the two employees pushing a 5,000 pound concrete barrier onto a truck bed that was four feet above ground level using considerable force to accomplish the task. It is undisputed that Taylor and Dorsey had their hands on the middle portion of the Jersey barrier pushing it into place on the truck bed. Nicolau testified that the two employees were “straining and pushing” with effort against the barrier, as their heads were down and their feet were digging into the ground. Even Dorsey admitted in his testimony that he was “leaning into” and pushing the barrier. However, Taylor testified that no force was required to push the barrier onto the truck bed. I credit Nicolau’s testimony that the employees were straining to push the barrier because their heads were down and their feet were digging into the ground. Also, Nicolau testified without contradiction that because the front end of the barrier was not raised and was setting on the truck bed, it would have required greater effort to push the barrier into place than if the entire barrier was in a raised position. Dorsey did not deny that the effort required force and noted that he had to lean into the barrier. I give no credence to Taylor’s testimony on this point as it strains credulity to believe that no force was required to push a 5,000 pound partially stationary object into position. Therefore, I conclude that Taylor and Dorsey were exerting considerable force to place the barrier onto the truck bed. And, I find that this force created the danger of Taylor and/or Dorsey losing their footing or hand positions on the barrier, which could cause them to fall or be exposed to a pinch point hand injuries which likely would have been permanently disabling.

Although Frasure Creek contends that there was not a reasonable likelihood that an injury of a reasonably serious nature would occur, I must reject this argument. Frasure Creek argues that if anything would have happened, the barrier would simply have fallen down onto the truck bed. Upon examination of Frasure Creek’s Exhibit B (page 1 is a rough hand drawing by Taylor and page 2 is a depiction drawn to scale), which demonstrates the location of the barrier in question in relation to the truck bed, a substantial portion of the barrier, perhaps 35-40 percent in area, is hanging off the bed of the truck over the ground. If something were to have happened, it cannot be said that the barrier would simply have fallen back onto the truck bed. If, for instance, the truck operator had tried to readjust the position of the barrier or suffered a momentary lapse of attentiveness from fatigue or environmental distractions, this could result in an improper movement of the boom controls and a corresponding large and unexpected movement of the barrier.<sup>20</sup> In these circumstances, it is reasonably likely that the barrier could have tipped off the truck bed and fallen to the ground, fatally crushing Dorsey and Taylor.

In summary, I conclude that the confluence of factors found herein, including the need to guide a large hoisted load, the exposure to pinch point and crush hazards, the large size and weight of the barrier, and the vagaries of human behavior, particularly noting that Taylor and

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<sup>20</sup> The Commission interprets safety standards to take into consideration ordinary human carelessness. *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Consequently, the construction of mandatory safety standards, which involve miner behavior, cannot ignore the vagaries of human conduct. *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983).

Dorsey could not communicate with or see the truck operator, and vice versa, that could result in this situation, persuade me that there was a reasonable likelihood that the failure to use a tagline to guide the hoisted Jersey barrier into place could have resulted in permanently disabling pinch point hand injuries or fatal crush injuries. Accordingly, I find that the violation was S & S and that the four prongs of the *Mathies* formula have been satisfied. See *Beckley Crane & Construction, Inc.*, 33 FMSHRC 372 (Feb. 2011).

### **3. Unwarrantable Failure**

As noted above, the term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence and is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.”. *Emery Mining Corp.*<sup>9</sup> FMSHRC at 2003-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-194.

In evaluating the evidence herein in light of *IO Coal*, 31 FMSHRC at 1350-1351, cited by *Frasure Creek*, I note that some of the factors used in evaluating aggravated conduct are absent, e.g. length of time violation existed or ongoing compliance efforts on the part of the operator. However, present are the high degree of danger caused by the violation and the operator’s knowledge of the existence of the violation. While *IO Coal* does stand for the premise that all of the factors must be taken into consideration or noted by the judge in determining whether the operator’s conduct is an unwarrantable failure, it also recognizes that all factors may not be relevant or may be less important than others. *Id.* at 1351.

In the instant case, the operator’s foreman Taylor actively participated in and supervised another employee in the violative conduct and knew, or should have known, that a tagline was necessary for guiding the large load onto the truck bed. When confronted by inspector Nicolau about the danger of the action, his reply was that he and Dorsey were in the “clear” because they were not underneath the barrier. And when asked by Nicolau if he realized that pushing created a hazardous condition, Taylor replied in the affirmative.<sup>21</sup> Also, when asked by Nicolau if there were any mitigating circumstances that Nicolau should consider, Taylor replied there were none. This unrefuted testimony establishes that Taylor knew that the conduct was violative. Also, Taylor’s customary job in the operator’s prep plant required him to constantly use taglines in the hoisting of materials on a daily basis. Therefore, he had direct knowledge of why taglines were necessary in the hoisting of materials so as to limit the exposure to miners in the surrounding areas to hazardous conditions. The failure to use a tagline on the Jersey barrier exposed himself and employee Dorsey to a hazardous condition that neither had the ability to control and that could have resulted in very serious or fatal injuries.

Based on the above, and the evidence as a whole, I find that *Frasure Creek*’s conduct constituted an unwarrantable failure as the negligence involved was at least high. In the oral argument at the hearing, the Secretary argued that the operator’s negligence should be found to

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<sup>21</sup> Taylor did not deny this admission at the hearing, stating only that he didn’t recall saying that to Nicolau.

be “reckless disregard” on the basis of Taylor’s testimony at the hearing to the effect that he still believed there was nothing wrong or unsafe about pushing the barrier onto the truck without a tagline.<sup>22</sup> While I am not unmindful of the seriousness of Frasure Creek’s conduct and the active involvement of its supervisor Taylor, I believe that, on balance, “reckless disregard” has not been established herein. Although it is a close question, I find that Frasure Creek’s negligence was high as originally found by the inspector. However, for the reasons discussed below, I find that the appropriate penalty is \$10,000.00.

#### **4. Imminent Danger Order (No. 8114384)**

When Nicolau saw Taylor and Dorsey pushing the Jersey barrier onto the truck bed, he immediately issued an imminent danger order as he believed Taylor and Dorsey were engaged in an activity that could result in a permanently disabling pinch point injury to their hands. As noted above, an imminent danger order is necessary when a condition could reasonably be expected to cause death or serious physical harm before the condition can be abated. 30 U.S.C. § 802(j). When Nicolau issued his order the foreman and employee were engaged in an activity where serious physical harm could result. Case law has made clear that considerable discretion must be accorded inspectors in making decisions that an imminent danger exists because the very essence of these orders is to act with dispatch to eliminate conditions that create an imminent danger. *See Rochester & Pittsburgh Coal*, 11 FMSHRC at 2164; *Utah Power & Light*, 13 FMSHRC at 1624; *Wyoming Fuel Company*, 14 FMSHRC at 1292. In issuing the imminent danger order in dispute, I find that inspector Nicolau did not abuse his discretion in issuing the imminent danger order as the carrying on and continuation of the violative conduct could reasonably be expected to have caused at least serious physical harm (hand crush injuries), if not death (crush injuries).

### **III. PENALTY**

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

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

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<sup>22</sup> The Secretary argues that if “reckless disregard” is established, the penalty should be increased to \$25,810.00, consistent with a Part 100 calculation.

30 U.S.C. § 820(i).

In assessing a \$10,000.00 penalty, I have given full consideration to these criteria. Specifically, I note Frasure Creek's violation history which is not excessive. Frasure Creek is a large operator and therefore the penalty is appropriate to the size of its business. There is no evidence that the size of the penalty will have any effect on the operator's ability to continue in business and, therefore, I conclude that it will not. However, with respect to the gravity of the violation, I find that it was a significant and substantial violation of the mandatory safety regulations and further, an unwarrantable failure. Although I have found that the negligence was high, I note that the Secretary's argument that Frasure Creek's conduct constituted "reckless disregard" is not baseless and has some appeal. The evidence clearly establishes that Frasure Creek's foreman knew that the situation was hazardous, took no action to take the precaution of using a tagline, that the failure to do so exposed himself and another employee to the high likelihood of receiving permanently disabling or fatal injuries, admitted after the fact that he shouldn't have engaged in the conduct and no mitigating circumstances were present.

Moreover, the Commission has recently determined that its judges may consider the deterrent effect purposes of the Mine Act's statutory penalty scheme. *Black Beauty Coal Company*, 34 FMSHRC \_\_ (Aug. 2012). As noted therein, the legislative history of the Mine Act makes clear that Congress intended that assessed civil penalties should be used to induce compliance with health and safety laws and regulations and to deter operators from violating such laws and regulations. *Id.*, at slip opinion, pg. 10. For this additional reason, I believe that an increased penalty is warranted beyond the amount that would be calculated using the Part 100 formula.

#### **IV. ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), the Respondent Frasure Creek Mining LLC is **ORDERED** to pay a civil penalty of \$10,000.00. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to "U.S. Department of Labor/MSHA" to P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter is **DISMISSED**.

The imminent danger order is hereby **AFFIRMED**.

The contest proceedings filed by Frasure Creek Mining LLC are hereby **DISMISSED**.

/s/ Janet G. Harner  
Janet G. Harner  
Administrative Law Judge

Distribution: (First Class U.S. Mail and E-mail)

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

August 21, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2010-871
Petitioner,	:	A.C. No. 29-02170-219891
	:	
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	Mine: San Juan Mine 1
Respondent.	:	

**DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION**

Appearances: Josh Bernstein, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;  
Daniel W. Wolff, Esq., Crowell & Moring, LLP, Washington, D.C., for Respondent.

Before: Judge Paez

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on October 14, 2010, against San Juan Coal Company (“San Juan,” “the company,” or “Respondent”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”), 30 U.S.C. § 815. The case was assigned to me on July 11, 2011. After agreeing to a briefing schedule and stipulating to the facts, the parties filed cross-motions for summary decision on June 8, 2012. Respondent filed a response to the Secretary’s motion on June 25, 2012. The Secretary filed no response to Respondent’s motion.

**I. STATEMENT OF THE CASE**

On March 16, 2010, an authorized representative of the Secretary issued San Juan two citations under section 104(a) of the Mine Act alleging violations of health and safety standards pursuant to regulations applicable to coal mines. *See* 30 C.F.R. pt. 75. San Juan originally contested both citations but withdrew its contest of Citation No. 8465929 in its November 4, 2010, Answer to the Secretary’s Petition for Assessment of Civil Penalty (“Resp’t Answer”). (Resp’t Answer at 2.)

What remains is the question of whether San Juan violated 30 C.F.R § 75.1731(a) as cited in Citation No. 8465925. Section 75.1731(a) states as follows: “Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be

repaired or replaced.” 30 C.F.R. § 75.1731(a). The parties have jointly stipulated to the facts and filed cross-motions for summary decision, as they disagree over the application of the regulation to the facts.

## II. ISSUES

### A. The Secretary’s Arguments

The Secretary contends that section 75.1731(a) is a mandatory standard and is, therefore, a strict liability standard under the Mine Act. (Secretary’s Motion for Summary Decision (“Sec’y Motion”) at 6.) According to the Secretary, the standard does not require any knowledge on the part of the company that it was in violation of the safety standard. Given that the company stipulated there were damaged rollers and belt conveyor components, and given the extent of the damage to the rollers indicating they had been defective for a while and the company had not repaired or replaced them, the Secretary believes she established that Respondent violated the standard. (*Id.* at 6–7.)

### B. Respondent’s Arguments

Respondent contends that while the rollers and belt conveyor components were damaged, the company had no knowledge that they were damaged until the inspector drew attention to them. Respondent took the belt offline and repaired the damage immediately when the Inspector did point out its defective condition. (Respondent’s Motion for Summary Decision (“Resp’t Motion”) at 9, 10.) Thus, Respondent argues, it fixed the damaged condition within a timely manner. (*Id.* at 9.) Respondent claims that section 75.1731(a) only calls for repair or replacement of damaged rollers and belt conveyor components within a timely manner, because the second sentence of the standard does not include the word “immediately” that is found in the first sentence. (*Id.* at 10.) Furthermore, Respondent argues that it did not have knowledge of the damaged condition prior to the inspector’s visit and, therefore, cannot be held responsible for failing to address the defective equipment earlier. (*Id.* at 15.) Thus, Respondent not only reads a temporal element but also a knowledge element into the mandatory standard. Finally, Respondent contends that if the Secretary is going to read the standard in a way not clear from its plain meaning, the company cannot be held liable because it was not afforded “fair notice” of the Secretary’s interpretation of the standard. (*Id.* at 4, 17, 18.)

The issues before me are (1) whether section 75.1731(a) is clearly written, (2) whether the regulation states that the fact of damaged conveyor belt components is a violation of section 75.1731(a), and (3) whether section 75.1731(a) imposes strict liability on the company to repair or replace all damaged rollers and belt conveyor components. For the reasons that follow, the Secretary’s motion for summary decision is GRANTED and the Respondent’s motion for summary decision is DENIED.

### III. FINDINGS OF FACT

As set forth in the Secretary's motion, the parties jointly stipulated to the following facts:

1. At all times relevant to this proceeding, San Juan Coal Company ("San Juan") was an "operator" as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977. . . .
2. San Juan owns and operates the San Juan Mine 1 in New Mexico.
3. At all times relevant to this proceeding, San Juan Mine 1 was a "mine" as defined by Section 3(h) of the Mine Act, and its mining services affected interstate commerce.
4. San Juan's San Juan Mine 1 is assigned Mine I.D. No. 29-02170.
5. San Juan operates San Juan Mine 1 subject to the jurisdiction of the Mine Act, and the Administrative Law Judge has jurisdiction in this matter.
6. On March 16, 2010, the Mine Safety and Health Administration ("MSHA") issued Citation 8465925 to San Juan. [Footnote omitted.]
7. Citation 8465925 alleges a violation of 30 C.F.R. § 75.1731(a).
8. Citation 8465925 was issued as a non-significant and substantial [section] 104(a) violation, with moderate negligence, the gravity of injury or illness classified as unlikely, and resulting in lost workdays.
9. MSHA assessed a one hundred and twenty seven dollar (\$127.00) penalty for Citation 8465925.
10. San Juan stipulates that [ ] if Citation 8465925 [is] affirmed, the \$127.00 penalty would be appropriate and would not impair its ability to remain in business.
11. Two impact rollers and the rubber skirting at the walkway side of the East Mains, No. 1 belt conveyor and No. 2 belt conveyor transfer were damaged.
12. On the No. 1 belt, two sections of each of the five section roller assemblies were seized up and not rotating, and one section had material worn away leaving a flat area on the roller.
13. Vapor was being expelled from the rollers due to moisture on the belt and rollers and heat being generated from the belt conveyor wearing on the seized rollers.
14. The rubber skirting had detached from the securing mounts allowing

approximately four feet of loose skirting material to drape over a rotating roller and wedge against the operating belt conveyor.

15. The operator removed the belt conveyor system from service following the issuance of the citation.

(Sec’y Motion at 1-2.)

The company has agreed that the inspector’s description of the alleged violation is true as reflected in the amended body of the citation, as follows:

Damaged rollers, or other damaged belt conveyor components, must be repaired or replaced. Two impact rollers and the rubber skirting at the walkway side of East Mains, No. 1 belt conveyor and Number 2 belt conveyor transfer were damaged. On the No. 1 belt, two sections of each of the five section roller assemblies were seized up and not rotating. One section had material worn away leaving a flat area on the roller. Vapor was being expelled from the rollers due to moisture on the belt and rollers and heat being generated from the belt conveyor wearing on the seized rollers. The rubber skirting had detached from the securing mounts allowing approximately four feet of loose skirting material to drape over a rotating roller and wedge against the operating belt conveyor. The belt conveyor system was removed from service.

(Secretary’s Unopposed Motion to Amend Citation 8465925 (“Sec’y Motion to Amend”) at 2; Order Granting Secretary’s Unopposed Motion to Amend; Sec’y Motion at 1, 2; Resp’t Motion at 3.)

### **III. GENERAL PRINCIPLES OF LAW**

Commission Rule 67 provides the standard for granting any motion for summary decision:

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

29 C.F.R. § 2700.67(b). The Commission –

“has long recognized that [ ] ‘summary decision is an extraordinary procedure,’” and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which “the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’”

*Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary decision, Commission Judges must evaluate the evidence in “the light most favorable to . . . the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences “drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Here, the parties stipulated to the facts and there is no genuine issue of material fact. Therefore, the issues before me are of a purely legal nature. The main issue in this case is whether the plain meaning of the regulation is clear whereby the operator should be held strictly liable. If the regulation is not clear, then the question is whether the Secretary’s interpretation of the regulation is reasonable and whether the company had fair notice of the Secretary’s interpretation.

#### **A. Regulatory Interpretation**

The company raises the issue of what is the proper interpretation of the regulation. The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). In ascertaining the meaning of the statute, courts utilize traditional tools of construction, including an examination of the ‘particular statutory language at issue, as well as the language and design of the statute as a whole.’ *Id.*; *Local Union 1261, United Mine Workers of America v. FMSHRC*, 917 F.2d 42, 44; *Coal Emp’t Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). As the Commission has stated: “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 at 1066 (citation omitted)). See *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). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. See *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965) (finding that reviewing body must “‘look to the administrative construction of the regulation if the meaning of the words used is in doubt’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945)); *Exportal LTDA v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on

its face.’’’) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); see also *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton Indus.*, 26 FMSHRC 146, 151 (Mar. 2004).

## **B. Fair Notice**

Respondent raises the issue of fair notice. If a regulation is ambiguous, the role of the Commission is “to determine whether the Secretary’s interpretation of [a] regulation is reasonable and whether the operator was given fair notice of its requirements.” *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. See *Ala. By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982); *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff’d*, 921 F.2d 1285, 1291 (D.C. Cir. 1990). The Commission has summarized this test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

## **C. Strict Liability**

The Mine Act imposes strict liability on all operators for mandatory health and safety standards. If an operator is shown to have violated a standard, it is held liable, even if it was not directly at fault for the violation. *Rock of Ages v. Sec’y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999); *W. Fuels-Utah v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Ames Constr.*, 33 FMSHRC 1607, 1611 (July 2011); *Bulk Transp. Servs.*, 13 FMSHRC 1354, 1359 (Sept. 1991).

Thus, if the regulation is clearly written, it may be imposed upon San Juan under strict liability. If the regulation is not clearly written, I must give deference to the Secretary’s interpretation of the standard so long as that interpretation is reasonable. Likewise, if the regulation is ambiguous, the Secretary’s interpretation of the standard may be imposed upon San Juan so long as a reasonably prudent person familiar with the mining industry would have recognized the Secretary’s interpretation of the standard given its protective purpose.

## **IV. DISCUSSION AND ANALYSIS**

The Secretary argues that section 75.1731(a) is a clearly written mandatory safety standard, imposing strict liability on a mine operator to repair or replace all damaged rollers and conveyor belt components. Respondent agrees that the standard is clearly written, but argues that the standard on its face should be interpreted with temporal and knowledge elements. Respondent reads the word “immediately” in the first sentence of the regulation (stating that all damage that poses a fire hazard must be repaired or replaced immediately) to imply that the situation described in the second sentence of the regulation (stating that any damage that is not a fire hazard must be repaired or replaced) does not require immediate action. Therefore, Respondent argues, the second sentence allows the operator to attend to the damage that is not a

fire hazard in a “timely manner.” Respondent argues that its reading of “timely manner” into the regulation would thus require the operator to have knowledge of the damage before the operator can be held liable for not repairing the damage.

However, I determine that a plain reading of the regulation indicates the term “immediately” that Respondent refers to in the first sentence goes to the critical need to remove the fire hazard. This plain reading is supported by the legislative history. When Respondent reads “immediately” in its interpretation of the standard, it is taking the word out of context.

#### **A. The regulation and its purpose.**

Section 75.1731(a) states: “Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced.” 30 C.F.R. § 75.1731(a). The MSHA Inspector cited San Juan under the second sentence of the standard: damaged rollers that do not pose a fire hazard “must be repaired or replaced.” (Sec’y Motion to Amend at 2.) In the standard’s regulatory history, the Technical Study Panel (“the Panel”) identifies the purpose of the standard as being the “[p]revention of belt fires,” because preventing such fires “is a critical element in improving miners’ safety, and proper maintenance and examinations will reduce the likelihood of fires.” Safety Standards Regarding the Recommendations of the Technical Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining: Proposed Rule, 73 Fed. Reg. 35,026, 35,046 (proposed June 19, 2008) (to be codified at 30 C.F.R. 75.1731(a) [hereinafter “Proposed Rule”]). This proposed standard was written to require the immediate repair or replacement of any rollers or damaged belt conveyor components, whether or not the damaged parts created a fire hazard. *Id.* The final rule was changed to impose a different level of vigilance and action on the operator for those damaged parts that pose a fire hazard and those that do not. Flame-Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air From the Belt Entry: Final Rule, 73 Fed. Reg. 80,580, 80,604 (Dec. 31, 2008) [hereinafter “Final Rule”]. The regulatory history explains the change made to the standard as being in response to “commenters object[ing] to the proposed term [“]immediately[“] because the proposal did not connect the requirement for immediate replacement of the damaged belt roller or malfunctioning component with a hazardous condition.” *Id.* Thus, the Secretary edited the rule to reflect the focus of the standard – to prevent fires in mines. *Id.* at 80,604-05. The standard focuses the operators’ attention on repairing or replacing those damaged parts of a belt that posed the most acute danger first, while still ensuring that damaged components are replaced so that belt conveyors are not permitted to become so damaged that they pose a fire hazard.

Conveyor belts are significant contributors to underground mine fires. Indeed, MSHA has determined that “fires in conveyor belt entries represent about 15 to 20 percent of all underground coal mine fires.” Proposed Rule at 35,028. A belt haulage system such as the one cited in this case is the mechanism by which coal is transported through the mine. Generally, a belt will be hundreds to thousands of feet long and will move along groups of rollers that form a “V” or “U” in the belt every several feet. They prevent coal from slipping off by keeping the

coal in the middle of the belt. *See Stillhouse Mining, LLC*, 33 FMSHRC 778, 780 (Mar. 2011) (ALJ). There will also generally be single rollers spread out at wider intervals from each other. *Id.* These belt haulage systems can present an ignition hazard. There are thousands of rollers along the belt, and any number of them could become jammed and stop rotating fluidly or stop rotating altogether, creating friction as the belt travels over the slowed or stopped roller. *See id.* at 810; *Ala. By-Prods. Corp.*, 4 FMSHRC at 2133. Stuck, malfunctioning, and damaged rollers are not uncommon. The heat generated by the friction between the belt and a defective roller heats up the roller and the belt, creating a potential ignition source. *See Stillhouse*, 33 FMSHRC at 810; *Ala. By-Prods.*, 4 FMSHRC at 2133. Belt haulage systems are a major source of fires in mines. *Stillhouse*, 33 FMSHRC at 810. According to MSHA's recorded statistics, between 1980 and 2007, "[f]riction at the belt drive and along the belt was the ignition source for 36 percent of the 65 conveyor belt fires reported." Proposed Rule at 35,028. The Panel identified "[b]elts rubbing stands" and "damaged rollers" as two of the indicators of increased ignition potential for examiners to look out for. *Id.* at 35,046.

Here, as the parties stipulated, the tract of the belt inspected was seriously damaged. Two impact rollers and the rubber skirting along the walkway were damaged. (Sec'y Motion at 1-2.) Two sections of each of the five section roller assemblies were seized up and not rotating. (*Id.*) On one of those sections, so much material had worn away that the roller had a flat area on it. (*Id.*) The rollers were subject to enough friction that the Inspector observed vapor being expelled from the rollers. (*Id.*) Finally, the rubber skirting had detached from the securing mounts and four feet of that skirting was draped over a rotating roller and was wedged against the operating belt conveyor. (*Id.*) This portion of the belt was likely on its way to creating a hazardous condition. While the citation does not characterize the violation as being a fire hazard, the belt and rollers were becoming a fire hazard, producing enough heat to vaporize the moisture on the belt and rollers, and with enough damaged parts to put the belt haulage system under significant stress. Given the particular state of damage the belt conveyor components were in at the time of the inspection, the company was in violation of the clear intention of the standard. The standard is meant to prevent fires from starting in underground mines and, thus, to prevent damaged rollers or belt conveyor components from becoming a fire hazard at all by repairing or replacing such parts.

**B. There is neither a temporal nor a knowledge element in the second sentence of section 75.1731(a).**

The language of section 75.1731(a) is clear and unambiguous. It requires an operator to discover any damaged rollers or belt conveyor components and determine if they present a fire hazard. If they present a fire hazard, the operator must take the belt offline and fix the damage immediately to prevent the damage from causing a fire at any moment. If they do not present a fire hazard, the operator still must fix the damaged parts so as not to let them become a fire hazard. A regulation "must be construed in light of its underlying purpose." *Ideal Cement Co.*, 12 FMSHRC 2409, 2414 (Nov. 1990). The regulatory history identifies why the first sentence of the standard includes the word "immediately" and the second sentence does not: the intent of the standard is to prevent fires from igniting in underground mines. The Secretary identified

damaged belt conveyors as being a major ignition source for mine fires. Proposed Rule at 35,028. She intended to draw the operators' attention to the need to repair any condition that is a current fire hazard immediately, while recognizing that other damaged parts that could become fire hazards if left unattended need not be repaired immediately, but could wait for a more convenient time. "A commenter [ ] noted that immediate replacement of damaged belt rollers or malfunctioning components is not always feasible or practical, and that it may be more appropriate for replacement to occur on maintenance shift. These commenters also stated that existing regulations adequately address this concern" of ensuring that damaged parts get replaced before getting so damaged they become fire hazards. Final Rule at 80,604-05.

San Juan prefers to read into the regulation that repairs must be completed in a "timely manner." It breaks the Secretary's regulations into two categories: maintenance, and fix and repair. Respondent argues that this is not a maintenance regulation because there is no language indicating that the operator is required to maintain the belts in a functional condition. Rather, Respondent likens section 75.1731(a) to the standard cited in *Lopke Quarries, Inc.*, section 56.14100(b), which requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 23 FMSHRC 705 (2001); 30 C.F.R. § 56.14100(b). In *Lopke*, the court determined that because there was no evidence indicating how long the equipment had been defective, the Secretary failed to prove that the operator did not correct the defective equipment within a timely manner. 23 FMSHRC at 718. As discussed in *Lopke*, section 56.14100(b) is distinguishable from section 75.1731(a) here because section 56.14100(b) includes the temporal requirement that all defects be corrected within a "timely manner" in the language of the regulation, whereas the second sentence in section 75.1731(a) contains no reference to time whatsoever. Also, the apparent intent of section 56.14100(b) is to prevent a person who is working around or with the equipment from being harmed because of the hazard – i.e., the defective equipment. Section 75.1731(a), on the other hand, does not aim to protect a miner from being injured by a defect; rather, its aim is to prevent a defect from causing the hazard – i.e., a fire. As the Commission recognized in *Allen Lee Good*, "[o]ne cannot take qualifying language from one standard and apply it to another standard. One must stay consistent with the standard at issue." 23 FMSHRC 995, 997-98 (2001). The underlying purposes of the two regulations are different. Section 56.14100(b) was written as an equipment safety standard. Section 75.1731(a) was written in an effort to prevent underground fires.<sup>1</sup> Given the context in which the regulations were written, the two standards are not comparable. The timely manner in one serves a purpose for that standard and cannot be read into the other. See *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008)

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<sup>1</sup> For section 75.1731(a), the Secretary was focusing on preventing underground mine fires in response to the Aracoma Alma Mine No. 1 belt fire that occurred in Logan County, WV in 2007. Final Rule at 80,604.

(stating that “the context in which the term is used also gives meaning to the term” and the plain meaning of the standard can best be understood by reading it in the context in which it was written).<sup>2</sup>

Given that time does not play a role in determining whether an operator violated the standard, Respondent’s argument that it lacked knowledge about the damaged condition of the rollers and belt conveyor components is irrelevant. Respondent argues that for the clock to begin ticking with regard to a determination of whether the company addressed the damaged parts in a timely manner, the Secretary must also prove that the company had knowledge of the damaged condition. (Resp’t Motion at 8-9.) As Respondent points out, a knowledge requirement is implied when a standard requires an operator to perform an action, such as repair broken equipment, within a certain amount of time of a trigger, such as in a timely manner. *See, e.g., Higman Sand & Gravel, Inc.*, 25 FMSHRC 175 (Apr. 2003) (ALJ) (holding that the Secretary must prove that the operator had knowledge of the brake malfunction and that the operator did not repair the malfunction before the equipment was put into operation, in order to establish that the operator violated the standard).

Based on the discussion below, I determine there is no temporal element in section 75.1731(a), and, thus, knowledge is not a required element for the Secretary to establish that Respondent violated the standard. Rather, section 75.1731(a) is similar in its intent to the intent of section 77.410(c), cited in *Nally & Hamilton Enterprises, Inc.*, which states that “[w]arning devices shall be maintained in functional condition.” 33 FMSHRC 1759 (Aug. 2011); 30 C.F.R. § 77.410(c). The purpose of section 77.410(c) is to prevent a hazard from arising. In *Nally*, the operator failed to maintain the reverse warning alarm on a lube truck. 33 FMSHRC at 1759. A malfunctioning reverse alarm itself is not the hazard. Rather, the hazard is the result of a malfunctioning reverse alarm – i.e., someone entering the path of the truck without the truck driver noticing, because the person entering the path did not notice the truck. Similarly, the hazard that the Secretary intends to protect against with section 75.1731(a) is not damaged belt conveyor parts, but rather the hazard that would result because of those damaged parts – i.e., a fire in an underground mine. Therefore, like the standard in *Nally* that requires an operator to maintain equipment in working order, and thus involves no temporal or knowledge element, section 75.1731(a) neither has a temporal element nor requires that the operator have knowledge of the damaged condition of the belt haulage system for it to be held in violation of the standard. *See Nally*, 33 FMSHRC 1759 (“the judge erroneously added a knowledge requirement to the standard”). Section 75.1731(a) simply requires that operators repair or replace damaged rollers and belt conveyor components. A knowledge requirement cannot be added “to the standard that is not intended by its text.” *Nally*, 33 FMSHRC at 1764. The Secretary expects routine

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<sup>2</sup> Respondent compares section 75.1731(a) with various standards that require defective equipment to be corrected in a timely manner, such as in *Oil-Dri Corp. of Ga.*, 2012 WL 894518 (Feb. 2012) (ALJ); *Giant Cement Co.*, 13 FMSHRC 286 (Feb. 1991) (ALJ). As discussed, section 75.1731(a) is clear and does not involve a time element except to draw attention to the importance of immediately repairing defective parts that pose a fire hazard.

examination of the condition of the rollers and belt conveyors and replacement and repair of those parts that are damaged. Thus, much like a standard that requires continuous maintenance of a piece of equipment in functional condition, section 75.1731(a) imposes liability on the operator “regardless of its knowledge of unsafe conditions.” *Peabody*, 1 FMSHRC 1494, 1495 (Oct. 1979). Given that knowledge is not an element in the standard, whether or not the operator had knowledge or should have had knowledge is only relevant in determining the appropriate penalty once the violation itself has been established. *Nally*, 33 FMSHRC at 1764.

**C. The operator had adequate notice of the proper reading of the cited standard.**

Respondent makes a notice argument, inasmuch as it posits that the plain reading of the regulation could be interpreted in more than one way and therefore the company did not have notice. Respondent argues that it is ambiguous whether there could be a temporal or knowledge-based reading in the plain language of section 75.1731(a). (Resp’t Motion at 3.) In making this argument, Respondent is attempting to stretch the limits of regulatory interpretation. There can only be one plain reading of a regulation. As I determined above, a plain reading of section 75.1731(a) reveals that to comply with the standard an operator must work to prevent fire hazards, meaning an operator is responsible for repairing or replacing defective rollers and belt conveyor components. As cited in *Nolichuckey Sand Company*, “[t]he Commission has held that, where ‘the meaning of a standard is clear based on its language, it follows that the standard provided the operator with adequate notice of its requirements.’” 22 FMSHRC 1057, 1062 (Sept. 2000) (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1144 (Oct. 1998)). This is in stark contrast to those cases cited by Respondent in which courts have found an operator had insufficient notice because an accident occurred due to unforeseeable circumstances. *See, e.g., Plateau Mining Corp.*, 519 F.3d 1176 (holding there was no violation because the operator was in compliance with its MSHA-approved plan and nothing unanticipated occurred that resulted in the accident); *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987) (holding that the Secretary failed to provide sufficient evidence that a reasonable person should have known that more roof supports were necessary to prevent a roof fall); *Pattison Sand Co.*, 33 FMSHRC 3096 (Dec. 2011) (ALJ) (holding that the Secretary failed to prove that a reasonable person would have known the MSHA-approved ground control plan was insufficient prior to the accident). Here, despite Respondent’s attempts at a tortured reading of the standard, San Juan was nonetheless put on notice by the language of the standard itself that it was required to repair or replace damaged rollers or other damaged belt conveyor components.

**D. Taking Respondent’s arguments to their logical conclusion, its interpretation of section 75.1731(a) would violate the purpose of the regulation.**

Finally, I must note that reading temporal and knowledge elements into section 75.1731(a), as Respondent argues, and taking them to their logical conclusion would undermine the Secretary’s reason for writing the standard. Respondent’s interpretation would also undermine the strict liability character of the regulation because it would read an inherent negligence element into the standard. Respondent would have the operator be responsible for

repairing only those rollers and belt conveyor components that it knows are defective. This would incentivize operators not to mark down damaged components on their workplace examinations as required. If the operator did not mark the damage down on the examinations, the damaged belt conveyor components would not likely be repaired until an MSHA Inspector arrived. The operator could argue that it did not have knowledge of the damage until the Inspector pointed out the damage. Or, if an MSHA Inspector does not come before the damage becomes a fire hazard, the operator might not fix the damage until the damage is so serious that it is a fire hazard and must be fixed immediately. This defeats the purpose of the standard as expressed in the regulatory history, which is to prevent fire hazards from arising. Proposed Rule at 35,046; Final Rule at 80,604. Once a damaged roller or equipment has become a fire hazard, it can start a fire at any time, perhaps before the operator realizes that it is a fire hazard and can fix the damage. Consequently, San Juan's suggested interpretation would likely result in an increased danger of fire in coal mines rather than helping to decrease the level of danger as the standard intends. Indeed, the goal of section 75.1731(a) is for conveyor belt damage never to reach the point of being an actual fire hazard while also recognizing that an operator will have thousands of rollers and thousands of feet of belt to maintain, whereby an operator must prioritize which damaged parts to repair or replace first.

The courts have made clear:

[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements. [Courts] must construe [regulations] in light of the statute[s they] implement [ ], keeping in mind that where there is an interpretation of an ambiguous regulation which is reasonable and consistent with the statute, that interpretation is to be preferred.

*Emery Mining Co. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Respondent's proffered interpretation of the standard is incompatible with the purposes of section 75.1731(a) and the Mine Act.

## V. CONCLUSIONS OF LAW AND PENALTY

Section 75.1731(a) is not ambiguous, but clear, on its face. An operator must repair or replace damaged rollers and other damaged belt conveyor components. In writing the regulation, the Secretary pointedly focuses the attention of operators on fixing fire hazards immediately, but still requires that no damaged parts be overlooked or left in a damaged condition. The parties stipulated to all the facts, which include damaged rollers and belt conveyor components. Accordingly, I find that San Juan violated section 75.1731(a), particularly given the significantly damaged condition in which the Inspector found the rollers and belt conveyor components. Consequently, I conclude that the Secretary is entitled to summary decision as a matter of law under Commission Rule 67, 29 C.F.R. § 2700.67.

Based upon the parties' stipulations, pleadings, and my consideration of the penalty criteria under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), including Respondent's history

of previous violations, ability to continue in business, and size, I conclude that the Secretary's proposed penalty of \$127.00 is appropriate for Citation No. 8465925. Additionally, given Respondent's withdrawal of contest regarding Citation No. 8465929 with a proposed assessment of \$127.00, I conclude a combined penalty of \$254.00 is appropriate for these two violations.

## VI. ORDER

In light of the foregoing, **IT IS ORDERED** that the Secretary's motion for summary decision **IS GRANTED** and Respondent's motion for summary decision is **DENIED**. San Juan Coal Company is hereby **ORDERED** to **PAY** a penalty of \$254.00 within 30 days of this order.<sup>3</sup>

/s/ Alan G. Paez  
Alan G. Paez  
Administrative Law Judge

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<sup>3</sup> Payment should be sent to: U.S. Department of Labor, MSHA, 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**

721 19<sup>th</sup> Street, Suite 443  
Denver, CO 80202-2500  
303-844-5267/ FAX 303-844-5268

August 27, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-879
Petitioner,	:	A.C. No. 05-03836-123538
	:	
	:	Docket No. WEST 2009-081
v.	:	A.C. No. 05-03836-163960
	:	
	:	Docket No. WEST 2009-241A
	:	A.C. No. 05-03836-166946-03
	:	
TWENTYMILE COAL COMPANY,	:	
Respondent.	:	Foidel Creek Mine

**DECISION**

Appearances: Amanda K. Slater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
R. Henry Moore, Esq., 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 (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile Coal Co. (“Twentymile” or “Respondent”) 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 Steamboat Springs, Colorado. The parties filed post-hearing briefs.

This case involves Order No. 7622766, Citation No. 7291716 and Citation No. 7621434 issued at Twentymile’s Foidel Creek Mine. Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. The mine extracts coal in panels using a longwall system.

**I. BASIC LEGAL PRINCIPLES**

**A. Significant and Substantial**

The Secretary alleges that the violations discussed below were of a significant and substantial nature (“S&S”). An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30

U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the most difficult to apply. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Musser Engineering, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(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.*, 6 FMSHRC 1573, 1575 (July 1984). The Commission and court have observed that an experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC at 1278-79; *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995). The focus of the gravity of a violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on “the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). Thus, a violation can be serious without being S&S.

## **B. Negligence and Unwarrantable failure**

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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. Under the Mine Act, an operator is held to a high standard of care. 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. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d) (2011). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9

FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F. 3d. at 136. Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). 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. *Id.* Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

## **II. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW**

### **A. Order No. 7622766; WEST 2009-081**

On August 6, 2008, MSHA Inspector Art Gore issued Order No. 7622766 under section 104(d)(2) of the Mine Act for an alleged violation of 30 C.F.R. § 75.380(d)(2).<sup>1</sup> The order alleges the following:

The primary escapeway for the 22 right longwall section, to the 18 right escape shaft is not clearly marked to show the route and direction of travel. The No. 1 entry of 22 right is designated as the primary and there is one (blue, the designated color) reflective marker for a distance of 4,800 feet.

(Ex. G-1). Inspector Gore determined that an injury resulting in lost workdays or restricted duty was reasonably likely to occur, that the violation was S&S, that twenty-three persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary proposed a penalty of \$17,301.00 for this alleged violation.

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<sup>1</sup> Section 75.380(d)(2) provides that “[e]ach escapeway shall be clearly marked to show the route and direction of travel to the surface.”

## 1. Summary of Testimony

Inspector Art Gore has worked for MSHA for approximately 21 years. (Tr. 13). Prior to his time with MSHA, Inspector Gore worked in the mining industry from 1971 to 1991 at coalfields in West Virginia, Kentucky, and Colorado. (Tr. 14).

On August 6, 2008, Inspector Gore visited Twentymile's Foidel Creek Mine as part of a quarterly E01 inspection. (Tr. 17-18). When Inspector Gore went into the Number 1 Entry of 22 Right he saw that the entry was not clearly marked to show the direction and route of travel, a violation of section 75.380(d)(2). (Tr. 19). Inspector Gore testified that most mines in the industry mark escapeways with round reflectors attached to the roof with wire. (Tr. 20). These reflectors are about two inches in diameter and are hung so that a person in the entry can shine a light and see a row of reflectors in one direction and white plastic or nothing in the other direction. *Id.* The distance between the reflectors varies, but a person at one reflector should be able to see the next reflector. (Tr. 21). Inspector Gore testified that he saw this type of reflector at Foidel Creek Mine on his last visit in 2011. *Id.* Inspector Gore testified that when he was in Number 1 Entry of 22 Right on August 6, 2008 he saw only one reflector for 4,800 feet. (Tr. 23-24). Inspector Gore marked Resp. Ex. 2 with a highlighter to indicate the area he was citing. (Tr. 22). Inspector Gore conceded that these reflectors would be difficult to see in smoke, but it would be easier to see something reflective through smoke than to see something non-reflective. (Tr. 42, 50).

Inspector Gore testified that the lifeline is a continuous directional line that miners can use to find their way through smoke to an escapeway. (Tr. 25). At the Foidel Creek mine they are equipped with tactile devices that designate the direction of travel and indicate the location of doorways and SCSRs. *Id.* There are strips of reflective tape on the cones and on the lifeline every 25 feet. (Tr. 26). Inspector Gore testified that this reflective tape is there to show the miners where the lifeline is and does not indicate the direction of travel. *Id.*

Inspector Gore testified that there were multiple problems with the lifeline in Number 1 Entry of 22 Right. He stated that the lifeline was down on the mine floor along most of the cited area. The floor was muddy and the reflective material on the lifeline was either covered with mud or was missing. (Tr. 27). The inspector issued Order No. 7622768 on the same day because of the condition of the lifeline. (Ex. G-3; Tr. 27-28). Inspector Gore testified that the only directional indicator a miner would encounter in the event of an emergency in that escapeway would be the cones, provided that the miner could find the lifeline in the mud. (Tr. 30).

Inspector Gore marked his order as reasonably likely to lead to an injury because at Crosscut 104 some rooms were not adequately closed off and a miner in an emergency could accidentally walk into them and be exposed to bad roof or ribs. (Tr. 32-33). He determined that 23 miners would be affected. (Tr. 33). At that particular time, mine management was frequently in the area due to problems with methane behind seals. (Tr. 34). Inspector Gore testified that the conditions cited were obvious and extensive. (Tr. 34-35). Inspector Gore issued the order as S&S. (Tr. 34).

Inspector Gore determined that the violation was the result of Twentymile's unwarrantable failure because he was able to spot the condition within five minutes and mine managers were frequently in the area and should have recognized the condition. (Tr. 35-36). The reflectors were hung in the escapeway to abate the condition. (Tr. 36).

Dennis Bouwens testified on behalf of Twentymile. (Tr. 51). He has worked for Twentymile for 24 years and is currently the technical safety coordinator, a position he has held for a little over a year. (Tr. 52). Prior to this position he was a general mine foreman for 18 years. *Id.* In both positions he has been responsible for evaluating safety plans and potential hazards. (Tr. 52-53).

Bouwens discussed the order with Inspector Gore when the inspector came out of the mine that day. (Tr. 55). Immediately following this conversation, Bouwens went underground with Dick Conkle, who was the safety manager of the mine at that time. (Tr. 55-56). Bouwens testified that he inspected the Number One Entry primary escapeway for the longwall and found that some of the lifeline was suspended from the roof and some was attached to cans. (Tr. 56). The lifeline did have reflective material on it, but in some places it was covered, damaged or missing. (Tr. 56-57). Bouwens also testified that while some of the cones on the lifeline were covered with dust or mud, the majority of the cones were visible. (Tr. 57).

Bouwens testified that the escapeway was marked by the directional cones on the lifeline in such a way that a miner could escape. (Tr. 58). Bouwens and Conkle took photographs of the lifeline. (Tr. 58). Res. Ex. 3 is a photo of the lifeline attached to the roof and reflectors in the escapeway. (Tr. 59). This photo was taken before any corrections were made in response to the citation. (Tr. 65).

Bouwens testified that the cones on the lifeline are designed to be a tactile device. (Tr. 68). He also stated, however, that a person trained on the use of cones would know which way to go just by looking at the direction the cones were pointing. (Tr. 72). The tape on the lifeline identifies the lifeline but does not indicate direction. (Tr. 70).

Bouwens testified that in Number 1 Entry, where the escapeway turns, there were three supports with "caution" tape across them. (Tr. 60-61). A person walking down the escapeway would know to turn at this point because the lifeline turned. (Tr. 61). If a person were not holding on to the lifeline in a smoke-free environment, the person would know to turn because those areas were barricaded off and the lifeline was visible going to the left. (Tr. 61-62). Management notified miners of any changes to the escapeway as soon as the changes were made. (Tr. 62).

Bouwens testified that reflectors are usually spaced about 250 feet apart. (Tr. 64). Blue reflectors are used for the primary escapeway and red for the secondary escapeway. Bouwens said that the cited area had once been a secondary escapeway and speculated that when the red reflectors were removed, blue reflectors were not installed to replace them. (Tr. 64-65).

## **2. Brief Summary of the Parties' Arguments**

### **a. Secretary of Labor**

The Secretary argues that the Respondent violated section 75.380(d)(2) by failing to clearly mark the cited escapeway. Although Respondent marked the escapeway with a lifeline and attached cones, the state of the lifeline and the lack of reflectors made these markings insufficient. Most of the lifeline was on the ground and in the mud, and the reflective material on the cones was mostly damaged or missing. Furthermore, the lack of reflectors might convince a trained miner that the cited escapeway was not an escapeway at all. In an emergency situation, a miner would be unable to determine the location and direction of the escapeway; the Secretary therefore argues that Respondent failed to clearly mark the cited escapeway.

The Secretary further argues that this case is distinguishable from my June 2010 Twentymile decision because the cited lifeline in the present case was covered in mud and down on the mine floor. *See Twentymile Coal Co.*, 32 FMSHRC 628 (June 2010) (ALJ). My previous decision held that a lifeline may satisfy the standard if it clearly marks the direction of travel to the surface. Whether the lifeline clearly marks the direction of travel to the surface was intended to be determined on a case-by-case basis. In the present case, due to the poor condition of the lifeline, the lifeline does not clearly mark the direction of travel to the surface and therefore does not satisfy the standard.

According to the Secretary, the lifeline was designed to be a tactile device, not a visual aid, and cones used as a visual device are not sufficient to satisfy the standard. Congress intended for the cones on the lifeline to be used in addition to visual aids such as hanging reflectors and not as a replacement for those reflectors. Even ignoring this intent, the use of the cones as a visual aid is confusing and difficult due to the orientation of the cones. The lifeline and cones were meant to supplement visual aids, and even if they were not, this particular lifeline would not satisfy the standard as a visual aid. Therefore, the Secretary asserts that the lifeline and its attached cones did not satisfy the safety standard.

Furthermore, the Secretary argues that the violation was S&S. Respondent violated section 75.380(d)(2), which contributed to the discrete safety hazard of delaying miners during an evacuation, which could reasonably contribute to a serious injury such as smoke inhalation in the event of an evacuation.

The violation of section 75.380(d)(2) was the result of high negligence and an unwarrantable failure to comply with a mandatory safety standard on the part of the Respondent based upon the entire circumstances, argues the Secretary. The violation was obvious and extensive, Respondent was on notice that greater efforts were necessary for compliance with this standard, supervisors were involved in this violation, and the lack of a clearly marked escapeway created a highly dangerous situation. The combination of these factors results in the Secretary's determination that the violative condition was the result of both high negligence and an unwarrantable failure.

**b. Twentymile Coal Co.**

Twentymile contends that no violation of section 75.380(d)(2) existed because the escapeway was clearly marked in compliance with 75.380(d)(2). The lifeline was in the escapeway, had visible markers, and had cones to indicate direction. The escapeway is marked by the lifeline, which shows the route of travel. These elements combine to clearly mark the escapeway and satisfy the standard.

Twentymile argues that compliance with section 75.380(d)(7) necessarily satisfies the general requirements of section 75.380(d)(2) and this relationship was interpreted in my previous Twentymile decision. Respondent argues that general statutory or regulatory provisions should be subordinate to specific related provisions. Therefore, 75.380(d)(2), a general provision, should be subordinate to section 75.380(d)(7), which is a specific statutory provision. The result of this subordination is that Twentymile did not violate section 75.380(d)(2).

Twentymile then explains that the lifeline met the specific directional route requirements of section 75.380(d)(7). Respondent argues that the lifeline and the cones were “clearly visible,” even with missing reflective material. If there were no smoke present, the lifeline and cones would be plainly visible, and if there were smoke in the area then neither the reflectors nor the lifeline and cones would be visible. Therefore, the presence or absence of reflective material does not determine whether an escapeway marking is clearly visible or not. Both the lifeline and the cones in the present case were therefore “clearly visible.” The lifeline satisfies the route requirement of the standard and the cones satisfy the directional requirement of the standard. The lifeline and cones are sufficient to satisfy the specific directional route requirements of section 75.380(d)(7), just as the lifeline in *Twentymile Coal Co.* did; therefore there was no violation of section 75.380(d)(2).

Twentymile further argues that if a violation existed, it was not properly designated as S&S because the inspector stated that harm “could occur,” which is not sufficient to support an S&S finding.

Also, Twentymile argues that the violative condition did not result from an unwarrantable failure, due to the Secretary’s failure to meet her burden. The Secretary bears the burden of proving an unwarrantable failure. Considering all of the circumstances, the Secretary did not show aggravated conduct on behalf of Respondent and therefore did not meet its burden. The unwarrantable designation was not appropriate because the violation was not readily identifiable by management, argues Twentymile. The lifeline clearly marked the escapeway and, therefore, the absence of reflectors would not constitute an obvious hazard to management. Furthermore, the length of time that the violation existed was limited to the time that the longwall was operating. An unwarrantable failure designation is not supported by the Secretary’s evidence or the facts and is therefore inappropriate.

### 3. Analysis of the Issues

It is not disputed that there were no reflective markers attached to the roof to indicate the direction of travel out of the primary escapeway in the event of an emergency. The issue is whether the lifeline that was present satisfied the requirements of the cited safety standard. In *Twentymile Coal Co.*, I determined that a lifeline can satisfy the requirements of section 75.380(d)(2). 32 FMSHRC at 640. My decision on that issue is incorporated herein by reference. 32 FMSHRC 638-42. Based on that decision, I find that an analysis must be undertaken to determine whether the particular lifeline in question in this case clearly marked the primary escapeway to show the route and direction of travel. Based on the evidence presented at the hearing, I find that the lifeline did not do so.

I credit the testimony of Inspector Gore as to the conditions he found. There was only one reflector for a distance of about 4,800 feet in the primary escapeway for the 22 Right longwall section. Inspector Gore also credibly testified that the lifeline in the cited area was down, mostly in mud, on the mine floor. The cones and the reflective material on the lifeline were either missing or covered in mud for much of this distance. (Tr. 23, 29-30). In some areas, the lifeline was hanging below eye level about three to four feet off the mine floor, while in other areas the lifeline was hanging properly. I find that the Secretary established a violation because there were no clearly visible reflectors, markings, or other objects that would direct miners out of the mine along the cited escapeway in the event of an emergency.

I also find that the Secretary established that the violation was S&S. The discrete safety hazard associated with having a significant portion of an escapeway insufficiently marked to show the direction of travel is the risk that miners would not be able to escape quickly in an emergency, resulting in an increased risk of injury due to a delay in evacuation. *Cumberland Resources*, 33 FMSHRC 2357 at 2364 (Oct. 5, 2011). The escapeway in the cited area was not straight or clearly marked, with the result that miners could become lost or confused. The resulting delays in escape are reasonably likely to contribute to a serious injury such as smoke inhalation. It is also reasonably likely that, in the absence of a clearly marked escapeway, miners working in the section would follow each other so that all 23 miners on the section would be delayed.

I also affirm Inspector Gore's negligence and unwarrantable failure determinations. The violation was extensive and obvious. Inspector Gore noticed the violation within minutes of arriving in the entry and the lack of marking on the roof extended for up to a mile. Inspector Gore previously talked to mine management about problems he observed concerning escapeways and improperly installed lifelines. Even assuming that Twentymile concluded that a lifeline can clearly mark an escapeway to show the route and direction of travel to the surface, it should have been clear to anyone that the lifeline in question could not possibly perform this function. Examiners walked this route on a weekly basis, yet it does not appear that the condition was reported in the weekly exam book. A serious safety hazard was created as a result of conditions cited by the inspector. Although the violation was not the result of Twentymile's "reckless disregard," or "intentional misconduct," Twentymile demonstrated a "serious lack of reasonable care" which constituted aggravated conduct constituting more than ordinary negligence. A penalty of \$18,000.00 is appropriate for this violation.

**B. Citation No. 7291716; WEST 2009-241A**

On September 3, 2008, MSHA Inspector Gore issued Citation No. 7291716 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.380(d)(7)(iv).<sup>2</sup> The citation alleges the following:

The continuous lifeline located in 17 Left #2 entry, crosscut 48+70 was not located in such a manner for miners to use effectively to escape. A 1 inch water hose ran underneath of the lifeline restricting it from being pulled down.

(Ex. G-4). Inspector Gore determined that an injury resulting in lost workdays or restricted duty was reasonably likely to occur, that the violation was S&S, that six persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a penalty of \$2,106.00 for this alleged violation.

**1. Summary of Testimony**

Inspector Gore testified that he inspected Foidel Creek Mine on September 3, 2008. (Tr. 75). He was accompanied on his inspection by Diane Ponikvar, Compliance Manager for Twentymile. (Tr. 75). Inspector Gore issued Citation No. 7291716 because he observed that a water line that supplies water to the seal pump was attached to the roof under and perpendicular to the lifeline, rendering the lifeline inaccessible. (Tr. 76). The roof in this area was ten feet high, which is a typical roof height at Foidel Creek Mine. *Id.* The lifeline was attached to the roof with a break-away, which is a plastic fastener designed to break when a miner pulls the lifeline. (Tr. 77). The water line was attached with cable fasteners. (Tr. 77). When a miner using the lifeline reaches the water line, he will not be able to pull down the lifeline because the water line will prevent him from doing so. *Id.* According to Inspector Gore, a miner would have to let go of the lifeline and would likely not be able to reach it on the other side of the water line because it was ten feet above the mine floor. (Tr. 77-78). Inspector Gore testified that a miner using the lifeline would be carrying 50 pounds of gear and may be wearing a rescuer, making it difficult for him to jump and grab the lifeline. (Tr. 78). Inspector Gore testified that to correct the violation, someone had to get a step ladder, cut the lifeline, and then retie it under the water line. (Tr. 78, 83). Inspector Gore did not mention a ladder in his notes from that day. (Tr. 88).

Inspector Gore issued the citation as S&S because the condition would hinder or delay a miner's exit from the mine in an emergency. (Tr. 82). A miner could be injured trying to get the lifeline down or the delay could cause the miner to be exposed to hazardous conditions. *Id.*

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<sup>2</sup> Section 75.380(d)(7)(iv) provides that “[e]ach escapeway shall be provided with a continuous, durable directional lifeline or equivalent device that shall be located in such a manner for miners to use effectively to escape.”

Miners can grab the lifeline at various locations where tags hang down from the line so the miner can pull it down, but those tags were not present in this area. (Tr. 84).

Inspector Gore conceded that the cited escapeway was actually in the 23 Right section rather than in the 17 Left as stated in the citation. As a consequence, the affected area was a continuous miner section, not a longwall mining section. (Tr. 85-87). Inspector Gore did not know why there would be a seal pump on a continuous miner section and did not ask who installed the water line. *Id.*

Dianna Ponikvar testified on behalf of the mine. Ponikvar works at Twentymile as compliance manager and supervises a compliance crew to check for possible violative conditions. (Tr. 90). Ponikvar has extensive mining experience and holds certifications as a mine foreman and mine examiner, among others. (Tr. 91).

Ponikvar testified that there is a difference between a water line and a water hose and that she saw a water hose under the lifeline when Inspector Gore issued his citation. (Tr. 92). Ponikvar testified that the hose was sagging under the lifeline. (Tr. 93). Ponikvar is 5 feet 5 inches tall and was able to reach the water hose without a ladder or jumping. (Tr. 93-94). Ponikvar testified that she abated the citation by disconnecting the water hose. (Tr. 93).

Ponikvar testified that all the lifelines are hooked with a tag line that the miner pulls to dislodge the lifeline and make it drop down. (Tr. 94). Furthermore, she asserted that, in an emergency, a miner in this area would still have easy access to the lifeline by reaching around the hose to grab it. (Tr. 94-95). According to Ponikvar, a miner would not be delayed by having to reach around the hose. (Tr. 94). Ponikvar also testified that the hose and lifeline were both next to the rib and that the lifeline was high enough that equipment moving through the area would not catch on it.

## **2. Brief Summary of the Parties' Arguments**

### **a. Secretary of Labor**

The Secretary argues that the Respondent violated section 75.380(d)(7)(iv) by impeding access to a lifeline in a primary escapeway by installing a water line underneath the lifeline. At a minimum, the Secretary asserts that the presence of the water line would require a miner to let go of the lifeline and search for it on the other side of the water line, which would constitute a violation. At worst, however, the miner would have no way to reach the lifeline after letting go of it because the lifeline was secured to the ceiling. In either scenario, the presence of the water line could impede the quick escape of a miner during an evacuation and Respondent, therefore, violated section 75.380(d)(7)(iv).

Also, the Secretary argues that the violation was S&S. Respondent violated section 75.380(d)(7)(iv), which contributed to the discrete safety hazard of miners not being able to escape during an emergency, which is reasonably likely to contribute to a reasonably serious injury. Therefore, Citation No. 7291716 was S&S.

The violation was due to at least moderate negligence, argues the Secretary. The water line running underneath the lifeline was obvious. An employee of Respondent intentionally hung the water line and he should have been trained to properly install the water line above the lifeline. No mitigating circumstances explaining the violative condition existed at the time of the trial or the issuing of the citation. Respondent was moderately negligent in allowing the water line to be installed underneath the lifeline and not correcting it immediately.

**b. Twentymile Coal Co.**

Twentymile contends that there was no violation of section 75.380(d)(7) because the water hose under the lifeline was at a height that it could readily be reached and a miner could grab the lifeline on the other side of the hose. The lifeline was continuous, crossed in only one section by the water hose. Grabbing the lifeline on the other side of the hose would not delay effective escape by a miner. Therefore, no violation of the cited standard existed.

Twentymile further argues that if a violation is found, the S&S designation was inappropriate. A lifeline violation is not automatically designated as S&S; the Secretary must show that the actual hazard created would be reasonably likely to result in a reasonably serious injury. The Secretary did not meet this burden. Therefore, if the violation is found, it should not be S&S.

**3. Analysis of the Issues**

I find that Twentymile impeded access to the lifeline in the primary escapeway in the 23 Right section. I credit the testimony of Inspector Gore that a “one-inch water hose had been hung from the mine roof preventing it from coming down.” (Tr. 79; Ex. G-5, p. 8). The water hose was about six inches below the roof at the cited location and was attached to the roof with cable fasteners. (Tr. 88). The lifeline was at least that high where it crossed over the hose. Furthermore, the placement of the lifeline above the water hose could require miners to let go of the lifeline and then find it again on the other side of the water hose. Given the 10-foot height of the mine roof, it may be difficult for miners to locate the lifeline on the other side of the hose and then pull it down, especially if the conditions are perilous and miners must exit the mine as quickly as possible.<sup>3</sup> I find that the presence of the water hose below the lifeline could reasonably be expected to prevent miners from having continuous access to the lifeline, as required by the safety standard. The operator is required to provide a “continuous” lifeline that is “located in such a manner for miners to use effectively to escape.” 30 C.F.R. § 75.380(d)(7)(iv). The presence of the hose below the lifeline violated this requirement. I relied on the testimony of Inspector Gore as to the conditions he observed in reaching this conclusion.

Whether the violation was S&S is a closer question. As stated above, the Commission and court have observed that an experienced MSHA inspector’s opinion that a violation is S&S

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<sup>3</sup> If a miner saw the water line before reaching it, he may also be able to yank on the lifeline which could loosen it from the break-away tie on the other side of the water hose so that he could easily grab it. I cannot assume, however, that a miner could easily do this during an emergency.

is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC at 1278-79; *Buck Creek Coal Inc.*, 52 F.3d at 135. I find that the evidence establishes that it is reasonably likely that a miner trying to exit the mine using the cited escapeway would have to let go of the lifeline to get around the water hose. In an emergency situation, miners may not be able to quickly locate and pull down the lifeline on the other side of the hose. Any delay in being able to escape during an emergency is reasonably likely to lead to an injury of a reasonably serious nature. The Secretary is not required to establish that it is more probable than not that an injury will result from a violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). I find that the Secretary established the S&S nature of the violation.

The Secretary established that Twentymile's negligence was moderate. A penalty of \$2,200.00 is appropriate for this violation.

**C. Citation No. 7621434; WEST 2008-879**

On June 6, 2007, MSHA Inspector Phil Gibson issued Citation No. 7621434 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 75.380(d)(7)(i).<sup>4</sup> The citation alleges the following:

The alternative escapeway in No. 1 entry of 19 Right, tailgate entry for 20 Right active longwall section, was provided with a directional lifeline that was installed near the right coal rib if a miner were going outby but it was not maintained throughout the entire length of this alternate escapeway. The inspector observed that the lifeline was broken in two just outby No. 7+00 crosscut and was lying on the mine floor for about 200 feet. This condition creates a potential delay of rapidly escaping in the event of an emergency.

(Ex. G-7). Inspector Gibson determined that an injury resulting in lost workdays or restricted duty was reasonably likely to occur, that the violation was S&S, that nine persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a penalty of \$ 3,996.00 for this alleged violation.

**1. Summary of Testimony**

Inspector Phil Gibson testified on behalf of the Secretary. Inspector Gibson works for MSHA as a coal mine inspector, a job he has held for 35 years. (Tr. 105). Prior to becoming an MSHA inspector, Gibson worked in the mine industry for six years as a general laborer, mechanic, and fire boss. (Tr. 105-06). He holds a certification as a fire boss. (Tr. 106). Inspector Gibson was unable to review his notes concerning the citation at issue because his

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<sup>4</sup> Section 75.380(d)(7)(i) provides, in part, that each escapeway shall be provided with a continuous directional lifeline “[i]n installed and maintained throughout the entire length” of the escapeway.

notes were lost in a fire in November 2007. (Tr. 107). Prior to this hearing, Inspector Gibson visited the mine to ask questions and refresh his recollection of the events. (Tr. 119).

On June 6, 2007, Inspector Gibson wrote Citation 7621434 because a lifeline installed in an alternate escapeway was not continuous. (Tr. 108). Inspector Gibson testified that in June of 2007, Twentymile was mining right to left on the map marked Gov. Ex. 14. (Tr. 109). The parties stipulated that the longwall at this time was between the 47 Crosscut and the headgate and the 62 Crosscut and the headgate. (Tr. 104).

Inspector Gibson testified that the escapeway on the map changed. (Tr. 110). An escapeway might change due to a roof fall or standing water. *Id.* At the time there were two potential exits, the first out of the 18 Right air shaft and the second out of the 6 Main North air shaft. (Tr. 110-11). The 6 Main North air shaft was the closest exit to where Twentymile was mining. (Tr. 111). 20 Right had three entries that lead to the 18 Right air shaft. *Id.* Entry 3 was a conveyor belt entry, blocked with a conveyor belt; Entry 2 was blocked by a roof fall; and Entry 1 had standing water in it, preventing a miner from traveling through the entry. (Tr. 112). Inspector Gibson recalled having conversations with Dennis Bouwens about water issues in Entry 1 and Entry 2. (Tr. 124).

Inspector Gibson testified that on June 6, 2007, the alternate escapeway was in Number 1 Entry of 19 Right, on the tailgate side. (Tr. 113). Inspector Gibson testified that if this were not the escapeway at that time, he would not have issued the citation. (Tr. 114). Further, Inspector Gibson testified that no one told him this was not the escapeway. The entry was marked with a lifeline with directional cones oriented in the correct direction. Inspector Gibson testified that the tailgate is not the preferred entry for an escapeway because it has return air and is subjected to the most roof stresses, but there is nothing that prevents the tailgate being used as an escapeway. (Tr. 120, 124).

Inspector Gibson testified that Number 1 Entry of 19 Right would have been the escapeway when 19 Right was first developed and was a continuous miner section. (Tr. 120-21). It is generally Twentymile's practice not to remove the lifeline after an entry ceases to be an escapeway. (Tr. 121).

According to Inspector Gibson, the lifeline was broken for a distance of roughly two hundred feet, and any miners using the lifeline would be delayed in searching for the other end. (Tr. 116). This delay could result in injuries if there were a fire in the area or if a miner's equipment became loose during the search. *Id.* Inspector Gibson determined that nine people would have been affected because that was the number of people on the section. (Tr. 117). He wrote the citation as S&S because, in an emergency, a broken lifeline is a hazard. *Id.* Inspector Gibson determined that the citation was due to moderate negligence because the operator had been cited before and there was an attempt to provide a lifeline but it was not maintained. *Id.* Inspector Gibson testified that the condition was obvious. The citation was abated by tying an additional length of lifeline to the existing lifeline. (Tr. 118).

Kevin Copeland testified on behalf of Twentymile. Copeland works at Twentymile as a draftsman. (Tr. 126). He has been a draftsman for 32 years and creates all of the mine maps. *Id.* Copeland searched for, but could not find, the maps from June of 2007. (Tr. 126-27). He did

find maps from prior to and after June 2007. (Tr. 127). MSHA requires maps to be on hand in case there is an emergency. (Tr. 127-28). If there is a change to the escapeways, it is marked on the map in the foreman's room immediately. (Tr. 128).

On a map of the mine from April 2007, marked as Res. Ex. 1-A, Copeland marked the alternate escapeway as being in Number 2 Entry. (Tr. 132). On a map of the mine from July 2007, marked as Res. Ex. 1-B, Copeland marked that the primary escapeway was in Number 2 Entry. (Tr. 133). There are no markers on either map showing the tailgate being used as an escapeway for any purpose in either April or July of 2007. (Tr. 134).

Copeland testified that, based upon the maps from before and after June 2007, he believes that the alternate escapeway was the No. 2 entry in June 2007 but has no personal recollection from June 6, 2007. (Tr. 135). Any temporary changes, such as a change for two days caused by a roof fall, would not be reflected on these maps. (Tr. 136).

Bouwens testified on behalf of Twentymile that in June of 2007 the tailgate entry in 19 Right was not an escapeway for the longwall. (Tr. 139). That entry would have been an escapeway during development. *Id.* If the entry were used as an escapeway during development, the lifeline would have been installed then. (Tr. 140). The lifeline would not have been removed after the entry ceased to be used as an escapeway so that if they needed to use that entry as an escapeway for the longwall the lifeline would already be there. (Tr. 141).

Bouwens testified that he does not know of any event in April, May, or June of 2007 that would have caused Twentymile to use the 1 Entry of the tailgate as an escapeway. (Tr. 140). Specifically, Bouwens testified that he does not remember there being any roof falls or water accumulations that would have required Twentymile to use Number 1 Entry of the tailgate as an escapeway on June 6, 2007. (Tr. 140). Bouwens conceded there probably was water in Number 1 Entry of 20 Right at some point, but could not say when. (Tr. 142). If all the entries on the headgate were not travelable, miners exiting the mine would have to use the tailgate. (Tr. 143). If all the headgate entries were blocked, Twentymile would designate a new escapeway. (Tr. 144).

## **2. Summary of the Parties' Arguments**

### **a. Secretary of Labor**

The Secretary argues first that the entry cited (No. 1 Entry of 19 Right) by Inspector Gibson was an escapeway due to the fact that Respondent provided no credible evidence to rebut Inspector Gibson's testimony and the presence of a lifeline. The maps provided by Respondent omit information about escapeways for the month of June, and do not show any temporary escapeways. In addition, none of Respondent's witnesses was sure that the cited entry was not an escapeway; indeed they conceded that if all other entries were blocked, the cited entry could be used as an escapeway.

Furthermore, according to the Secretary's argument, the presence of the lifeline in the entry made it an escapeway. There can be more than the two required escapeways.

Respondent's witnesses admitted that under certain circumstances the cited entry may be used as an escapeway. Because the cited entry could have been used as an escapeway and it contained a lifeline, which is a characteristic associated with escapeways, the Secretary contends that she proved by a preponderance of the evidence that the No. 1 Entry of 19 Right was an escapeway.

Due to the broken lifeline in No. 1 Entry of 19 Right, the Secretary argues that Respondent violated 30 C.F.R. §75.380(d)(7)(i). Respondent offers no evidence to rebut the fact that the lifeline was broken and therefore in violation of the mandatory safety standard.

The Secretary also asserts that Citation No. 7621434 was properly designated as S&S. Respondent violated section 75.380(d)(7)(i), which contributed to the discrete safety hazard of miners not being able to escape during an emergency, which is reasonably likely to contribute to a reasonably serious injury. Therefore, Citation No. 7621434 was S&S. Finally, the Secretary argues that Respondent's violation of 30 C.F.R. §75.380(d)(7)(i) was due to moderate negligence because the broken lifeline was obvious, was clearly a hazard, and Respondent had been cited for problems with other lifelines in the past.

#### **b. Twentymile Coal Co.**

Twentymile contends that no violation of the standard existed because the cited area was not an escapeway and therefore no lifeline was necessary. The lifeline was present because the No. 1 entry had been used as an escapeway during development mining. Although no maps exist for that time, the mine's witnesses testified that the escapeway would not have been in the tailgate. There was a lifeline in that entry because it is mine policy not to remove lifelines from entries when they cease to be escapeways. The witness testimony supports the argument that the No. 1 Entry of 19 Right was not an escapeway and, therefore, Twentymile did not fall under section 75.380(d). Twentymile also states that the designation of the citation as S&S as well as the appropriateness of the penalty are at issue.

### **3. Analysis of the Issues**

I find that the citation must be vacated. It is not at all clear that the No. 1 entry was an escapeway in June 2007. The Secretary bears the burden of proof. The passage of time and the lack of complete documentation make it difficult to determine whether there was a violation of the safety standard. The testimony of Copeland tends to show that the alternate escapeway was in the No. 2 entry at the time of the inspection. Inspector Gibson admitted that Twentymile does not necessarily remove the lifeline when an entry no longer functions as an escapeway. I also recognize that, in many instances, the presence of a lifeline in an entry would make that entry a *de facto* escapeway because miners trying to escape the area might well travel down the entry when attempting to leave the mine because of the presence of the lifeline. In such an instance, the lifeline would need to be properly installed along its entire length. The evidence is too uncertain in this instance to affirm the citation on that basis, however. I find that the evidence concerning this citation is too vague and unreliable to affirm the violation. Consequently, Citation No. 7621434 is **VACATED**.

### **III. SETTLED CITATIONS**

A number of the citations and orders at issue in these cases previously settled. By order dated December 6, 2010, I approved a settlement in the amount of \$11,563.00 in WEST 2008-879 for six citations and orders. By order dated September 24, 2010, I approved a settlement in the amount of \$103,496.00 in WEST 2009-081 for 13 citations and orders. I ordered Twentymile to pay these penalties within 40 days of my orders approving partial settlement.

At the hearing, the parties agreed to settle Citation No. 7291709 in WEST 2009-081 by deleting the S&S designation and reducing the penalty to \$2,000.00. The parties also agreed to settle Citation No. 7622549 in WEST 2009-241A by deleting the S&S designation and reducing the penalty to \$2,000.00 and to settle Citation No. 7622546 in that same docket for the original proposed penalty of \$3,405.00.

### **IV. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which are not disputed by Twentymile. (Ex. G-8). At all pertinent times, Twentymile was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. The gravity and negligence findings are set forth above.

**V. ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2008-879		
7621434	75.380(d)(7)(i)	VACATED
WEST 2009-081		
7622766	75.380(d)(2)	\$18,000.00
7291709 (settled)	75.380(d)(7)(iii)	2,000.00
WEST 2009-241A		
7291716	75.380(d)(7)(iv)	2,200.00
7622546 (settled)	75.380(d)(7)(iv)	3,405.00
7622549 (settled)	75.380(d)(7)(i)	2,000.00
TOTAL PENALTY		\$27,605.00

For the reasons set forth above, the citations are **AFFIRMED** or **VACATED**, as set forth in this decision. The Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$27,605.00 within 30 days of the date of this decision.<sup>5</sup>

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

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<sup>5</sup> 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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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August 29, 2012

LEFT FORK MINING COMPANY, INC., : EQUAL ACCESS TO JUSTICE  
Applicant, : PROCEEDING  
: :  
v. : Docket No. EAJ 2012-03  
: :  
SECRETARY OF LABOR : Formerly KENT 2012-443-R  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, (MSHA), : Mine ID: 15-12564  
Respondent. : Mine: Straight Creek #1

**DECISION**

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN for the Secretary

John M. Williams, Esq., and Todd C. Myers, Esq., Rajkovich, Williams, Kilpatrick, & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY for the Applicant

Before: Judge Andrews

This case is before me upon an Application for Fees and Other Expenses filed by Left Fork Mining Company, Inc., (“Left Fork” 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**

A brief summary of the prior decision is important to understanding the parties’ arguments in this case.

On March 22, 2011, Left Fork was issued 104(a) Citation No. 8353804<sup>1</sup> citing a violation of 30 C.F.R. § 75.333(h). *Left Fork Mining Co., Inc., v. Sec’y of Labor*, 2012 WL 1564573 (2012)(ALJ). This Citation underlies the issuance of 104(b) Order No. 8353807, the subject of

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<sup>1</sup> This Citation was assigned to an ALJ other than the undersigned. As in the prior Decision, the undersigned makes no evaluation of the validity of this Citation.

Docket No. KENT 2012-443-R and the Decision underlying the instant case. *Id.* The Citation stated as follows:

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

*Id.*

Because the Mine was also under a 103(k) order, it had to submit a plan in order to abate Citation No. 8353804. *Id.* A plan was submitted by Left Fork on March 23, 2011, but MSHA did not formally respond to it. *Id.* Nevertheless, on March 29, 2011, MSHA issued Order No. 8353807 for failure to submit a plan stating, “The operator has not submitted a plan to repair the affected seals. Reasonable time has been given to the operator to submit a plan.” *Id.*

The remainder of the record contains evidence of several communications between MSHA and Left Fork and many required revisions to Left Fork’s plan to seal the Straight Creek Seam so that work could continue in a different seam. *Id.* The final modification of the 103(k) order in June 2011 allowed for power and pumping in the Straight Creek Seam for the purposes of construction in order to seal the seam. *Id.* This plan was contingent upon submission of updated action plans through the process. *Id.*

On January 11, 2012, 104(b) Order No. 8353807 was modified by MSHA to de-energize all power and withdraw all miners with the following justification:

Numerous hazards are present throughout the entire mine. There are 19 unabated 104(b) orders currently at this mine over a broad area. Some of these 104(b) orders have existed for up to approximately 18 months uncorrected by the operator. Additional hazards have been identified at this mine in several locations.

The operator was cited for seals not being maintained as required (See 104(d)(2) order # 8353803 and 107(a) order #8353800 on 3-22-11, The operator has previously submitted for approval a seal construction plan to construct new seals for which during this time the operator was to prepare the seal sites, conduct examinations and pump water. No work is being done to prepare for seal installation as verified by evaluation of these areas. The only work that has been done for some time has been examinations and pumping water.

Resources are not being allocated or used to address the many hazards that exists and that continue to accumulate at this mine. These conditions expose those miners conducting examinations and doing work to pump water to numerous hazards that have the potential to result in injuries that range from lost workdays/restricted duty up to include fatal. This order is being modified for the affected area to include the entire mine. The operator must withdraw all miners

from the mine and de-energize all electrical power from the underground portion of the mine. The operator is being allowed to run the mine fans to prevent the accumulation of explosive methane/ch4.

*Id.*

A hearing was held on an expedited basis by agreement of the parties in Hazard, Kentucky on January 30-31, 2012. *Id.* Based on the language of 30 U.S.C. § 814(b) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”) and the evidence and testimony at hearing, the undersigned found that Order No. 8353807 was improperly issued and, thus, vacated it. *Id.* Left Fork had, in fact, submitted a plan six days prior to the issuance of the Order that was never addressed by MSHA. *Id.* Further, the Secretary did not offer sufficient evidence that no plan had been submitted and did not even include the plan submitted on March 23, 2011 in her hearing exhibits. *Id.*

The undersigned further explained that although the modification to the 104(b) Order must be vacated since the original 104(b) Order was improperly issued, the modification would have been improper regardless of the initial finding. *Id.* Most of the modification was entirely unrelated to the original Order or underlying Citation; rather, the inspector cited several unabated orders and unspecified hazards as the reason for the modification. *Id.* The pertinent information written in the modification lists the actions to be taken to shut down the entire mine, which were actions that were not authorized by Section 104(b) of the Mine Act. *Id.* The final conclusion reached by the undersigned was that the Order and modification were both vacated. *Id.*

## **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

Left Fork contends that, as a small company with limited financial resources, it is an eligible applicant under the Act. It argues that it is a prevailing party because the Modified (b) Order was vacated at hearing, which caused MSHA to allow Left Fork to reenergize the mine. Further, it contends that the Secretary's position was not substantially justified because they were ruled to be arbitrary, capricious and unreasonable under the facts or law by the Court.

The Secretary contends that Left Fork is not eligible for attorney's fees because it is not a prevailing party in the litigation. The Secretary states that because the area at issue remains under a section 103(k) order, Left Fork gained no direct benefit from the judge's decision vacating the Modified 104(b) Order. She further argues that the Secretary's position was reasonable based on the dangers surrounding the issuance of the Order which created special circumstances, making an award unjust.

## ANALYSIS AND CONCLUSIONS OF LAW

As a preliminary matter, Left Fork correctly states that to be eligible to seek EAJA awards, it must first qualify as a "party." The Administrative Procedure Act defines a "party" as including a corporation named as a party in an agency proceeding. 5 U.S.C. § 551(3); 29 C.F.R. § 2704.104(a). Further eligibility requirements are laid out in 29 C.F.R. § 2704.104(b)(3)(iii), stating in pertinent part that any corporation must have a net worth of less than \$7 million and must employ less than 500 employees. Left Fork has provided evidence that it had a net worth of approximately \$2 million and employed only eleven employees when the contest proceeding was filed. *See* Application for Award of Attorney's Fees and Expenses, p. 5; Ex. 2. The Secretary does not oppose this argument. Therefore, the undersigned finds that Left Fork is a "party" eligible to seek EAJA awards.

The purpose of EAJA is to make attorney's fees available against the government where private litigants successfully challenged or defended against agency actions. *See generally* H.Rep. No. 1418, 96th Cong., 2d Sess., 8-13 (1980) *reprinted in* [1980] U.S.Code & Admin.News 4984, 4986-92; *Grand Blvd. Imp. Ass'n v. City of Chicago*, 553 F. Supp. 1154, 1157 (N.D. Ill. 1982). This involves a two step analysis based on the language of the statute.

First, 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 decree 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 as 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.*

The Secretary then has the opportunity to prove that her position was nevertheless 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. The agency bears the burden of establishing that its position was substantially justified. *Sec’y of Labor v. Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998)(citing *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992)). The First Circuit has stated that although there may be some overlap in the merits determination and the substantial justification, the judge’s exercise of independent judgment is “essential to determine whether an EAJA award is warranted.” *Contractors Sand and Gravel*, 20 FMSHRC at 968 (Sept. 1998)(citing *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1<sup>st</sup> Cir. 1987)). Any other approach would demean the “precise language of EAJA.” *Id.*

The undersigned finds that Left Fork is a prevailing party. By vacating the 104(b) Order and its modification in the underlying case, the legal relationship was certainly changed concerning this particular Order. The Order as written de-energized the entire mine and forced the operator to withdraw its miners. Upon the vacation of the citation, the Mine could be re-energized, as the 103(k) Order discussed by the Secretary did not require de-energization of the Mine. In its last modification, it specifically allowed Left Fork to operate and maintain its pumps to prevent the complete flooding of the mine. In light of this, the undersigned finds that the legal relationship between the parties was changed.

It is beyond argument that the judgment after hearing was in favor of the party seeking the fees. The sole issue before the undersigned was the validity of 104(b) Order No. 8353807 and its modification. In the decision, the undersigned vacated the entirety of the Order due to its lack of authority to issue it under section 104(b) of the Act. Based on this, the undersigned finds that the judgment was in favor of Left Fork.

The undersigned also finds that the judicial pronouncement was accompanied by judicial relief. The Secretary argues that relief on the merits “is defined as actual relief which materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” Citing *Farrar v. Hobby*, 506 US 203 (1992). Because this was a 104(b) order, no civil penalty was assessed. At hearing, the only judicial relief sought was vacation of the Order which, as stated several times, was granted. As the undersigned only had jurisdiction over that one particular Order, that was all of the relief that could be requested in this case. Therefore, the undersigned finds that actual relief was given.

Finally, the undersigned finds that the Secretary’s actions were not substantially justified within the meaning of the Act. To be sure, the issuance of the Order had no reasonable basis in law or fact. In the underlying decision, the undersigned found that the 104(b) was improperly written based on the evidence and the language of the statute. The Secretary has not sought appeal of that decision. Further, it seems bewildering that a reasonable person could be satisfied with the Secretary’s decision when it had absolutely no basis in law or fact.

The Secretary's final contention is that the case was reasonable based on the dangers involved which created special circumstances making an award unjust. The special circumstances exception in section 504(a)(4) has its genesis in 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). Section 504(a)(1) provides that, in an administrative adjudication, a party that prevails in an action brought by the agency shall be awarded fees and other expenses "unless ... the position of the agency was substantially justified or that special circumstances make an award unjust." *Sec'y of Labor v. Georges Colliers, Incorporated*, 27 FMSHRC 362, 368 (Apr. 2005)(citing 5 U.S.C. § 504(a)(1)). The House Report that accompanied EAJA, when it was enacted in 1980, stated the following with regard to the special circumstances exception to awards to prevailing parties in section 504(a)(1) and section 2412(d)(1)(A):

Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. *It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.*

*Id.* (citing H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4990 (emphasis added)).

The Congressional record also indicated that Congress wanted "to ensure that the government is not unduly deterred from advancing its case in good faith." 142 Cong. Rec. S3242, S3244 (1996) (statement of Senator Bond). One way in which Congress did this was to exclude an award when special circumstances are present. *Id.* These special circumstances "are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees even in situations where the ultimate award is significantly less than the amount demanded." *Id.* "Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of fees unjust." *Id.* From this, one court emphasized that "the theme of 'unclean hands' pervades the jurisprudence of 'special circumstances' under EAJA." *Air Transport Assn. of Canada v. FAA*, 156 F.3d 1329, 1333 (D.C. Cir. 1998).

The Secretary cites the methane inundation leading to the issuance of the initial 103(k) order as special circumstances. She then continues to say that a 104(b) order was issued for failure to abate the condition in a timely fashion. However, what she does not explain is that the 104(b) order had very little, if anything, to do with the actual seals. Instead, it addressed several other unabated conditions and the failure to submit a plan. Further, she fails to explain that MSHA failed to even respond to Left Fork's initial attempts to submit a plan for approval. Failing to respond to the plan not only led to the issuance of an erroneous 104(b) order, but it also did nothing to help abate the problem.

Did Left fork engage in a flagrant violation of the 103(k) order or endanger lives? Consider the sequence of events. First, MSHA prohibits the repair of a crack at a seal that allows some methane into that particular area of the mine. Then, many months later when some

methane is again found in the area of the unrepaired crack, MSHA penalizes the mine for, essentially, allowing some methane into that environment. And this punitive action takes place just two days before the long anticipated approval of a plan, many months and many man hours in the making, to seal off the entire seam of the mine where the crack is located, which, in addition to the prohibited repair would also resolve the methane leak. Indeed, just as Left Fork was working to dewater the mine and seal off the entire Straight Creek Seam by working for months with one division of MSHA, Inspectors of another division go to the mine and completely de-energize it thereby preventing execution of the seam sealing plan and further contributing to any dangerous situation (e.g. flooding) then existing. In the opinion of the undersigned, Left Fork was working to abate issues in the Straight Creek Seam by sealing it off, but the actions of MSHA frustrated this effort and even led to flooding of the entire mine.

Based on the foregoing, the undersigned finds that the Secretary has not met her burden of showing that special circumstances existed making an award unjust.

### **ORDER**

It is hereby **ORDERED** that Left Fork Mining Company, Inc.'s Application for Award of Attorney's Fees and Expenses is **GRANTED**. It is further **ORDERED** that the Secretary of Labor shall **PAY** the Applicant's attorney's fees in the amount of \$37,779.77 within thirty (30) days of the date of this decision.

/s/ Kenneth Andrews  
Kenneth Andrews  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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August 29, 2012

D.Q. FIRE & EXPLOSION CONSULTANTS, INC., Contestant,	:	CONTEST PROCEEDING
	:	
	:	Docket No. WEVA 2011-952-R
	:	Citation No. 8249977; 01/11/2011
v.	:	
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Mine ID: 46-08436
	:	Mine: Upper Big Branch Mine – South
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEVA 2011-2480
	:	A.C. No. 46-08436-264775
	:	
v.	:	
	:	
	:	
D.Q. FIRE & EXPLOSION CONSULTANTS, INC., Respondent.	:	Mine: Upper Big Branch Mine – South

**DECISION**

Appearances: Pollyanna E.F. Hampton, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner

R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Respondent

Before: Judge Andrews

**STATEMENT OF THE CASE**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration against D.Q. Fire & Explosion Consultants, Inc. (“D.Q.” or “Respondent”), at the Upper Big Branch-South mine (the “Mine”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (the “Mine Act” or “Act”). This docket involves a citation issued pursuant to Section 104(a) of the Act with an assessed penalty

of \$112.00. The parties presented testimony and documentary evidence at the hearing held in Charleston, West Virginia on May 22, 2012 where they participated fully therein.

### **JOINT STIPULATIONS**

The parties agreed to the following stipulations, submitted and marked as Exhibit JX-1 at the hearing:

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. D.Q. was providing consulting expertise at the Upper Big Branch Mine-South located in Montcoal, West Virginia on January 11, 2011 when Citation 8249977 was issued.
3. Upper Big Branch Mine-South was operated by Performance Coal Company, a former subsidiary of Massey Energy Company on January 11, 2011.
4. Performance Coal Company was an “operator” as defined in Section 3(d) of the Act at the coal mine at which the order at issue in this proceeding was issued.
5. The products of the mine at which Citation 8249977 was issued entered commerce, or the operator or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.
6. The penalty which has been assessed for this violation pursuant to 30 U.S.C. 820 will not affect the ability of D.Q. to remain in business.
7. The individual or individuals whose signatures appear in Block 22 of Order 8249950 were each acting in their official capacity and as an authorized representative for the Secretary of Labor when the order was issued.
8. None of the exhibits that the parties intend to offer into evidence and that were exchanged prior to hearing will be subject to objection as to authenticity. Specifically, the parties stipulate that the following documents are authentic and may be admitted into evidence without objection by the opposing party. This stipulation does not mean that either party stipulates to the truth of any allegation in the exhibits but merely to their admissibility and authenticity.
  - 1) Citation 8249977
  - 2) R17
  - 3) 103(k) Order # 4642503-BB and modification #4642503-BC
  - 4) Notes of James “Keith” McElroy
  - 5) UBB Investigation Zone Map

- 6) Daily Logs of Stephen Dubina dated January 10-12, 2011
- 7) Performance Coal Company Photo Log dated January 11-12, 2011
  
- A) Notes of Dr. Reszka
  
9. True copies of Citation 8249977, with any modification and abatements, were served on D.Q. or its agent as required by the Act.
10. Citation 8249977, along with any and all modifications and abatements, were issued by a duly authorized representative of the Department of Labor, MSHA.
11. The Citation contained in Exhibit A attached hereto is an authentic copy of Citation 8249977, including any and all modifications or abatements.
12. Exhibit B attached hereto MSHA's Assessed Violation History Report, R-17 report, accurately sets forth the history of violations by D.Q. for the time period specified. A review of the history of violations prior to the issuance of Citation 8249977 does not reveal any prior violations. Such history of violations may be used to calculate penalty assessment amounts for the citations at issue.
13. Citation 8249977 was timely abated.
14. Citation 8249977, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the order.
15. On April 5, 2010 an underground coal dust explosion occurred at the Upper Big Branch Mine-South killing 29 miners and injuring two.
16. On January 11, 2011 MSHA issued Citation 8249977 citing a violation of Section 103(k) of the Federal Mine Safety and Health Act.
17. Citation 8249977 states as follows:

Evidence indicates the operator worked in violation of the 103(k) order #4642503-BB. This modification specifies "No persons shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations." The operator failed to comply with this stipulation on 01-11-2011 and 01-12-2011. Investigative activities were conducted in Zone 5 without modification of the k order. This condition has not be [sic] designated as "significant and substantial" because the conduct violated a prevision [sic] of the mine act rather than a mandatory safety or health standard.

A copy of the order is attached at Exhibit A.

18. Citation 8249977 was issued as no likelihood of resulting injury or illness. The negligence level was designated as high. The Citation was assessed for a total civil penalty of \$112.00 against Respondent.

### **THE CITATION**

MSHA Inspector James K. McElroy issued 104(a) Citation No. 8249977 bearing the date of January 11, 2011 to Chris Schemel, President, for alleged violations of Section 103(k) of the Mine Act at the Performance Coal Company's Upper Big Branch South Mine. The citation was drafted between January 14 and January 17, 2011. Tr. 77. The Condition or Practice is set forth in Stipulation #17 above. The negligence was designated as high. *See also*, Stipulation #18.

The citation was terminated on January 18, 2011, when Manager Chris Prater conducted additional training to the accident investigation team related to the 103(k) order #4532503-BB. Ex. G-1.

The issues presented are whether D.Q. was an independent contractor under the Act, whether the citation was validly issued, the degree of negligence, and the penalty to be assessed.

### **LAW AND REGULATIONS**

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C §814(a).

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. §813(k).

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. Under the Mine Act, an operator is held to a high standard of care. 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. The failure to exercise a high standard of care constitutes negligence. The categories and definitions of the negligence criterion are as follows:

**No negligence** is where the operator exercised diligence and could not have known of the violative condition or practice;

**Low negligence** is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;

**Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;

**High negligence** is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and

**Reckless disregard** is where the operator displayed conduct which exhibits the absence of the slightest degree of care.

30 C.F.R. §100.3(d).

### **SUMMARY OF THE TESTIMONY**

#### **A. Testimony of Stephen B. Dubina, Jr.**

Stephen J. Dubina, Jr. (“Dubina”) is an electrical engineer with MSHA’s Pittsburgh Technical Support Center who was assigned as an observer to the Performance Coal/D.Q. investigative team. Tr. 17. He received a Bachelor’s degree in engineering from the University of Steubenville in 1970 and a Master’s degree in engineering from Virginia Polytechnic Institute in 1976. Tr. 18. Dubina worked in coal mines for approximately 10 years before coming to MSHA in 1980 to work in his current position as an electrical engineer. Tr. 17.

Following the Upper Big Branch (“UBB”) mine explosion of April 5, 2010, Dubina was part of the MSHA investigation team, in the electrical group, tasked with determining if there were any electrical problems with the face equipment. Tr. 20. Some time later, he was taken off the investigation team, and was assigned as an observer in the mine by his supervisor, Norman Page. Tr. 42. Dubina was not an authorized representative of the Secretary of Labor (“Secretary”), and had no authority to enforce the Mine Act on behalf of the Secretary. Tr. 20. As an observer, Dubina does not recall if he wore MSHA coveralls, but he did wear a hardhat that had “MSHA” written on it. Tr. 45.

On January 10, 2011, Dubina entered the mine as an observer with an investigative team from D.Q. On that day, the team consisted of Dr. Chris Schemel, Dr. Ray Bennett, a UMWA representative, and Dubina as an observer. Tr. 21. Dubina was aware that UBB was under a 103(k) order, and that this order limited their access to Zone 5 of the mine. Tr. 23.

The team went up Entry No. 3 to 45 Break and then to Zone 5. Tr. 21. Dubina testified that at the time, he did not have a map and did not know that they had entered Zone 5. Tr. 25.

Schemel asked Dubina if they could proceed further in order to show Bennett the shearer. Tr. 21-22. Dubina allowed them to observe the shearer, but said they could not proceed further because there were bad roof conditions that posed a safety risk. Tr. 22. The team then performed some additional examinations of timbers and roof stoppings and proceeded to exit the mine for the day. Tr. 22. Dubina examined maps later in the day and discovered that the team had entered Zone 5. Tr. 22.

On January 11, the team was lead by Dr. Pedro Reszka, and they entered through the tailgate area rather than the headgate. Tr. 26. Dr. Reszka is not an examiner and was not conducting examinations as required by the regulations on that day. Tr. 27. The team entered the mine from Zone 3, Entry No. 2, into Crosscut 24, which is in Zone 5. Tr. 29-30. Dubina testified that the team took photographs in what he later confirmed was Zone 5. Tr. 35. Dubina suspected at the time that the team may have entered Zone 5, but did not have a map with him. Tr. 30-31. He expressed this suspicion to Leon Moskalink, the UMWA representative, but did not say anything to Reszka at that time. Tr. 30-31. Dubina had previously witnessed Reszka consult maps, and presumed that he knew where they were at in the mine. Tr. 31. Dubina testified that as an observer, it was not his job to tell Reszka of his suspicions as to their location, and that he had no authority to tell them where to go or to modify the 103(k) order. Tr. 31, 34. On cross-examination, Dubina testified that in his previous capacity on the investigation team, he was only capable of recognizing electrical violations. Tr. 43.

On January 12, the team entered at Entry No. 2 into the headgate area and into Zone 5 through Crosscut 24. Tr. 33, 35. They went back and forth in Crosscuts 25 and 26 and to the longwall in Entry 26. Tr. 36. At Entry 26 and under Shield No. 1, the team conducted measurements on some of the equipment covers that were blown off during the explosion. Tr. 36. From there, the team proceeded to the Tailgate 22 area and back into Entry No. 3 in order to examine the conditions of the roof bolts and the stoppings. Tr. 36. During the course of the day, the team examined, measured, and took photographs of the timbers, roof bolts, blown-out stoppings, the monorail belt structure, and the face area of the longwall conveyer belt. Tr. 34. Dubina testified that he told Reszka that they were in Zone 5 when the team crossed over into Area 24 or 25. Tr. 37. Reszka did not respond, but rather looked at Dubina and then continued with his tasks. Tr. 37.

Dubina maintained daily logs for January 10, 11 and 12, which corroborate the routes he described in his testimony for these dates. Tr. 32-33, 38-39; Government Exhibit 6; Respondent's Exhibit E.<sup>1</sup> He testified that he drafted the logs on January 13 or 14. Tr. 32. In the log dated January 10, Dubina wrote of granting Schemel's request to proceed further in by to view the longwall shear, and that he limited them to the first crosscut outby shears. Ex.-RE. However, there is nothing in Dubina's logs for January 12 that mentions his comment to Reszka that they were in Zone 5. Tr. 50-51. Dubina explained that the reason he included the interaction with Schemel was because it was a mutual conversation, whereas he did not include his comments to Reszka because Reszka did not respond. Tr. 56-57.

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<sup>1</sup> Further exhibits will be referred to as Ex.-G# for Government Exhibits and Ex.-R# for Respondent Exhibits.

On cross-examination, Dubina testified that he neither explained to Schemel at that time that he was not authorized to grant permission nor did he tell him to stop. Tr. 48, 50, 51. Dubina explained on redirect that his role as an observer limited any authority to grant permission. Rather, he was to report to the AI team if he witnessed any apparent violations. Tr. 56. Dubina testified that when he confirmed that the team had entered Zone 5, he proceeded to report it to the AI team. Tr. 56. He further testified that though he did not tell Reszka or Schemel specifically that he was not an authorized representative of the Secretary, he did indirectly mention this fact to the team at one point. Tr. 55.

## **B. Testimony of James Keith McElroy**

James Keith McElroy (“McElroy”) has served as a conference litigation representative (CLR) with MSHA in the Pikeville district in Kentucky since January, 2012. Tr. 61. Prior to this position, he worked as an electrical specialist with MSHA for almost 7 years. Tr. 61. He has worked in the coal industry for over 30 years as an equipment operator, mine foreman, general mine foreman, and maintenance manager. Tr. 62. He is a certified mine foreman, a certified electrician, and a certified shot fire, and has been an authorized representative of the Secretary since December 2006. Tr. 62-63. McElroy was a member of the MSHA accident investigation team at the UBB mine. Tr. 62-63.

In his testimony, McElroy explained that the purpose of the 103(k) order was to prevent a reoccurrence of accidents, prevent additional injury to persons, and “protect and preserve any evidence that may lead us to the cause or causes of the explosion that killed 29 miners.” Tr. 64, 66. McElroy testified that the 103(k) order was modified on December 23, 2010, and that it was this modified order that was in effect on January 11 and 12, 2011. Tr. 64-65. The December 23 order stated: “103(k) Modification allowing Performance Coal to proceed with its’ [sic] investigation following the completion of investigation activities on the longwall. This order is hereby modified to allow Performance Coal to proceed with its’ [sic] investigation activities with the following stipulations: No person shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations...” Tr. 65-66; Ex.-G3. McElroy testified that this modified order forbade anyone from entering, photographing, or conducting any type of activity in Zone 5 due to MSHA’s ongoing investigation in that area. Tr. 66. According to McElroy these ongoing investigative activities in Zone 5 included ventilation tests, water spray system tests, and attempts to recover missing components and shearer bits. Tr. 67. However, in cross-examination, McElroy seemed to indicate that the water tests were completed by January 10. Tr. 86.

McElroy testified that he modified the 103(k) order for January 10 to allow entrance into Zone 5 “for this date only and travel to cross cut #48 to view the area of 21 tailgate.” Tr. 67-68; Ex.-G3. McElroy testified that he made this modification after speaking with Dubina and hearing that Dubina had given permission to enter Zone 5 on January 10. Tr. 67-68. Though McElroy could have issued a citation for the January 10 violation because Dubina did not have authority to grant permission to enter Zone 5, he did not want to give the appearance that “we were trying to set someone up to write them a ticket.” Tr. 67-68.

McElroy testified that he issued Citation No. 8249977 sometime between January 14 and 17, after receiving notice from Dubina that the team had entered Zone 5 on January 11 and 12, investigating the matter, and corroborating the information with the submitted photo logs. Tr. 70, 77, 78. McElroy also discussed the matter with Jasey Magard, whose daily logs indicate that Reszka and Chris Prater admitted to entering Zone 5 and taking photographs there. Tr. 83-84; Ex.-G8. McElroy dated the citation on the date the violation occurred, which he testified is common practice with MSHA. Tr. 77. McElroy issued the citation against D.Q. because he understood them to be an “operator” under the terms of the Act, stating that “a contractor doing a service at the mines is also defined as an operator.” Tr. 75. He admitted that D.Q. was not performing equipment service, but maintained that they were performing a “service” as defined by the Act. Tr. 88-89. McElroy testified that an outside contractor can perform services on a mine even when there is no coal production, and that investigative services were such services. Tr. 90, 92.

McElroy testified that he determined that the negligence was “high” on the citation because they knew or should have known their location, and there were no mitigating circumstances. Tr. 75. McElroy said that D.Q. had been working for Massey Energy, had been at the mine for “quite awhile,” and knew about the modifications and procedures of the 103(k) order. Tr. 75-76. Furthermore, the zones had been determined by Massey Energy, so D.Q. should have known the boundaries of each zone. Tr. 76.

On cross-examination, McElroy described the procedure that is normally followed in modifying a 103(k) order. Tr. 82-83. First, the operator would have to request permission from MSHA to enter the restricted area by at least the night before. Tr. 82. Then, MSHA would perform the modification, deliver it to the mine, and an authorized representative would be assigned to travel with the team into the restricted zone. Tr. 82-83.

McElroy testified that with regards to the system of calls from the underground team to the dispatcher, there was no MSHA representative in the room with the dispatcher and MSHA did not monitor the conversations. Tr. 137. Rather MSHA representatives would hear the page, and could pick up the phone in the MSHA trailer to listen if they chose. Tr. 138. He further testified that he has never seen a dispatcher’s log. Tr. 138-139.

### **C. Testimony of Pedro Reszka Cabello**

Pedro Reszka Cabello (“Reszka”) is an independent consultant who has worked for D.Q. Fire & Explosions since August 2010. Tr. 94. He has a Bachelor’s degree in mechanical engineering, a Master’s degree in engineering and a Ph.D. from the University of Edinburgh in Scotland in fire safety engineering. Tr. 94.

Reszka testified that D.Q. was retained by Allen Guthrie, the attorney representing Massey during the UBB investigation. Tr. 119. He stated that Dr. Schemel of Packer Engineering was originally retained to conduct the investigation for Massey in the UBB mine in June 2010, and that he was brought on some time later. Tr. 95. Between October 25, when Massey's investigation officially began, and December 23, Reszka estimated that he spent at least 10 working days in Zone 5. Tr. 95-96. Reszka testified that Zone 5 is "a critical part of the mine, and we believe many important events happened there during the accident, before and after." Tr. 96.

Reszka described the process by which he and his team would notify MSHA of where they were planning on traveling in the mine each day:

We would have a very formal meeting with the Massey people, especially Charlie Bearse and Chris Prater; and we would let them know our intentions for the week and the following day. They would either e-mail or call the MSHA representatives and let them know where we were going.

Tr. 96.

Reszka testified that on the week of January 10, Dr. Ray Bennett had come from Texas to conduct underground investigation. Tr. 97. He stated that Bennett was limited to five days of underground activities, or else he would be required to comply with the 40-hour training requirements in the regulations, so the team planned to show Bennett the "most relevant parts of the mine" on January 10, 11, and 12. Tr. 97.<sup>2</sup> On the days that Reszka was part of the team, he made the decisions where to go in consultations with Bennett. Tr. 121. Reszka knew that the UBB mine was under a 103(k) order, and understood the order to mean that they would not be able to enter Zone 5 unless they notified MSHA the prior day. Tr. 122. However Reszka stated that he had no prior experience with MSHA or with 103(k) orders upon which to base his understanding of procedures. Tr. 127.

Referring to Ex.-RC, Reszka testified that Prater sent an email to the MSHA team on January 8 informing MSHA where the teams would be traveling on January 10. Tr. 97-99. The email stated that Team 3 would be in Headgate 22 and 22 Crossover, which Reszka testified were in Zones 4 and 5. Tr. 98-99. Reszka also asserted that they had told Prater that on January 11 the team would be going to 21 Headgate, which in part is in Zone 5. Tr. 99. Reszka believed that Prater notified MSHA by phone on the night of January 10 of the intended activities for January 11, however he admitted to not being on the call or in the room when the alleged phone call was made. Tr. 99, 122-23.

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<sup>2</sup> Ironically, in *Packer Engineering, nka D.Q. Fire & Explosion Consultants, Inc.*, slip op. (August 13, 2012) (ALJ), Respondent argued that similar activities by Schemel did not require completion of the 40-hour training, arguing that he was a "scientific worker." Here, Respondent appears to be making the argument that expeditious access to Zone 5 was necessary because delay would have required Bennett to complete additional training.

Referring to Ex.-RD, Reszka testified that Prater sent an email to the MSHA team on the night of January 11 informing MSHA where the teams would be traveling on January 12. Tr. 100. The email stated that the teams would be in “HG 21/22 crossover” and in the glory hole panel, and stated that the teams “can be expected to take gas samples, dust samples, identify evidence, conduct surveying, take still photography and digital video.” Ex.-RD. Reszka testified that it was a mistake for the email not to mention that the team would be going to Tailgate 22, and that the team was authorized to go to Tailgate 22. Tr. 100. He stated that the “normal practice would be that we would let them know where we were going, and we assumed that we were authorized unless they said anything.” Tr. 100-101.

Reszka testified that the MSHA representative accompanying the team each day had the authority to prohibit them from entering an area or from an activity. Tr. 102. He further stated that he was not aware that Dubina was not an authorized representative of the Secretary, and did not know the difference between Dubina and McElroy. Tr. 102. Reszka believed Dubina was in a position to authorize or prohibit access to parts of the mine. Tr. 102. Reszka stated that on January 11, when the team entered Zone 5, Dubina did not say anything to him. Tr. 103. Each day, including January 12, Reszka would tell Dubina where the team planned to go and the areas they planned to visit. Tr. 104. Reszka testified that on January 12, when the team entered Zone 5 through Crosscut 23 or 24, he did not recall Dubina saying anything about their entering Zone 5. Tr. 105, 110-111.

Reszka disagreed slightly with Dubina’s testimony concerning where the team traveled on January 12, but did not dispute that the team entered Zone 5. Tr. 106-107. Reszka testified that he asked Dubina for permission to perform measurements at one point, but did not state if Dubina assented. Tr. 107-108. Later the team consulted the map to decide on the best route, and Reszka testified that Dubina was part of this discussion. Tr. 108-109. Furthermore, Danny Lavery told Reszka about a conversation that Lavery had with Dubina, wherein Lavery asked Dubina for permission to enter Tailgate 22 and Dubina allowed it. Tr. 111.

After a conversation on January 13 with MSHA representatives including Maggard, Reszka and Lavery met on January 14 in order to draft a statement of the events. Tr. 111-112. The statement does not discuss January 10 or 11, and Reszka testified that at the time of drafting it, he and Lavery believed that their only wrongdoing was omitting Tailgate 22 in the January 11 email that described the activities for January 12. Tr. 113-114; Ex.-RB.

#### **D. Testimony of Danny Lee Lavery**

Danny Lee Lavery (“Lavery”) works for the Marfork Coal Company at the Horse Creek Eagle Mine, but has been employed by Performance Coal at the UBB mine following the explosion. Tr. 128-129. His role at the UBB mine was to accompany the underground teams, and in this capacity he often travelled with Reszka Tr. 129.

Lavery testified that he believed Dubina to be an MSHA inspector, similar to McElroy and Maggard. Tr. 130. Lavery was not able to recall if Dubina ever stated to him that he was not an inspector or an authorized representative of the Secretary. Tr. 130. Lavery testified that on January 12, he asked Dubina if the team could go into Tailgate 22, and that Dubina said “I don’t

see a problem with that.” Tr. 130-131. Laverty explained that his reason for asking was courtesy and to ensure that the team was not doing anything wrong. Tr. 130. He further testified that if Dubina had told him not to enter Tailgate 22 because it was in Zone 5, the team would not have entered. Tr. 131.

Laverty testified that there was a requirement for the team to call out to the dispatcher, Mike Kiblinger, each hour using the mine phones, for both safety and tracking purposes. Tr. 131-132. Laverty made most of those calls, and would usually ask about barometric pressure, while providing the dispatcher with information concerning their current location, and at times stating their next intended location. Tr. 132. He testified that he had been told that MSHA was monitoring these calls, but has never witnessed their monitoring. Tr. 132. Furthermore, Laverty testified that the dispatcher was supposed to keep a log detailing the teams’ locations, but did not know if such a log was actually kept. Tr. 132-133.

### **CONTENTIONS OF THE PARTIES**

Respondent propounds several arguments for why the citation was in error and should be vacated. First, it states that D.Q. was not an independent contractor covered by the Mine Act, specifically because it was aiding in post-accident investigation and had a minimal presence at the mine. Respondent argues that performing “services” means that the independent contractor must be involved with mine construction or extraction and must have a continuing presence at the mine. Next, Respondent argues that the 103(k) order was not valid because MSHA abused its discretion in modifying the order for January 10, but not for January 11 and 12. To support this position, Respondent asserts that the Secretary has presented no reasonable distinction between the day that it modified the order and the subsequent days that it refused to modify the order. Assuming, *arguendo*, that the 103(k) order was valid, Respondent argues that D.Q. did not violate the order because D.Q. notified MSHA of its intentions to travel to Zone 5 or received approval from Dubina. Finally, Respondent argues that if a violation is found, it was not due to any negligence because D.Q. believed that MSHA was notified by email or phone of the intent to travel to Zone 5 or that Dubina had authorized such entry.

The Secretary argues that D.Q. is an “operator” as defined under the Mine Act, and that it violated the 103(k) order in effect when the investigation team traveled to, and took measurements and photographs in, Zone 5 on January 11 and 12, 2011. The Secretary contends that the Act does not limit the definition of operators to those engaged in coal extraction, because the Act comprehends independent contractors for mines even where there is no production. Furthermore, the Secretary argues that MSHA has wide latitude in issuing 103(k) orders, and that it was well within MSHA’s authority to issue such orders in Zone 5 of the UBB mine following the explosion that killed 29 miners and seriously injured two others. The modification of the 103(k) order for January 10 was not an abuse of discretion, the Secretary argues, because MSHA believed that the January 10 entry into Zone 5 may have been the result of a miscommunication between Schemel and Dubina.

The Secretary argues that the Respondent did not receive permission to access Zone 5 and did not even provide the minimal notice that it argues was required of them. Specifically, the Secretary argues that the Respondent failed to present sufficient evidence of the alleged phone

call to MSHA that gave notice on January 10, or the call's contents, and the email on January 11 did not indicate that the team intended to travel to Zone 5. Dubina was an observer and not an authorized representative of the Secretary, therefore he did not have any authority to grant access to Zone 5 or modify the 103(k) order. The Secretary disagrees with Respondent's description of an "informal" notice system for modifying 103(k) orders and suggests that D.Q. violated the order by not receiving proper modification of the order prior to entering Zone 5.

Furthermore, the Secretary asserts that there was no evidence that MSHA modified the 103(k) order for January 11 and 12, meaning that the team was forbidden from traveling to, or perform investigations in, Zone 5. The Secretary argues that MSHA's determination of high negligence was warranted in this instance because Reszka and Schemel knew or should have known of the violative condition or practice, and there are no mitigating circumstances. The Secretary contends that D.Q. had spent considerable time in this area of the UBB mine, and was traveling with maps, indicating they knew their location when they entered Zone 5. The Secretary suggests that the proposed civil monetary penalty of \$112.00 is too low to serve as a deterrent and proposes an increase of the fine to \$1,000.00.

## **FINDINGS AND CONCLUSIONS**

### **I. Was D.Q. an "operator" under the Act?**

The Mine Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). Furthermore, MSHA regulations define "independent contractor" as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine." 30 CFR § 45.2(c). Respondent argues that D.Q. is not an independent contractor under the Act because it was performing no services in the mine. Relying primarily on the two-pronged test developed in *Old Dominion Power Co. v. Donovan, Sec'y of Labor, FMSHA and FMSHRC*, Respondent argues that an independent contractor must be engaged in either mine construction or the extraction process, and must have a continuing presence in the mine, in order to qualify as an independent contractor that performs services. 772 F.2d 92, 96-97 (4<sup>th</sup> Cir. 1985) (Fourth Circuit held that electric utility was not "operator" when their presence at the mine consisted in once a month trip to electrical substation located adjacent to a mine-access road and segregated by a locked chain link fence for purposes of billing and equipment servicing.) Respondent asserts that D.Q.'s investigative activities, which involved on-site investigation and off-site analysis, do not qualify as services under this two-pronged approach. Distinguishing the facts of *Old Dominion*, the Secretary asserts that an independent contractor assisting in an investigation is providing "services" under the Act.

In *Otis Elevator*, the Commission limited *Old Dominion* to its facts in holding that an elevator repair company that provides maintenance for mine elevators was an independent contractor providing services under the Act. *Otis Elevator Co.*, 11 FMSHRC 1896 (Oct. 1989), *aff'd* 921 F.2d 1285 (D.C. Cir. 1990). The Commission interpreted *Old Dominion* as limited to scenarios where the employees "rarely, if ever went on mine property and hardly, if ever, came into contact with mining hazards." 11 FMSHRC at 1898. The Commission set forth a two-

pronged test to determine whether an independent contractor was an “operator” under the Act. The first part of the test examines “the independent contractor’s proximity to the extraction process,” while the second part looks at “the extent of its presence at the mine.” 11 FMSHRC at 1902. As part of the first prong, the Commission examines whether the contractor’s activities were “sufficiently related to the overall extraction process.” 11 FMSHRC at 1902.

Applying this two-pronged approach, the Commission held that an elevator maintenance company was an “operator” under the Act, when employees spent an average of 1.5 hours per week in the mine inspecting elevators used to transport miners in and out of the mine. 11 FMSHRC at 1897, 1898. The Otis Elevator employees worked “in areas where miners normally worked and travelled, and they were exposed to many of the same hazards as the [] miners.” 11 FMSHRC at 1902. Even though the Otis employees were not engaged in coal extraction or mine construction, their inspection of the transport elevators affected the safety on other miners. 11 FMSHRC at 1902.

The Commission affirmed the *Otis Elevator* approach in *Joy Technologies*, and specifically rejected the narrower test proposed by *Old Dominion*. 17 FMSHRC 1303 (Aug. 1995), *aff’d* 99 F.3d 991 (10th Cir. 1996), *cert. denied* 520 U.S. 1209 (1997) (holding that company was “operator” when its employees spent six days in 2.5 month period at the mine, and were exposed to similar hazards as other miners, for the purpose of maintaining machinery that affected the safety of other miners.) The Tenth Circuit affirmed the Commission’s holding, but stated that it “decline[d] to adopt either the *Old Dominion* approach or the Commission’s diluted version of that approach.” 99 F.3d 991, 999. Instead, the Tenth Circuit articulated a clear meaning approach, stating:

Rather, we think the definition of “operator” in section 3(d) of the Mine Act is clear and means just what it says – an operator includes “any independent contractor performing services ... at [a] mine.” Although Congress may have been specially concerned with contractors who are engaged in the extraction process and who have a continuing presence at a mine, section 3(d) by its terms is not limited to these contractors. Nothing in the legislative history shows a “clearly expressed legislative intention” to the contrary that would allow us to “question the strong presumption that Congress expresse[d] its intent through the language it cho[se].”

99 F.3d at 999-1000 (citations omitted).

In the instant case, D.Q. was retained by the Performance Coal attorneys in June 2010 to conduct an investigation of the causes of the explosion of the UBB mine. Tr. 95. At that time, D.Q. investigators began traveling underground accompanying the MSHA teams. The Massey investigation began on October 25, 2010, and the D.Q. investigators spent a considerable time in the mines during the operator’s investigation. Tr. 95. Reszka estimated that between October 25 and December 23, when the 103(k) order was modified, he personally spent at least 10 working days in Zone 5 alone. Tr. 95-96.

The D.Q. team traveled throughout the mine, taking photographs, measurements, and compiling data for the purposes of investigating the causes of the explosion. In this capacity, they examined the timbers, roof bolts, stoppings, conveyors, supply cars, a monorail, electronic motor covers, and closures. Tr. 27, 32-33, 34-35, 36. The team also took measurements and photographs of many of these areas, traveled to areas where miners normally travelled, and were exposed to hazards to which miners would be exposed. Tr. 21-22, 36, 39, 121, 125.

The first part of the analysis to determine whether D.Q. was an “operator” under the Act examines the independent contractor’s proximity to the extraction process. This prong does not require the contractor to be directly involved in coal extraction, but rather requires that the contractor’s activities be “sufficiently related to the overall extraction process.” *Otis Elevator*, 11 FMSHRC at 1902. The Commission has found this prong satisfied where the contractor maintained elevators that miners used (*Otis Elevators*), sold and maintained equipment that miners used (*Joy Technologies*), cleaned and plugged gas wells, “which penetrated the mine atmosphere,” (*Lang Brothers, Inc.*, 14 FMSHRC 412, 416 (Sept. 1991)), was a “transportation broker” that hauled coal away from the mine (*Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1358 (Sept. 1991)), and when the contractor was an engineering firm engaged in “engineering support, mapping, and surveying services” (*Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1269 (Oct. 2010)). Alternately, the Seventh Circuit reversed the Commission in *Northern Illinois Steel Supply Co. v. Sec’y of Labor, FMSHA and FMSHRC*, in holding that an independent contractor that delivered steel later used by the operator for catwalks, handrails, and other structures, was too distant from the extraction process to be considered an operator under the Act. 294 F.3d 844 (7th Cir. 2002).

D.Q.’s activities were sufficiently related to the overall extraction process. As noted above, the Commission has made clear that under this analysis, the independent contractor need not participate in actual coal extraction to be related to the extraction process. Respondent asserts that this was “not a normal mining situation,” presumably because there was no ongoing coal or mineral extraction. Resp. Br. 8. However, the Secretary is correct in asserting that the Mine Act does not limit the definition of operators or independent contractors to producing mines. Sec’y Br. 15. Section 3(h)(1) of the Act defines “mine” as including, “lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits.” 30 U.S.C. § 803(h)(1) (emphasis added); see also *Musser Engineering, Inc.*, 32 FMSHRC at 1268 (interpreting this provision to include services performed in a mine several years prior to any coal extraction).

*Musser Engineering* provides a close analogy to this case. In *Musser Engineering*, the Commission held that an engineering firm that assisted in preparing the original permit application and maps for a mine was an “operator” under the Act. Similar to the Respondent here, Musser argued that much of its work in preparing the permit and maps was performed off-site. 32 FMSHRC at 1269. However the Commission found that Musser’s activities examining the mine for its offsite work were sufficiently related to the extraction process. The Respondent’s argument that contractor “services” must be either construction services or “equipment installation, equipment service or repair, material handling, drilling or blasting” run counter to the Commission’s holding in *Musser Engineering*. Resp. Br. 9. Indeed, D.Q.’s investigative

services were in many ways similar to those provided by Musser. D.Q. spent considerable time in the mine taking measurements, photographs, and performing examinations, which it then took offsite for analysis. D.Q. was similarly in a mine that was not engaged in the active extraction of coal. And, as Respondent's counsel made clear at hearing, D.Q. was providing a service that was required by MSHA regulations, meaning that they were essential to operating a mine. Tr. 89. As Judge Lesnick wrote in finding that Musser Engineering's services were essential to the mining process, "The Mine Act makes no distinction between activities done to meet operational requirements of the mine and those done in a direct effort to meet specific criteria of the Mine Act." *Musser Engineering, Inc.*, 28 FMSHRC 699, 714 (July 2006) (ALJ).

The second prong of the *Otis Elevator* analysis requires the contractor have more than *de minimis* or infrequent contact with the mine. 11 FMSHRC at 1902. The Commission has found this requirement satisfied in instances where the contractor spent six days in the mine in a 2.5 month period, 17 FMSHRC at 1308, seven to ten days total on a continuing basis, 14 FMSHRC 413, 420, and even as little as 1.5 hours per week in the mine. 11 FMSHRC 1896, 1897. The full extent of how much time D.Q. spent in the mine was not testified to at the hearing, however it is clear that D.Q. was in the mine frequently. Reszka testified that D.Q. had been traveling into the mine since at least June, 2010. Tr. 95. In the two months between October 25 and December 23, Reszka testified that he had spent at least 10 working days in Zone 5. Tr. 95-96. Add to this estimate the three days at issue in this hearing that the team spent at Zone 5 in January, and the result is that D.Q. spent at least 13 days in Zone 5 in a 3 month period.<sup>3</sup> Furthermore, this estimate does not even include the time that Reszka and others in the D.Q. investigation team spent in other areas of the mine. Under either the *Otis Elevator* or *Joy Technologies* standards, I find D.Q. to be an "operator" under the Act.

Lastly, Respondent's mention that D.Q. was not hired directly by Performance Coal, but rather by a law firm representing Performance Coal, makes no difference in determining that D.Q. was an operator. The definition of "independent contractor" defines it as a party "that contracts to perform services or construction at a mine," and does not provide a specific requirement that the contract be *with* the mine. 30 C.F.R. § 45.2(c). The legislative history of the Mine Act further supports the position that independent contractors need not have contracts with the mine. A Senate report accompanying the Act stated,

Similarly, the definition of mine 'operator' is expanded to include 'any independent contractor performing services of construction at such mine. 'It is the Committee's intent to thereby include individuals or firms who are engaged in construction at such mine, *or who may be under contract or otherwise, engaged in the extraction process for the benefit of the owner or lessee of the property.*

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res. , *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 3414 (emphasis

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<sup>3</sup> While not included in the record, I do note that in a recent Order for Partial Summary Decision issued by Judge Miller, she found that Schemel accompanied MSHA investigators into the UBB mine for 25 days between June 2010 and October 6, 2010. *Packer Engineering, nka D.Q. Fire & Explosion Consultants, Inc.*, slip op. (August 13, 2012) (ALJ).

added). See also *United Energy Services, Inc. v. FMSHA*, 35 F.3d 971, 976 (4th Cir. 1994) (interpreting legislative history to mean that contract not required with mine).

Citing the Commission in *Joy Technologies* and *Bulk Transportation Services*, the Tenth Circuit stated, “FMSHRC, in applying the statute, has consistently stated that “[o]ur focus is on the actual relationships between the parties, and is not confined to the terms of their contracts.” 99 F.3d at 996 (citations omitted). It is of no moment that D.Q.’s contract is with the attorneys for Performance Coal rather than the coal company because D.Q.’s services were for the benefit of, and in coordination with, Performance Coal.

## **II. Was there a Violation of the 103(k) Order?**

In the event of a mine accident, Section 103(k) of the Mine Act authorizes a mine inspector to “issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine.” 30 U.S.C. § 813(k). As Judge Koutras explained in *Southern Ohio Coal Co.*, “Section 103(k) orders are typically issued by MSHA inspectors to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate the investigation of accidents.” 13 FMSHRC 1783, 1798 (Nov. 1991) (ALJ). The Senate Report accompanying the Mine Act amendments of 1977 articulate the importance of preserving the scene of an accident in order to ensure the safety of miners and prevent future accidents:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person; The grant of authority in Section 104(i) to take appropriate actions and in Section 104(j) to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders. Further, the circumstances surrounding the accident may be such that [an] order necessary to preserve evidence may be appropriate. It is intended that by preventing possible destruction of evidence, the Secretary may be better able to determine the cause of the accident and thereby prevent the future occurrence of a similar accident.<sup>4</sup>

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res. , *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 3429

Pursuant to this authority, an MSHA investigator issued a 103(k) order following the UBB mine explosion that killed 29 miners and injured two. The order was modified on 12/23/2010 to allow Performance Coal to proceed with its investigation, subject to a number of stipulations. Ex. G3. The first stipulation stated, “No persons shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations.” Ex. G3. The majority of the remaining stipulations concern safety or preservation

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<sup>4</sup> Section 104(j) of the Mine Act is currently 103(k).

of evidence issues. The December 23 order was in effect on January 11 and 12, 2011, when D.Q. investigators went to Zone 5 to take photographs, measurements, and perform their examination. Dubina and Reszka testified that D.Q. was not conducting examinations as required by the regulations, which would have provided the only allowable reason to enter Zone 5. Tr. 27, 35, 122.

Respondent asserts that the December 23 order was not in effect because “permission to enter Zone 5 could be granted in two ways: by advance notice to the MSHA investigative team by email or telephone call or by permission of the MSHA personnel who accompanied the investigative team.” Resp. Br. 11. To support this argument, Respondent cites only to Reszka’s testimony, where he stated that he did not know the difference between Dubina and an authorized representative and that his “understanding was that they [MSHA] had the authority to tell us not to do something or not to go somewhere.” Tr. 96, 102, 122.<sup>5</sup> Though Reszka is a fire safety expert, he made it abundantly clear that he had no specific knowledge or expertise with mine safety protocols or procedures when he testified in cross-examination that he had no prior experience with MSHA or with 103(k) orders. Tr. 127. Though Respondent repeatedly refers to the informal procedures by which a 103(k) order could be modified, he produced no witnesses that were so told by the MSHA investigative team and no document that described this informal procedure. Without any credible evidence in the record that this informal procedure was the proper way to modify a 103(k) order, Respondent’s presentation of emails or telephone calls are of no consequence.

Assuming, *arguendo*, that all that was required of the operator to comply with the 103(k) order was to inform the MSHA investigative team the night before by telephone or email of their intention to go to Zone 5, the evidence at hearing does not even show compliance with these informal procedures. Respondent presented only Reszka to testify that it was his “understanding...that there was a phone call” on the night of January 10 telling MSHA where the D.Q. investigative team intended to go the following day. Tr. 99. However, Reszka admitted on cross-examination that he was not in the room or on the call for the alleged phone call, and did not know what was said during the course of the call. Tr. 123. Furthermore, with regard to the email that Prater sent on the night of January 11 concerning where the teams would go on January 12, it omits reference to Tailgate 22. Ex.-RD. The team went to Tailgate 22, which is in Zone 5, on January 12 without making MSHA aware. Tr. 22. Lavery testified that he asked Dubina, who was not an authorized representative of the Secretary, whether the team could proceed to Tailgate 22, and Dubina responded “I don’t see a problem with that.” Tr. 130-131. Dubina did not recall this conversation, but admitted under cross-examination that that turn of phrase was not “untypical” of him. Tr. 135-136.

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<sup>5</sup> Respondent also cites to the cross-examination of Dubina to support this claim. However, this exchange did not concern entering Zone 5 or modifying the 103(k) order. Rather, as part of the December 23 order, the operator was required to inform the MSHA investigative team of their “investigation activities planned for the following day.” Ex.-G3. This is indicative of a flaw running through much of Respondent’s argument wherein Respondent conflates the procedures for complying with the December 23 order by informing MSHA of its plans for the following day with procedures for modifying the 103(k) order in order to be permitted to travel to Zone 5.

Contrary to the informal procedures for modifying a 103(k) order that Respondent repeatedly evokes, McElroy, who is an authorized representative knowledgeable about 103(k) orders, testified to the proper procedures for modifying such orders. Tr. 82-83. He stated that in order for a 103(k) order to be modified, the operator must request modification by at least the night before, MSHA must perform the modification, deliver the modification to the mine, and assign an authorized representative to escort the operator for the day of the modification. Tr. 82-83.

On January 11, 2011, Dubina testified that the D.Q. team traveled from Zone 3 down Entry number 2 to Crosscut 24, which is in Zone 5. Tr. 29. While in crosscut 24, they examined a supply car, a monorail, took several measurements, and then proceeded to Entry number 1. Tr. 27, 29, 121; Ex.-G6. Furthermore, the team took nine photographs of equipment within Zone 5. Tr. 72; Ex.-G7.

On the night of January 11, at 10:19 p.m., Prater sent an email to members of the MSHA investigative team stating:

3 teams for tomorrow

2 teams on HG 21 / 22 crossover

1 team working in the glory hole panel

Teams can be expected to take gas samples, dust samples, identify evidence, conduct surveying, take still photography and digital video.

Ex.-RD. Respondent argues that this email constituted the extent of the required notice to enter Zone 5. Resp. Br. 12-13. However the December 23 order that was in effect required Performance Coal to submit daily a “detailed description of the investigation activities planned for the following day.” Ex.-G3. The email appears to have been sent in compliance this stipulation, rather than as a request to modify the 103(k) order.

On January 12, 2011, the D.Q. team traveled through the North Glory Mains at Entry No. 2 into the Headgate area. Tr. 33, 105. From there, the team went into Zone 5 by through Crosscut 24. Tr. 35, 105. They traveled through Crosscuts 25 and 26, went to the longwall at Entry 26, and under Shield number 1. Tr. 36. Then they went up to Tailgate 22, to the face area, and then back to Entry No. 3. Tr. 36. While in these areas, the team conducted measurements, examined roof bolts, timbers, and stoppings, and took 26 photographs in Zone 5. Tr. 34, 35, 36, 37; Ex.-G7.

Dubina and Reszka disagreed slightly in their accounts of the precise route on January 12, however there was no disagreement that the team spent considerable time in Zone 5, and while there conducted measurements and took photographs. These facts concerning D.Q.’s entry and activities in Zone 5 on January 11 and 12 are largely undisputed. I find that the December 23 order was in effect on these days, and D.Q.’s activities were in violation of the prohibitions stated in the order.

MSHA bears some of the responsibility for the confusion in this matter for sending Dubina to observe the D.Q. team. Dubina is not an authorized representative of the Secretary, and his role appeared to be limited to observing and reporting back to the MSHA investigative team. On at least one occasion, he prohibited the D.Q. team from proceeding to an area because he felt the area was unsafe. And on at least one occasion, when asked if the team could proceed to an area within Zone 5, he said that it was alright. Dubina testified that he did not have a map and therefore did not know that the area was in Zone 5. Furthermore, this occurred on January 10 – a day that McElroy retroactively modified the 103(k) order to account for this confusion.

Respondent places the blame on MSHA for the overall confusion over Dubina's role, stating that though Dubina never stated that he was an authorized representative, he failed to articulate that he lacked authorization. This follows Respondent's general trend of placing the burden on MSHA for failing to stop the team from advancing into Zone 5. Respondent faults Dubina for never stating that he was not an authorized representative, rather than D.Q. personnel for simply assuming that Dubina had such authority. Resp. Br. 4. Respondent faults MSHA for not monitoring calls between the D.Q. team and the Performance Coal dispatcher, so that MSHA would have been aware that D.Q. was in Zone 5. Resp. Br. 5. Respondent faults Dubina for not stopping the D.Q. team from entering Zone 5 because Reszka and Laverty testified at hearing that they would have complied with such instructions. Resp. Br. 12, 14. Respondent places the burden on the Secretary for not producing specific evidence to dispute Reszka's vague testimony concerning an alleged telephone call on January 11, when Respondent has not produced any credible evidence that such call occurred. Resp. Br. 16. And Respondent faults MSHA for its "failure to disagree" with the plans allegedly communicated by email and telephone. Resp. Br. 14. This line of argument, where MSHA is repeatedly faulted for failing to stop the operator from entering Zone 5 and violating the 103(k) order, misunderstands the nature of these orders. When MSHA issues 103(k) orders, it is the operator's responsibility to comply with the restrictions and protocols articulated in the order. MSHA is not further responsible for stopping the operator from violating the order *before* such violations occur. Section 104(a), under which Respondents here are cited, authorizes MSHA to issue a citation *after* a violation occurs. 30 U.S.C. § 814(a). If Respondent's logic concerning MSHA's affirmative duty to stop operators prior to committing a violation was correct, then § 104(a) would be moot.

### **III. No Abuse of Discretion**

Respondent further argues that MSHA abused its discretion by not modifying the 103(k) order for January 11 and 12. Respondent provides two reasons why the failure to modify the order was an abuse of discretion: first, it argues that the timing of the citation and modifications indicate that they were unreasonable; second, that there should have been no 103(k) order in effect in January because MSHA had by that time completed its tests in Zone 5.

With regards to timing, Respondent argues that McElroy abused his discretion in modifying the 103(k) order to allow access to Zone 5 on January 10, but not modifying the order to also include access on January 11 and 12. Resp. Br.17. The Commission has jurisdiction to review 103(k) orders under an abuse of discretion standard. *See e.g., Emerald Coal Resources*, 30 FMSHRC 122, n.1 (Jan. 2008) (ALJ), *citing Eastern Associated Coal Corp.*, 2 FMSHRC

2467 (Sept. 1980). “The Commission has noted that ‘abuse of discretion’ has been found when ‘there is no evidence to support the decision or if the decision is based on an improper understanding of the law.’” *Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996).

McElroy retroactively modified the 103(k) order on January 17 to allow Performance Coal to enter Zone 5 on January 10 only. Tr. 83; Ex.-G3. McElroy testified that he made the modification after speaking with Dubina and being told that Dubina had given D.Q. permission to enter Zone 5 on January 10. Tr. 67-68. He explained that though Dubina was unauthorized to grant such permission for D.Q. to access Zone 5, McElroy recognized that some confusion had arisen and did not want to give the false impression that MSHA was “trying to set someone up to write them a ticket.” Tr. 67-68. McElroy further testified that he issued the retroactive modification and citation sometime between January 14 and 17, after he investigated the matter. Tr. 70, 77, 78. MSHA has broad discretion to issue orders and enforce them, and I find McElroy to have articulated a reasonable explanation for his decisions.

Respondent’s second argument that MSHA abused its discretion is that MSHA had completed its tests in Zone 5 by January, and that if any additional evidence were found Dubina or the UMWA representative could have retrieved it. The Secretary responds that MSHA had not completed its tests and investigation in Zone 5, and that the order was still in effect pursuant to MSHA’s duty to “properly and thoroughly investigate the cause of this tragic accident and to assiduously preserve evidence.” Sec’y Reply Br. 3.

At hearing, McElroy testified that there were several tests ongoing in Zone 5, including ventilation and water systems test. Tr. 66-67. Furthermore, he testified that MSHA was still searching for the remote control shearer and shearer bits, which had not yet been recovered and were believed to be in Zone 5. Tr. 67. On cross-examination, McElroy acknowledged that the water tests may have been completed by January 10, but contrary to Respondent’s Brief did not state that the ventilation tests were complete. Tr. 86. Reszka testified that he believed that MSHA’s ventilation and water tests were both completed in late December 2010. Tr. 114-115. He testified to this conclusion concerning the completion of the water test because he was not at the mine during Christmas, and recalls being absent for that test. Tr. 114-115. On cross-examination, Reszka admitted that he was not actually privy to any MSHA conversations and did not know what testing MSHA was planning for Zone 5. Tr. 120. In addition to ongoing tests, Dubina testified that on January 10, the team came upon an area with a large roof fall and he would not allow the team to go all the way up to the shearer because the roof posed a significant safety danger. Tr. 21-22.

MSHA has broad discretion to issue 103(k) order following a mine accident. *Performance Coal Co.*, 32 FMSHRC 1352, 1356-57 (Sept. 2010) (ALJ); *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ); *Miller Mining Co., Inc. v. Secretary of Labor, FMSHA*, 713 F.2d 487, 490 (9th Cir. 1983) (“Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons.”) The record contains uncontroverted evidence that MSHA was still searching for the remote control shearer and shearer bits in Zone 5. MSHA also maintains that it was conducting ongoing tests, on at least the ventilation systems in Zone 5. Furthermore, there were significant safety risks in Zone 5, as is

evidenced by Dubina's restriction on traveling to an area with a bad roof. Any one of these safety or investigative reasons is sufficient to warrant the continuation of the 103(k) order.

#### **IV. Level of Negligence**

MSHA regulations define negligence as, "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). McElroy determined that D.Q.'s violation of the 103(k) order was the result of "high" negligence. Ex.-G1. High negligence will be found when "[t]he operator knew or should have known of the violative conduct or practice, and there are no mitigating circumstances." *Newtown Energy, Inc.*, 2012 WL 1564583 (April 2012) (ALJ). Respondent argues that if the 103(k) order was violated, it was not the result of high negligence because D.Q. did not act negligently. These arguments, like many of the others, rest primarily on Respondent's repeated claim that compliance with the order required only informal notice to MSHA by email or telephone. The Secretary responds that Performance Coal created the zone systems and D.Q. personnel knew that there was a 103(k) order that limited access to Zone 5. Reszka testified that he always traveled with maps, and he had spent significant time in Zone 5 prior to the December 23 order. This is the same reason McElroy provided at hearing as to why he evaluated D.Q.'s conduct as resulting from high negligence. Tr. 75-76.

There is no contention that D.Q. personnel did not know they were traveling to Zone 5. Rather, Respondent argues that it complied with the 103(k) order by informing MSHA by email or telephone that it planned to enter Zone 5, or seeking approval from Dubina to enter Zone 5. For the reasons above, I do not find D.Q.'s belief in this informal procedure to be a mitigating circumstance. The prohibitions and stipulations of the 103(k) order were clear on its face, and Respondent offered no evidence of why the belief in the informal modification procedures was reasonable. Accordingly, I find that D.Q. acted with high negligence when it violated the 103(k) order.

#### **V. PENALTY**

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

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

In Citation No. 8249977, MSHA assessed a proposed civil penalty of \$112. The Secretary requests that the penalty be increased to \$1,000 for this violation, in order to have a deterrent effect. The legislative history of the Mine Act discusses the important deterrent effect of civil penalties:

To be successful in the objective of including [sic] effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.

S. Rep. No. 95-181 at 90 (1977). The Commission has recently affirmed this position in holding that judges may consider the deterrent effect purposes of the Mine Act's statutory penalty scheme in assessing penalties. *Black Beauty Coal Company*, 34 FMSHRC \_\_ (Aug. 2012). "Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act...However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act." *Spartan Mining Co.*, 2008 WL 4287784 at \*21 (FMSHRC) (August 2008); *see also Signal Peak Energy, LLC*, 2012 WL 2499036 (ALJ) (June 2012).

Perhaps a lesson to be drawn from this case is that small, independent contractors with no significant violation history hired by attorneys representing mine operators can, without fear of incurring large fines or other significant consequence, violate protective orders issued following an accident occurring in a mine. Certainly, a 104(a) citation with a penalty of \$112.00 is no deterrent.

I have fully considered all six statutory penalty criteria and assess a civil penalty in the amount of \$1,000, as proposed by the Secretary. D.Q. is a small operator with no history of violations. There is no evidence that the size of this penalty will have any effect on the contractor's ability to continue in business and, therefore I conclude that the increased assessment will not. There is also no evidence to support assessment of an even higher penalty amount.

As discussed above, D.Q. acted with high negligence. The investigative team carried and consulted maps and knew at all times that they were entering and conducting activities in Zone 5. They knew this area had safety hazards, and was an ongoing site for MSHA investigation following the UBB mine explosion. Furthermore, they knew of the prohibitions in the December 23 103(k) order. They chose to disregard this order; no modification of the (k) order allowing entry into zone 5 was communicated to them prior to January 10, or either of the days following. In doing so, they not only placed themselves at risk by traveling to areas of the mine that were damaged from the explosion, but also placed at risk the investigation of the causes of the mine disaster. D.Q.'s entering and conducting investigative activities in Zone 5 in violation of the (k) order was a grave violation. Twenty nine miners died and two were seriously injured from the UBB mine disaster, and the 103(k) order was in place in part to preserve crucial evidence

necessary for MSHA's investigation. But for the small size of D.Q. and lack of a violations history, the gravity and negligence established by D.Q.'s repeated behaviors in disregard of an important 103(k) order issued to protect the scene of one of the worst mine disasters in recent years would suggest a much higher penalty amount.

### **ORDER**

For the reasons set forth above, the citation is **AFFIRMED**, as indicated. D.Q. Fire & Explosion Consultants, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,000 within 40 days of the date of this decision.<sup>6</sup>

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

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/mzm

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<sup>6</sup> 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

# **ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004-1710  
Telephone No.: 202-434-9950  
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August 31, 2012

SECRETARY OF LABOR, MSHA, on	:	TEMPORARY REINSTATEMENT
behalf of SEAN TADLOCK,	:	PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2012-511-D
	:	VINC-CD 2012-01
v.	:	
	:	
	:	
BIG RIDGE, INC.,	:	Willow Lake Portal
Respondent	:	Mine ID 11-03054

**ORDER VACATING ORDER OF TEMPORARY REINSTATEMENT**

This matter came 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 (Mine Act), 30 U.S.C. § 815(c)(2). A hearing on the application was held in Benton, Illinois on May 10, 2012, and a Decision and Order of Temporary Reinstatement was entered on May 16, 2012, pursuant to which Tadlock was economically reinstated to his former position.

By letter dated May 18, 2012, the Secretary informed Tadlock that, after careful review of the information gathered during an investigation of his complaint, the Secretary's Mine Safety and Health Administration determined that Big Ridge did not violate section 105(c) of the Mine Act and that the discrimination complained of did not occur. Tadlock then proceeded to file an action on his own behalf with the Commission, pursuant to section 105(c)(3) of the Act. The temporary reinstatement order has remained in effect.

On August 14, 2012, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *North Fork Coal Corp. v. FMSHRC*, No 11-3398 (6th Cir. Aug. 14, 2012), reversing a Commission decision, and holding that upon the secretary's determination that discrimination in violation of the Mine Act has not occurred, a miner is no longer entitled to temporary reinstatement. On August 15, 2012, Respondent filed a motion to dissolve the temporary reinstatement order. The Secretary filed an opposition, and a telephonic hearing on the motion was held on August 27, 2012.

Respondent's motion to dissolve the temporary reinstatement order is grounded on the Sixth Circuit's decision in *North Fork*. The same issue is pending before the Seventh Circuit in *Vulcan Construction Materials, LP v. FMSHRC*, No. 11-2860, which was argued on February 10, 2012. There is no indication as to when a decision will be rendered in that case. While the *North Fork* decision is not binding, and a decision on the motion could be deferred until the Seventh Circuit issues a decision, the reasoning of the majority and concurring opinions in *North Fork* is persuasive, including Judge Sutton's discussion of the general principles for granting interim relief.

Although, Big Ridge made the decision to provide economic reinstatement instead of reinstatement on the job site, it has no remedy to recover wages and the cost of benefits provided to Tadlock if it prevails in his individual action. As Judge Sutton observed, the lack of a basis for recovery by a mining company might implicate due process concerns. *North Fork*, slip op. at 16 (Sutton, J., concurring). In contrast, Tadlock, who has represented in his section 105(c)(3) case that he has obtained other employment, would be entitled to the remedy of back-pay if he succeeds in his action.

### **ORDER**

Based upon the foregoing, the Decision and Order of Temporary Reinstatement entered on May 16, 2012 is hereby **VACATED**.

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

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