

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2016

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

v.

NEW NGC, INC.,
Respondent.

NEW NGC, INC.,
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-155
A.C. No. 41-02822-368186

Mine: Harper Quarry

CONTEST PROCEEDING

Docket No. CENT 2015-37-RM
Citation No. 8854429; 10/08/2014

Harper Quarry
Mine ID 41-02822

DECISION

Appearances: Maria C. Rich, Conference and Litigation Representative,
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Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor (Secretary), acting through the Mine Safety and Health Administration (MSHA), against New NGC, Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The single citation, contested at hearing, involves alleged uncontrolled ground control hazards on a gypsum highwall at the Respondent's Harper Quarry surface mine site.

At hearing, MSHA Inspector James Whetsell testified for the Secretary. New NGC Quarry Manager Henry Wilson testified for the Respondent. Professional Mining Engineer John Head also presented expert testimony for the Respondent. For the reasons that follow, Citation No. 8854429 is **AFFIRMED** in full with the exception of the assessed negligence level. Due to mitigating circumstances I find the negligence level to be low rather than moderate thus the civil monetary penalty shall be reduced from \$138 to \$100.

II. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

New NGC operates the Harper Quarry surface gypsum mine eighteen miles northwest of Harper, Texas. Sec'y Ex. 4-1. At the time of the inspection at issue Harper Quarry had six miners, including the quarry manager, working on 400 acres. Tr. 73. They were actively mining a 250 foot east-west cut on the north wall. Tr. 74. The mining process involves miners stripping overburden then blasting to extract gypsum from the cut. *Id.* The miners drive Cat 740 articulated haul trucks along a haul road at the base of the highwall to remove the gypsum to a processing area. Tr. 24, 37. The haul road at issue was 200 feet long and 15 feet wide in the north-east section of the Quarry. Tr. 24. It was abutted by a small island to the west and a 19-20 foot tall highwall to the east. *Id.*; Sec'y Ex. 5.

On October 8, 2014, Inspector Whetsell conducted an inspection of the east highwall and determined that it posed a hazardous ground condition to people using the 15 foot wide haul road at the bottom of the highwall. Tr. 24; Sec'y Ex. 1-1, Resp. Ex. R-A. He made his determination based on seeing vertical and horizontal cracks in the rock. Tr. 17, 22; Sec'y Ex. 1-1. Both parties presented testimony stating that fractures like the ones here could be a sign of loose rock. Tr. 17, 107. Loose rocks are at risk of falling. Tr. 26, 108. Inspector Whetsell opined that the fractured rock he observed were in his estimation upwards of 600 lbs. Tr. 26. Falling rocks of that size can result in serious injury or a fatality. Tr. 40.

The east highwall at issue was approximately twenty feet in height. Tr. 18, 30 & 97. The parties disagree about the slope of the highwall. Tr. 44, 89; Resp. Ex. E. If the highwall is sufficiently sloped and low, then falling rocks are more likely to roll and "unlikely to impact the driver of the truck." Tr. 105; Resp. Ex. E. If the loose rocks are on a more vertical and tall face of the highwall, they are more likely to fall and bounce making their landing unpredictable. Tr. 27. Inspector Whetsell maintained sections of the wall in question were near vertical. Tr. 44, 52. He further testified that rocks on the highwall might either roll, or fall and bounce. Tr. 27. The Respondent's engineering expert Mr. Head testified that the angle of the slope was closer to 60-70 degrees. Resp. Ex. E. Mr. Head also submitted in his report that the rocks were at most fourteen feet from the ground. *Id.* Taking these two facts together, he concluded the rocks could

only roll down the wall, not fall or bounce. Tr. 96. Inspector Whetsell and Mr. Head both agree that no matter how a rock separates from the highwall, it could potentially pose an obstacle to a haul truck or be a serious hazard to a pick-up truck. Tr. 34, 41, 99, 110.

The Respondent contends that cracks in the rock at the Harper Quarry mine site are not indicative of loose rocks because it is a gypsum mine. Tr. 95-96. Quarry Manager Wilson and Mr. Head testified that large cracks are not unusual for gypsum and only if the cracks move or grow do they pose a potential hazard. Tr. 86, 96, 106. Mr. Wilson testified that in his observations he had not seen the cracks at issue grow any larger during the weeks before the citation was issued. Tr. 86. Furthermore, Mr. Wilson maintained that the time it took to perform the citation abatement is evidence that the rocks were not loose. Tr. 82. Inspector Whetsell testified that there are many factors, not just the looseness of the rock, that could affect how long it takes to scale a highwall, and the time between issuing and terminating the citation was not excessive. Tr. 33, 63. Based on Mr. Wilson's testimony, it took 30-45 minutes to scale the hazardous portions of the highwall. Tr. 81-82. According to Citation No. 8854429, two hours and twenty five minutes passed between issuance and termination of the citation. Tr. 32; Sec'y Ex. 1-1. Neither Mr. Wilson nor Inspector Whetsell were present at the time of abatement. Tr. 61-62, 86. Whether or not the abatement took an excessive amount of time depends on how much of the highwall was scaled. Tr. 33, 82.

The exact size and amount of highwall that needed to be scaled is indeterminable because the dimensions relied upon are based solely on photos, and visual inspection by the Quarry Manager and the Inspector. Tr. 29, 102. The Respondent contends the loose rocks were only 12-14 feet high up on the wall pursuant to Mr Head's estimation and only a 20 foot or so length needed to be scaled according to Quarry Manager Wilson. Tr. 87; Resp. Ex. E. The Secretary maintains the hazard consisted of loose rocks closer to 17-19 feet high up and extended for 30 feet or more. Tr. 45, 111; Sec'y Ex. 2-2. I would note here that Mr. Head did not personally observe the fractured rocks or their location on the highwall prior to abatement as did Inspector Whetsell and Quarry Manager Wilson did not offer testimony regarding how far up the wall the fractured rock was observed. Accordingly, I defer to Inspector Whetsell's direct observations in this regard.

The inspector was concerned about the hazard posed by this particular highwall in the quarry since Mr. Wilson stated haul trucks would take anywhere between 30-60 trips each day on the haul road below the highwall. Tr. 37, 75. Inspector Whetsell reported seeing vehicle tracks and black smudging on the sides of the haul road indicating where trucks had rubbed alongside the wall. Tr. 24; Sec'y Ex. 2-1, Ex. 2-2. The two parties disagree over what types of vehicles used the haul road. Tr. 22, 31, 75; Sec'y Ex. 1-1. Inspector Whetsell recorded in the citation that a Cat 740B haul truck, a Volvo EC210BLC, and a Cat 980 front end loader use the haul road. Sec'y Ex. 1-1, Resp. Ex. R-A. During testimony, Inspector Whetsell further identified tracks in Sec'y Ex. 2-1 that he believes are evidence of pick-up trucks using the haul road as well. Tr. 22, 31. Mr. Wilson maintained that haul trucks and other large machinery used the haul road and pick-up trucks did not. Tr. 31, 75. However, Mr. Wilson also testified he drove his own vehicle, a pick-up truck, presumably on the haul road to inspect the highwall the very morning of the inspection. Tr. 84-85. This is contrary to what Inspector Whetsell states Mr. Wilson told him in that pick-up trucks never travel on that haul road. Tr. 30. Also, based on

his experience as a miner and inspector, Whetsell speculated that the miners most likely used the haul road to enter and exit the quarry. Tr. 31, 38, 55.

The types of vehicles that use the road effects the level of danger the hazardous ground condition poses to miners. Tr. 99, 110. Loose rocks could cause damage by either rolling into the road or rolling directly into a vehicle. Tr. 29, 110. A haul truck being hit by a rock sliding from 14 feet off the highwall might not impact the operator. Tr. 99, Resp. Ex. E. However, if a pick-up truck was hit by a rock falling from 17 feet it would cause a serious hazard. Tr. 110. In addition, if any vehicle ran over, or attempted to avoid, a fallen rock it could pose a serious hazard. Tr. 29. Depending on the vehicle, damage could range from blowing out a tire, to losing control and flipping the truck over, to direct damage to the operator. Tr. 29, 40, 48, 99, 110.

MSHA issued a proposed penalty assessment of \$138.00 for Citation No. 8854429. Sec'y Ex. 1-1. Respondent contested Citation No. 8854429 claiming the rocks on the highwall were not loose, and even if they were, did not present a danger to the miners who used the haul road. Tr. 13.

III. PARTY ARGUMENTS

The Secretary argues that the conditions in Harper Quarry violate 30 C.F.R. § 56.3200, the violations are significant and substantial, and the operator was moderately negligent. Sec'y Posthearing Brief 3. The Secretary maintains there was a violation because like *MSHA v. Hoover*, 33 FMSHRC 751 (ALJ, March 11, 2011), there was an identifiable hazardous ground condition above a haul road with tracks indicating vehicle passage. Sec'y Br. 4. The Secretary maintains the violation was significant and substantial because the hazard was reasonably likely to result in an injury or illness of a reasonably serious nature. Sec'y Br. 7. The Secretary's claim is based on the rock being sufficiently loose to be at risk of falling, and their assumption that not only haul trucks, but also pick-up trucks and miners on foot use the haul road as a means of ingress and egress from the pit. Sec'y Br. 9. Based on the Inspector's testimony at the hearing claiming light vehicles and pedestrians used the haul road, the Secretary requests the type of injury expected should be increased to fatal. Sec'y Br. 4. Lastly, the Secretary maintains the mine operator was moderately negligent because the Quarry Manager identified the potential hazard, but did not test it for stability. Sec'y Br. 12.

The Respondent, argues there is no violation of 30 C.F.R. § 56.3200 because 1) the rocks at issue were not loose and 2) the miners were never in danger. Respondent's Posthearing Brief 4. The first argument is premised on the fact that it took a Volvo excavator with a jackhammer attachment 30-45 minutes to scale the area in question. Resp. Br. 7. Had the rocks been loose, Respondent maintains they would have come off the wall much faster. *Id.* The second argument is premised on the assumption that only haul trucks and similarly large equipment use the haul road. Resp. Br. 10. According to the expert testimony provided by the respondent, a falling rock could not impact the operator of a haul truck. Resp. Br. 11. Should the violation stand, the Respondent requests the likelihood of injury be reduced to no injury, and the significant and substantial designation be removed. Resp. Br. 14. The request to lower the seriousness of the citation is premised on the assumption that a haul truck operator driving at 5 miles an hour could not be hurt by a rock rolling into the haul truck or road from a height of 14 feet. Resp. Br. 11.

IV. ANALYSIS

A. Citation No. 8854429

MSHA Inspector James Whetsell issued Citation No. 8854429 for an alleged violation of 30 CFR § 56.3200 on October 8, 2014. Whetsell alleged within the citation that:

There is loose cracked (vertical and horizontal) overhanging rock about 20 feet up on the North East Highwall above the haul road with rubber tire tracks against the East highwall. This narrow haul road about fifteen feet wide with a small wall on the West side forces traffic to run parallel against the highwall. There are tracks rubber tired, and cat next to the wall. The Cat 740B haul truck makes over 30 trips a day past this material. Other traffic includes the Volvo EC210 BLC Excavator with hammer, and Cat 980 Front end loader. If this condition were to go uncorrected a serious rock fall accident could occur.

Sec'y Ex. 1, 1. Whetsell designated Citation No. 8854429 as a moderate negligence violation that was likely to contribute to the occurrence of a permanently disabling injury. *Id.* Whetsell determined that the failure to remove or otherwise control the loose rock was significant and substantial. *Id.*

A violation of § 56.3200 requires:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. § 56.3200. Standard § 56.3200 requires the Secretary to show that (1) a dangerous condition exists and (2) work or travel occurs in the affected area. The Respondent contends the first part is not satisfied because the cracked highwall was not in danger of falling, or alternatively, the miners operating vehicles on the haul road were not in danger.

The Mine Act imposes on the Secretary the burden of proving the alleged violation by a preponderance of the credible evidence that the ground conditions present on the highwall created a hazard. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. cir. 1998). A standard must provide adequate notice of required or prohibited conduct. *Lanham Coal Company*, 13 FMSHRC 1341, 1343 (September 1991). The reasonably prudent person test is used to assess whether a standard provides adequate notice of required conduct. *Martin Marietta Aggregates*, 26 FMSHRC 847, 848 (Nov. 2004). The standard is: "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). Applied to standard

§56.3200, the question is whether the “reasonably prudent person” would have recognized the cracked highwall as a ground condition hazard and abated it. *Martin Marietta Aggregates*, 26 FMSHRC at 848. To determine whether the condition of a highwall presents a hazard, the testimony of “experienced observers” is relevant. *Id.* (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)).

The first element of 30 C.F.R. § 56.3200 is to determine whether a dangerous condition exists. Whetsell observed the highwall first hand and determined it posed a hazard based on his 41 years of experience, MSHA training, and inspection of “thousands of highwalls.” Tr. 16. Furthermore, based on a review of photos and conversations with the Quarry Manager, Respondent’s expert witness testified that the cracks in question “very well may” have caused him concern. Tr. 107. Quarry Manager Wilson testified that because of the unique elastic qualities of gypsum, the cracks were not of concern to him. Tr. 85-86. In fact, he testified he had been inspecting the highwall regularly and had not seen any movement or expanding in the cracks in the past couple of weeks. *Id.* Also Mr. Wilson did not report any unplanned separation from the highwall face. Tr. 78. However, there is no documentation to corroborate Mr. Wilson’s claims that the cracks have not widened or moved. Tr. 106-107. The only evidence that supports Mr. Wilson’s statements is his testimony that alleged scaling the wall was difficult and time consuming. Tr. 82-83. Mr. Wilson was not present at the time of scaling and is basing his description of the scaling effort on a conversation with the excavator operator. Tr. 86. In addition, there are discrepancies in Mr. Wilson’s testimony, denigrating his credibility.

When the citation was issued, Mr. Wilson told Inspector Whetsell that he only drove his pick-up truck on the secondary road. Tr. 30. However, during the hearing, he testified to driving his pick-up truck to visually inspect the highwall with a spotlight in the dark on the very morning the citation was issued. Tr. 84. Wilson also testified that only haul trucks use the haul road. Tr. 75. However, photo exhibits of the haul road show excavator and pick-up truck tracks as well. Sec’y Ex. 2-1. Lastly, according to Inspector Whetsell’s testimony, when the citation was issued Mr. Wilson said there were about 30 trips on the haul road a day. Tr. 30. Yet at trial Mr. Wilson testified that there were between 50 and 60 trips on the haul road a day. Tr. 75. Weighing the opinion and testimony of Mr. Wilson and Respondent’s expert, Mr. Head, who did not personally observe the hazardous condition against the opinion and testimony of Inspector Whetsell, I credit the testimony of the Inspector that a hazardous ground condition existed.

The Respondent further contends that even if the highwall was a hazardous ground condition, it was not dangerous to people because, it alleges, only large vehicles used the haul road. The Respondent’s expert, Mr. Head convincingly demonstrated that there was little to no likelihood that a haul truck driver would be directly impacted by a rock. Resp. Ex. E. However, in his report Mr. Head does not address any of the other ways a falling rock could cause serious injury besides direct impact. *Id.* During the hearing, the Secretary established through Inspector Whetsell’s testimony that a rock in the road way could still cause serious injury to a haul truck driver by potentially causing the driver to lose control and wreck his vehicle. Tr. 29. The Respondent’s expert also corroborates the Inspector’s conclusions by stating fallen rocks could very well “hit the side of the truck...hit the tire tracks...present themselves as obstacles in the middle of the road...”. Tr. 99. If pick-up trucks used the haul road the likelihood falling rocks would cause serious injury is much greater. Tr. 34, 40. Inspector Whetsell pointed out tracks on

the haul road that he identified as pick-up truck tracks. Tr. 37; Sec'y Ex. 2-1. In his testimony Mr. Wilson admitted to driving his pick-up truck to perform a visual inspection with a spotlight the morning of the citation. Tr. 84. Based on exhibit 2-1, the testimony of Inspector Whetsell, and the testimony of Mr. Wilson, I find pick-up trucks did use the haul road.

The Secretary also alleges that pedestrians used the haul road. Sec'y Br. 4. However, there is not enough substantial evidence in the record to determine with certainty that pedestrians used the haul road. From his experience as a miner, Inspector Whetsell assumes pedestrians used the haul road. Tr. 31, 38, 40. Despite not having a company policy to the contrary, Quarry Manager Wilson testified they try not to use the haul road as a pedestrian path. Tr. 83. There is no concrete evidence of foot traffic on the haul road. Without more information, the assumption that there is foot traffic on the haul road is only speculation. Therefore, I deny the Secretary's request to increase the gravity of the injury to fatal.

The second element of 30 C.F.R. § 56.3200 is to show that either work or travel occurs in the affected area. There is undisputed evidence of vehicle tracks on the haul road indicating people travel through the hazardous condition. Sec'y Ex. 2-1, 2-2.

I have relied upon the exhibits, the hearing, and credibility assessments of the witnesses to reach my conclusions. Considering Inspector Whetsell has 41 years of experience with mining operations, he reviewed the highwall firsthand, his concern for the cracks was corroborated by the respondent's expert, and there is evidence people traveled in both large vehicles and pick-up trucks in the hazardous area, I affirm that 30 CFR §56.3200 was violated.

B. Significant and Substantial

A violation is significant and substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984). An S&S designation must be based on the particular facts surrounding the violation, and viewed in the context of ongoing mining operations. *Texasgulf Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *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 absence of an injury producing event when the cited practice occurred does not preclude an S&S determination. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005). The standard of review for the third prong requires

some clarification. The third prong focuses on whether the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (2010). For the third prong, the relevant hazard should be assumed. *Peabody Midwest Min., LLC v. Federal Mine Safety and Health Review Com'n*, 762 F.3d 611, 613 (7th Cir.) (Aug. 2014); *Knox Creek Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin.*, 811 F.3d 148, 164 (4th Cir.) (Jan. 2016).

The first prong is satisfied because I have found a violation occurred. The second prong is satisfied because the violation – failing to abate hazardous ground conditions – does contribute to a discrete safety hazard. In this case, the danger is loose rocks falling on the haul road where miners travel. A highwall is likely to crack when it is shot; exposed to weather such as humidity, freezing, or thawing; and exposed to vibrations from passing trucks. Tr. 27. The last time the wall was shot was a week or so prior to inspection. Tr. 53, 69. Inspector Whetsell testified that this is most likely when the cracks were formed. Tr. 69. Humidity and rain are potential destabilizing factors, but freezing and thawing likely were not because of the time of year. Tr. 27. Due to the proximity of the passing trucks to the highwall, approximately 18-24 inches, I credit Inspector Whetsell’s testimony that vibrations from haul trucks making 30 to 60 trips per day could adversely affect the stability of the highwall. Tr. 27-28. The potential for future shooting as part of regular mining operations, normal weathering, the passage of time, vibrations from passing haul trucks, plus gravity mean the cracks on the highwall would reasonably be expected to result in falling rocks Tr. 27.

The third and fourth prongs are satisfied because falling rocks are reasonably likely to cause an injury, and that injury is reasonably likely to be serious. The potential serious injury is based on the fact that along with haul trucks and large machinery, there is evidence that pick-up trucks used the haul road as well. Sec’y Ex. 2-1, Tr. 84. While the injury to a haul truck driver may not assuredly constitute a serious injury, the potential damage to a person driving a pick-up truck would certainly constitute a serious injury. Tr. 34. A rock upwards of 600 lbs. falling from 19ft. could pulverize a passing pick-up truck. *Id.* I find all of the elements have been met to find the violation significant and substantial.

C. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 C.F.R. § 100.3: Table X. These regulations apply to the Secretary’s proposal of penalties only, and are not binding on the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). The Commission instead directs its judges to “evaluate negligence from the starting point of a traditional negligence analysis. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act.” *Brody*, 37 FMSHRC at 1702. In evaluating an operator’s negligence, the judge should consider “what actions would have been taken under the same circumstances by a

reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Res.*, 36 FMSHRC 1972, 1975 (Aug. 2014).

Quarry Manager Wilson acknowledged he had seen the cracks that worried Inspector Whetsell. Tr. 76. He did not think they were concerning, however, because the nature of Harper Quarry gypsum was to crack. *Id.* Despite the failure to scale a visibly cracked highwall, mine operations were consistent with what a reasonably prudent person would do. First, the miners at Harper Quarry scale the walls every time after they blast. Tr. 74. Second, Mr. Wilson inspects the mine every morning. Tr. 84. Third, Harper Quarry mine site has an excellent safety record in general with only three violations over the past two years, none of which involved loose ground conditions. Sec’y Ex 3-1. Taking these facts into consideration, I find that a low rather than a moderate negligence level is most appropriate.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

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

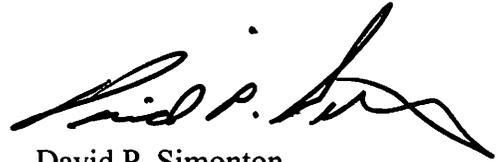
These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assessed penalty of \$138.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec’y Petition, Ex. A.

The Respondent is a mid-size operator with low rate of total violations per inspection day and no recent history of prior ground control violations. I have found that the Respondent acted with low negligence. The parties have stipulated that the proposed penalty will not affect its ability to continue in business. Tr. 6. I have found that the violation was likely to result in a permanently disabling injury. The parties have stipulated that the Respondent promptly abated the violation by scaling down the loose overhanging material. Sec’y Ex. 1, 1; Tr. 6.

After considering this evidence in light of the six statutory factors and in consideration of the lowered negligence level I find a penalty amount of \$100 to be appropriate.

VI. ORDER

The Respondent, New NGC, Inc., is **ORDERED** to pay the Secretary of Labor the sum of **\$100.00** within 30 days of this order.¹ The associated notice of contest proceeding CENT 2015-37 is **DISMISSED**.



David P. Simonton
Administrative Law Judge

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¹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF
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