

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

August 31, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-317
Petitioner,	:	A.C. No. 46-09062-166012-02
	:	
v.	:	
	:	
DYNAMIC ENERGY, INC.,	:	
Respondent.	:	Mine: Coal Mountain No. 1 Surface

DECISION

Appearances: Matthew R. Korn, Esq., and Jacob M. Hargraves, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of the Secretary of Labor; James F. Bowman, Midway, West Virginia, on behalf of Dynamic Energy, Inc.

Before: Judge Paez

This case is before me upon the Secretary of Labor’s (“Secretary”) Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2006).¹ In dispute are one section 104(a) citation and two section 104(d)(2) orders issued to Respondent, Dynamic Energy, Inc. (“Dynamic”). The Mine Safety and Health Review Administration (“MSHA”) issued these orders and citation at Dynamic’s Coal Mountain No. 1 Surface operation.

I. Statement of the Case

All three of the alleged violations at issue in this case involved equipment in active use at this surface coal mine. Order No. 6615025 charges Dynamic with violating 30 C.F.R. § 77.1007(b) for failing to correct equipment defects affecting safety on its highwall driller before its use. Similarly, Citation No. 6615028 alleges that Dynamic violated 30 C.F.R. § 77.1606(c), an analogous regulation applicable to buses and other haulage equipment. Finally, in Order No. 6615029 MSHA charges Dynamic with a 30 C.F.R. § 77.404(a) violation for failure to maintain a front-end loader in safe operating condition and failure to remove the unsafe loader from service. The Secretary submits that each of these three alleged violations should be

¹ In this decision, the hearing transcript, Dynamic’s exhibits, and the Secretary’s exhibits are abbreviated as “Tr.,” “Ex. R-#,” and “Ex. S-#,” respectively.

designated as significant and substantial² (“S&S”) and as the result of Dynamic’s unwarrantable failure³ and proposes a total civil penalty of at least \$58,000.00.

Chief Judge Robert J. Lesnick assigned Docket No. 2009-316 and Docket No. 2009-317, to me on January 4, 2010. On November 30, I approved the Secretary’s Motion to Approve Settlement and Motion to Approve Partial Settlement. All three citations at issue in Docket No. 2009-316 and six citations of the nine citations and orders at issue in Docket No. 2009-317 settled. I held a hearing in South Charleston, West Virginia, on December 7, 2010. The Secretary presented the testimony of two officials from MSHA—Charles R. Bigley, Jr., a surface specialist coal mine inspector, and James Louis Angel, a mechanical engineer. (Tr. 23:17–21, 219:6–7.) Dynamic called two witnesses—Terry Garland Church, an outside contractor and the maintenance foreman at Dynamic, and James E. Miller, Dynamic’s Safety Manager. (Tr. 62:15–18, 156:22–157:1, 157:22–23.) The Secretary and Dynamic submitted post-hearing briefs on February 4, 2011, and February 5, 2011, respectively. The Secretary filed her reply brief on February 24, 2011, and Dynamic filed its reply brief on February 23, 2011.

II. Issues

Dynamic denies each of the three alleged violations. The Secretary responds that the conditions were properly cited as violations and that the allegations underlying the citation and orders were valid. In addition, the Secretary requests in her post-hearing brief that the designation of negligence in Citation No. 6615028 be modified to high negligence and that the violation be designated as having occurred as a the result of Dynamic’s unwarrantable failure to

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

comply with the cited mandatory safety standard.⁴ Moreover, the Secretary asks that an adverse inference be drawn because of Dynamic's missing preshift reports. Accordingly, the following issues are before me:

(1) Whether Dynamic's failure to maintain preshift reports regarding the portal bus and CAT Loader should result in an adverse inference; (2) whether the cited conditions were violations of the Secretary's mandatory health or safety standards; (3) whether the Secretary's assertions regarding the gravity of the alleged violations are supported by the record; (4) whether the Secretary's assertions regarding Dynamic's negligence, including unwarrantable failure, in committing the alleged violations are supported by the record; and (5) whether the civil penalties are appropriate.

For the reasons set forth below, Citation No. 6615028 is **AFFIRMED** as an S&S violation and **MODIFIED** to high negligence. Order Nos. 6615025 and 6615029 are **AFFIRMED** as S&S violations attributable to the operator's unwarrantable failure.

III. Background and Findings of Fact

A. Dynamic's Operation at Coal Mountain No. 1 Surface Mine

Dynamic operates Coal Mountain Mine No. 1, a surface coal mine consisting of multiple mining areas. (Tr. 31:8–10.) The mine had two primary mine sites—the “main” surface mine, known as Job 30, and the “satellite” mine, known as Job 20—that are connected by a road and share the same MSHA mine identification number. (Tr. 30:7–12, 31:8–17.) Dynamic conducted mine operations at Job 30 and contracted with Vecellio & Grogan (“V&G”) to mine Job 20. (Tr. 30:10–13, 172:20–21.)

In the course of mining Job 20, V&G employed both its own equipment and equipment that Dynamic provided. (Tr. 30:12–14, 32:25–33:4, 172:20–24.) Specifically, Dynamic provided V&G with a highwall drill. (Tr. 33:19, 172:21–22, 215:6–7.) James “Mitch” Webb was V&G's only foreman on Job 20 mine, and he supervised both V&G and Dynamic employees. (Tr. 32:25–33:13, 173:9, 215:10.) Dynamic informed Webb which type of coal Dynamic needed; Webb then oversaw mining at the site. (Tr. 30:7–31:17, 173:17–19, 215:1–3.) Webb was “responsible for anyone and everyone that would be on that job.” (Tr. 31:2–4.) James

⁴ Inspector Bigley initially designated Citation No. 6615028 as involving “moderate” negligence. (Ex. S-3.) In her Pre-hearing Report, the Secretary listed “[w]hether the condition at issue in [section] 104(a) citation no. 66105028 was the result of an unwarrantable failure based on high negligence attributable to the operator” as one of the legal issues to be litigated at trial. (Sec'y Pre-Hearing Report at 6.) At the hearing, the Secretary's counsel asked me to find Citation No. 6615028 as an unwarrantable failure in her opening statement. (Tr. 18:5–8.) The Secretary requested in her post-hearing brief that I increase the level of negligence to “high” and designate the violation as being the result of the operator's unwarrantable failure to comply with the cited standard based on the evidence adduced at trial. (Sec'y Br. at 8 n.1.)

Sloan was Dynamic's superintendent at the Job 20 mine. (Tr. 101:12–23.) Miller was Dynamic's safety manager at the time of the violation and generally took pictures of cited violations for future reference. (Tr. 201:16–17.)

Dynamic uses unmodified school buses purchased at auction as portal vehicles to transport miners to and from their mine sites. (Tr. 73:14–19, 91:14–15, 209:7.) Dynamic's school buses travel on steep, narrow, and curvy roads. (Tr. 93:16–20.) The roadways are highly traveled by large and small equipment, including coal trucks and rock trucks. (Tr. 97:10–12.)

V&G operated Dynamic's highwall drill on Job 20 to drill blast holes. (Tr. 33:19, 215:6–7; Ex. S-1.) A highwall drill is a piece of machinery used to drill vertical holes into rock below. (Tr. 34:24–35:15, 42:12–13, 54:14–18.) A typical highwall drill is flat and rectangular in shape, with a center-mounted engine and an operator cab. (Ex. S-10.) The vertical drill mast and drill steel extend through the flat body of the drill, called the deck, and drill directly down into the ground. (Tr. 34:19–20, 34:23–25, 35:9–15, 54:14–16, 181:17; Ex. S-10.) Depending on where the drill is positioned, the deck can be raised or lowered to ensure that the drill deck remains flat. (Tr. 48:13–17, 182:15–17.) Head guides stabilize the drill head and hold the motor steady as it turns the drill steel. (Tr. 42:13–15, 55:18–19, 179:23–24.) Operators access the drill using "ladder steps." (Tr. 181:9–11; Ex. S-10.) Dynamic's drill had either two or three access points. (Tr. 181:14, 39:17–40:14, 56:3–12.) The drill's "ladder steps" are constructed out of braided steel cables. (Tr. 42:8–13, 180:10–18; Ex. R-4.) A drill operator typically mounts and dismounts the drill four or five times per shift. (Tr. 47:16–18, 51:2–4.)

V&G also operated a CAT front-end loader to load overburden on Job 20. (Ex. S-6.) Loaders have dump buckets capable of lifting twenty-five to thirty tons of material, have a high center of gravity, and often operate alongside a rock truck. (Tr. 110:22–23, 111:14–20.) When the loader's front bucket is loaded, the front tires are placed under increased pressure. (Tr. 110:19–20.) At times, the loader operated in a rocky pit. (Tr. 108:10–12, 119:10–11.)

V&G's loader uses Superhawk tires. (Tr. 112:24–113:3.) Shandong Hawk International Rubber Company, Limited, manufactures the Superhawk tire in China, and GCR Tire Center distributes the tire to Dynamic. (Tr. 161:14–16, 224:23–225:1.) The Superhawk tire is a bias ply tire. (Tr. 225:9–11.) Bias ply tires are constructed with a steel band running around the inside of the wheel. (Tr. 228:19–22.) Plies of fiber—usually nylon—are wrapped from the sidewall around the steel band at an angle and connect to a steel band on the opposite side of the tire. (Tr. 228:19–24, 231:5–8.) The steel bands and plies hold air pressure in the tire. (Tr. 228:24–229:1.) The Superhawk tire has 30 plies, but has a 58-ply strength rating. (Tr. 225:9–11.) The loader's tires contain approximately 98 pounds-per-square-inch of air pressure. (Tr. 229:4–5.)

B. Bigley's September 4, 2008, Inspection of Job 20

Inspector Bigley arrived at Coal Mountain Mine No. 1 on the morning of September 4, 2008. (Tr. 29:3–7.) Webb accompanied Bigley on his inspection as the operator's representative. (Tr. 30:4–5.) While inspecting Job 20, Bigley observed employees operating the

highwall driller to drill rock. (Tr. 42:2.) Bigley noticed that the drill created an excessive amount of dust, so he performed a complete inspection on the drill. (Tr. 34:9–13.) Bigley observed “excessive head movement” and worn head guides. (Tr. 34:14–17, 42:5–8.) Bigley testified that as he dismantled the drill he noticed the cable ladder steps at the main boarding point “were almost completely broken in two.” (Tr. 35:21–23.) Bigley physically grabbed the wire strands to inspect them, but did not weight test the strands to determine if they would hold a person’s weight. (Tr. 46:22–23, 136:3–6.) The drill operator told Bigley he had notified V&G about the condition, and Webb admitted knowing the step was “damaged” and that the steps should have already been fixed. (Ex. S–2, Tr. 35:25–36:3, 124:17–19, 130:2–4.) Preshift reports from at least three shifts between September 2 and 3 characterized the wire-ladder steps as bent, but were marked as operable. (Tr. 51:21–52:10, 125:24, 128:1–9, 178:6–14; Exs. R-3, S–2, S–5.) On September 3 and 4, the preshift report indicated the head guides were defective. (Tr. 52:9–13; Ex. R-3.)

After determining the head guides and ladder steps affected safety, Bigley issued Order No. 6615025 to Dynamic for a violation of § 77.1007(b). (Tr. 44:16, 46:5–17; Ex. S–1.) In light of the number of times the drill operator might access the driller in a given day and Bigley’s estimation that the cable ladder was likely to break, he marked the violation’s gravity as reasonably likely to result in injury or illness. (Tr. 46:10–12, 48:17–24; Exs. S–1, S–2.) Moreover, if the cable ladder broke, a miner might fall up to seven feet. (Tr. 46:11–14, 48:25–49:20; Ex. S–2.) As a result, Bigley determined the injury was likely to result in lost workdays or restricted duty. (Tr. 48:25–49:6; Ex. S–1.) These factors also led Bigley to mark the citation as S&S. (Tr. 50:10–21; Ex. S–1.) Bigley assessed Dynamic’s negligence as high based on his conversation with Webb. (Tr. 51:1–6, 53:10–13; Ex. S–1.) Further, Bigley’s conversation with Webb and Webb’s failure to barricade the ladder or shut down the drill led Bigley to designate the violation as being the result of Dynamic’s unwarrantable failure to comply with the standard. (Tr. 53:14–54:6; Ex. S–1, S–2.)

At some point after the violation, V&G Safety Director Bob Kennedy took pictures of the violation and provided them to Miller, his counterpart at Dynamic. (Tr. 174:12–22, 180:8–9.) To abate the order, the operator removed the drill from service. (Tr. 48:7–9.)

C. Bigley’s September 10, 2008, Inspection of Job 20

1. Portal Bus Inspection

Bigley again inspected Job 20 on September 10, 2008. (Tr. 88:6–19.) While waiting for a bus to transport him around the site, Bigley heard a bus approach. (Tr. 89:3–5.) The bus was “really loud,” which Bigley recognized as indicative of an exhaust problem. (Tr. 89:5–7.) Bigley signaled for the bus to pull over so he could inspect it. (Tr. 89:8–10.) According to Bigley, the driver told him that the exhaust had been broken off “for a long time,” that he was unable to “get [Dynamic] to fix it,” and that the exhaust fumes were “pretty bad.” (Tr. 90:5–6.) Bigley personally boarded the bus and smelled noxious exhaust fumes but did not take an air sample inside the bus. (Tr. 90:6–8, 99:25–100:2, 136:20–21, 137:7–12.) The bus did not have a

muffler; the exhaust system had been cut or broken off below the driver's seat under the bus. (Tr. 90:10–12, 136:25–137:5; Ex. S–3.) Indeed, exhaust systems routinely broke off the portal buses used at this mine. (Tr. 72:9–11, 72:14–18, 100:21–101:2, 210:20–22.)

Additionally, Bigley twice observed the portal bus stop with its front wheels locked and sliding as the bus' rear wheels continued to spin. (Tr. 89:11–14, 89:19–22.) After stopping, the bus driver told Bigley he had informed his superiors about the defective brakes and thought the brakes had been fixed. (Tr. 89:16–19, 109:1–5.) As he examined the bus, Bigley observed oil soaking parts underneath the hood and found the brake fluid reservoir empty. (Tr. 90:22–91:2, 146:3–6.) He also stated the oil was “just all leaking back out” and characterized the leak as “pretty excessive.” (Tr. 91:5.)

Bigley then examined the bus' steering joint with the help of the driver. (Tr. 90:14–17.) An eighth of an inch of movement is the out-of-service criterion. (Tr. 91:23–25, 67:3–4, 144:2–19.) Bigley visually observed movement of three-eighths of an inch. (Tr. 90:15–17, 98:10–13, 106:8–13; Ex. S–3.) Bigley did not use a dial indicator to measure the amount of movement in the steering joint. (Tr. 91:19–21, 143:13–16.)

The bus's gas pedal had also been broken off completely, leaving a three-eighths of an inch round metal linkage to be depressed as an accelerator. (Tr. 91:7–11, 211:16–212:3.) Sloan, the mine superintendent, told Bigley that he had no knowledge of these conditions. (Tr. 100:17–101:11.)

After determining that the brake system, steering joint, exhaust, and gas pedal affected safety, Bigley issued Citation No. 6615028 to Dynamic for a violation of § 77.1606(c). (Tr. 92:21–93:1; Ex. S–3.) Given the brake and steering defects he observed, Bigley determined the driver's inability to control the bus made an injury reasonably likely to occur. (Tr. 97:20–98:13; Ex. S–3.) In light of the size of the other vehicles traveling the roadways at Job 20, Bigley determined that fatalities would be likely in a collision. (Tr. 99:13–22; Ex. S–3.) He found that twelve miners would be affected. (Ex. S–3.) Based on these findings, Bigley marked the citation as S&S. (Tr. 100:6; Ex. S–3.) Finally, Bigley testified that, although the bus driver told Bigley he had reported the defective brakes and the preshift reports consistently listed exhaust problems, he had no evidence that Sloan knew the bus was in “this bad of shape.” (Tr. 100:24–101:11.) Thus, Bigley assessed Dynamic's negligence as moderate. (Tr. 100:17–20; Ex. S–3.) After the citation was issued, Dynamic scrapped the bus. (Tr. 103:9–10.)

2. CAT Front-End Loader Inspection

While at Job 20, Bigley also examined V&G's CAT front-end loader. As he approached the vehicle in a pit scattered with rocks, Bigley observed an “obvious” problem with one of the loaders' tires. (Tr. 107:16–20.) Bigley inspected the tire, finding “cuts going a long way around the circumference of the tire,” as well as “gashes pretty deep like an inch, inch and quarter into the sidewall.” (Tr. 107:20–24.) Bigley also looked at the inside of the tire and found “these same marks and more cuts across the sidewall.” (Tr. 108:8–10.)

Rocks cause the tire cuts and tire wear. (Tr. 118:20–119:8, 159:21–25.) The Superhawk tire had deep, circumferential cuts and gashes to the sidewall, some of which exposed and severed three of the tire’s plies. (Tr. 107:18–24, 108:8–17, 114:1–15, 166:25–167:5, 159:23–25, 169:23–171:1, 201:22–24; Ex. S–6.) Bigley observed the tire while under a load, and witnessed the tire’s sidewalls flex. (Tr. 121:5–9.)

During his inspection, Bigley brought the tire to Sloan’s attention. (Tr. 107:25–108:2.) Sloan agreed the tire was in poor condition, indicated that Dynamic knew the tires were defective, and told Bigley that Dynamic had taken pictures of the tire and contacted the tire company to obtain a replacement. (Tr. 108:2–6, 113:15–20, 151:18–24, 154:4–7.) Sloan also told Bigley that Dynamic had not removed it from service because Dynamic did not have another tire and that GCR had not yet visited the site to make an assessment. (Tr. 108:6–7, 152:2–4.)

In addition, Bigley observed that the loader’s engine doors could not be latched shut, and the handrails on the loader’s top deck were loose with missing bolts and broken welds. (Tr. 109:1–5, 121:17–122:2.) The engine doors were located within a foot to fifteen inches of the operating cab boarding steps. (Tr. 110:5–7, 170:16–19.)

Bigley determined the CAT loader’s tire, steps, and engine doors violated § 77.404(a) and issued Order No. 6615029. (Tr. 109:12–14; Ex. S–6.) Given the tire’s condition, Bigley believed a tire explosion could happen at any time. (Tr. 110:16–17.) In addition, if this tire blew, then the CAT loader could fall over and hit an adjacent rock truck. (Tr. 110:24–118:1, 111:14–20.) Moreover, Bigley explained, the concussive force of a tire explosion could propel a rock into other vehicles or miners. (Tr. 111:5–9.) Though fatalities were possible, Bigley found lost workdays or restricted duty to be the most likely outcome. (Tr. 116:19–117:7; Ex. S–6.) As a result, he designated the order’s gravity as reasonably likely to result in injuries. (Tr. 112:11–16; Ex. S–6.) Given the “extensive” damage to the tire, the rocky pit, and the likelihood of serious injury, Bigley designated the violation as S&S. (Tr. 117:12–17; Ex. S–6.) Based on his conversation with Sloan, Bigley determined Dynamic’s negligence to be high and designated it as an unwarrantable failure. (Tr. 117:21–118:15; Ex. S–6.) After being cited, Sloan immediately removed the loader from service. (Tr. 109:15–18.)

D. Credibility of the Parties’ Witnesses

1. Charles R. Bigley, Jr., Surface Coal Mine Inspector, Surface Specialist, MSHA

At the time he issued citations in this case, Bigley was an MSHA surface coal mine inspector. (Tr. 23:14–24.) Bigley worked in surface coal mines for ten years as an employee and owned his own surface mining business for six years. (Tr. 25:24–26:5.) As a surface miner, Bigley surveyed, built ponds, cleared and reclaimed land, maintained and operated equipment, trained others to do so, was a certified mine foreman, and inspected steering mechanisms. (Tr. 26:8–14, 26:25–27:2, 98:18–22.) Bigley has also held his commercial driver’s license (“CDL”) for over-the-road trucks since 1996. (Tr. 27:10–14.)

Bigley joined MSHA as a trainee inspector in March 2007, became an inspector in March 2008, and became a surface specialist inspector in 2009. (Tr. 23:14–15, 25:6–16, 23:19–21.) Bigley spent 21 weeks as a MSHA inspector trainee in the National Mine Academy, which included classes in surface mining, haulage, prep plants, structural safety and hoisting. (Tr. 23:25–24:6.) Bigley has not received training in, nor has MSHA established, any out-of-service criteria for off-road tires. (Tr. 149:17–24, 231:22–25.) Bigley admitted he was not familiar with the Superhawk tire’s construction. (Tr. 152:14–20.)

As a surface specialist, Bigley gives surface mines regular health and safety inspections to identify hazards and enforce regulations. (Tr. 24:9–12.) Bigley inspects equipment—including vehicles, and large and small mining equipment—as well as ground control, facilities and structures, and explosive areas. (Tr. 24:12–14.) Thirty-five to forty percent of his time is spent inspecting equipment. (Tr. 24:19–22.) Bigley performs approximately 30 mine inspections per year. (Tr. 24:25–25:5.)

Based on Bigley’s candid testimony at the hearing and his extensive experience in surface coal mining and operation of commercial vehicles, I afford great weight to his testimony.

2. James L. Angel, Mechanical Engineer, MSHA Approval and Certification Center

Angel received his Bachelor of Science degree in mechanical engineering at the University of Dayton and began working at MSHA in 1983. (Tr. 218:2–219:10.) Since 1983, Angel has received training in mechanical aspects of mining and mining processes and has also attended industry conferences on safety, engineering, and tires. (Tr. 219:13–219:19.) Angel has extensive experience dealing with tire manufacturers through the SAE International Construction & Agricultural Council’s Tire and Rim Subcommittee. (Tr. 220:2–5.)

Angel had previously testified to tire conditions as an expert witness. (Tr. 220:6–8.) Dynamic stipulated that Angel is qualified as an expert witness to testify to the condition of the tire at issue in Order No. 6615029. (Tr. 218:10–14.) Based on Angel’s professional experience and previous expert witness experience—both of which directly deal with tire safety—I afford significant weight to Angel’s testimony.

3. James E. Miller, Safety Manager, Dynamic Energy

Miller has worked in the coal mining industry since 1970. (Tr. 156:10–12.) Miller began as a miner, with a full range of miner duties except drill operation. (Tr. 156:15–18, 157:2–5.) Miller holds an 07 miner’s card. (Tr. 158:3–4.) A miner earns an 07 card after taking a forty hour class, completing an apprenticeship, and passing a test. (Tr. 158:6–11.)

After more than twenty years as a coal miner, Miller became a surface inspector with West Virginia’s Office of Miners’ Health, Safety & Training. (Tr. 156:15–18.) As an inspector, Miller reviewed mine safety, including equipment and paperwork checks and accident investigations. (Tr. 157:10–12.) Miller also inspected off-road tires several times. (Tr.

158:16–18.) Miller worked as a surface inspector for sixteen years until he joined Dynamic as a safety manager in 2008. (Tr. 156:25–157:2, 157:6–7.) His duties at Dynamic mirrored his duties as a West Virginia surface mine inspector. (Tr. 157:25–158:1.)

Two reasons lead me to weigh Miller’s testimony less heavily than Bigley’s testimony. First, it is unclear from the record whether Miller worked in underground or surface mines. Bigley’s mining experience, conversely, was solely in surface mines. Second, although Miller served as a surface inspector for a significantly longer period than has Bigley, Miller was a state inspector rather than an MSHA inspector. Though the positions are seemingly analogous, the record is unclear whether state and federal training, regulatory standards, or inspection protocols are comparable.

Miller’s significant mining background provides a basis for understanding how mining operations and equipment work. Based on Miller’s long experience in the coal mining industry as a miner, mine inspector, and safety manager, I afford significant weight to Miller’s testimony.

4. Terry Garland Church, Maintenance Foreman, Dynamic Energy

Church is the maintenance foreman at Dynamic. (Tr. 62:15–18.) Working as a contractor through Justice Highwall Energy, Church spends one hundred percent of his time at Dynamic. (Tr. 74:11–75:3.) Church began working in the coal industry in 1973. (Tr. 61:11–13.) Church worked in various capacities, including work as a truck driver, an equipment operator, a foreman, a production foreman, and a maintenance foreman. (Tr. 62:5–8.) Johnson also owned his own strip job and surface mines, and worked as a logger. (Tr. 61:20–24.) While working at a garage in Alexandria, Virginia, Johnson attended classes at a diesel college. (Tr. 62:10–14.)

Between fifteen and eighteen men report to Church in his capacity as the mine’s maintenance foreman. (Tr. 62:21–22.) Church schedules work, orders parts, and maintains “all” of the equipment, including the portal buses. (Tr. 62:22–25.)

As the maintenance foreman for the mine, Church may bear the brunt of any blame for maintenance failures at the mine. His opinion testimony may, therefore, have conflicting motives. I afford reasonable weight to his testimony regarding the mechanical workings of the portal bus, roadways, and maintenance procedures based on Church’s long experience as a mechanic, formal training, and position as maintenance foreman.

E. Discovery

Dynamic contested these violations on November 7, 2008. (Sec’y Br. at 1; Resp’t Mot. to Strike; Tr. 194:15–17.) The Secretary requested the preshift inspection reports for the CAT loader and portal bus through discovery, but they had already been destroyed by Dynamic. (Tr. 193:13–16, 205:3–9.) The Secretary requests that I draw an adverse inference from Dynamic’s decision to destroy those preshift reports. (Sec’y Br. at 24, 29.)

IV. Principles of Law

A. Strict Liability

The Mine Act's regulatory regime establishes strict operator liability for the conduct of contractors and individual miners. *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006) (rejecting operator's argument it cannot be held liable for an independent contractor's violations because the Mine Act is a strict liability statute); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.") (citations omitted). The Commission has observed that "operator[] fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

B. Spoliation

When a party intentionally destroys evidence in its control, a judge has discretion to draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *Kronsich v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998). Before drawing an adverse inference, the Judge must find that the destroying party had control over the evidence and an obligation to preserve it at the time it was destroyed. *Id.* at 126. The Commission has held that an Administrative Law Judge must address missing preshift examination reports because the operator had them within their control and should have anticipated litigation. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009).

C. Safety Standards

1. Broadly Applicable Safety Standards

The Commission has stated that broadly worded safety standards are intended to be applied in myriad contexts and measures violative conduct against "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *U.S. Steel Mining Co.*, 27 FMSHRC 435, 439 (May 2005) (citing *Alabama By-Products*, 4 FMSHRC 2128, 2129 (Dec. 1982)); *see also Ideal Cement Co.*, 12 FMSHRC 2409, 2415–16 (Nov. 1995) (quoting *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)).

MSHA announcements and policy memoranda "that were . . . publicly available or brought to the attention of the operator" are among the factors considered in a reasonably prudent person analysis. *U.S. Steel Mining Co.*, 27 FMSHRC at 442 (citing *Good*, 23 FMSHRC 995, 1005 (Sept. 2001)). Worn, broken, or non-working tires, brakes, or steering may make

equipment unsafe to operate. See V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 77 at 177 (2003) ("PPM").

2. Equipment Defects Affecting Safety

To prove a § 77.1007(b) and § 77.1606(c) violation, the Secretary must establish the operator (1) used or made available for use equipment with (2) an equipment defect that (3) affects safety. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2415–16 (Nov. 1995) (construing identical language to determine an equipment defect affecting safety). Equipment defects include missing as well as malfunctioning components. *Id.* Defects affecting safety may be cited based on the potential danger they pose. See *United States Steel Corp.*, 6 FMSHRC 1423, 1435 (June 1984) (approving Administrative Law Judge conclusion that a defect's "potential consequences" supported finding that the defect affected safety); cf. *Dynatec Mining Corp.*, 23 FMSHRC 4, 12 (Jan. 2001) (finding that in light of limited repairs the operator made, potential dangers amounted to substantial evidence that "hazard to persons" existed) (citations omitted). Safety defects need not have a major or immediate effect on safety to violate the standard. *Ideal Cement*, 12 FMSHRC at 2415 (citing *Allied Chemical Corp.*, 6 FMSHRC 1854, 1858 (Aug. 1984)).

3. Safe Maintenance and Removal From Service

The Commission has stated that § 77.404(a) imposes two requirements on operators: (1) "to maintain machinery and equipment in safe operating condition" and (2) "to remove unsafe equipment from service." *U.S. Steel Mining Co.*, 27 FMSHRC Rt 438 (citing *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979)). Under § 77.404(a), equipment is judged by the reasonably prudent person standard. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1557 (Sept. 1996); see also *Steel Branch Mining*, 18 FMSHRC 6, 10–12 (Jan. 1996) (consulting manufacturer's manual and industry standards in applying the reasonably prudent person test)

D. Significant and Substantial

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). To establish an S&S 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 in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has further found that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); see also *Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). An evaluation of the reasonable likelihood of injury

should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

E. Unwarrantable Failure

In *Emery Mining*, the Commission determined that an unwarrantable failure is “aggravated conduct constituting more than ordinary negligence.” 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

V. Further Findings of Fact, Analysis, and Conclusions of Law

A. Strict Liability

In defending both orders and the citation, Dynamic suggests it is not liable for individual miners’ negligent decisions regarding the equipment’s operability by asserting that “[t]he negligence of rank-and-file miners is not imputable to the operator.” (Resp’t Reply Br. at 10) This argument, however, fundamentally misunderstands the Mine Act’s strict liability regime. As the operator of the mine, Dynamic is liable for any violation at Coal Mountain No. 1 Surface Mine. *Musser Eng’g Inc.*, 32 FMSHRC at 1272. I therefore reject any argument that Dynamic cannot be cited for a violation based on an individual miner’s conduct or contractor V&G’s conduct.

B. The Secretary’s Requests For Adverse Inferences

In her post-hearing brief, the Secretary requests that an adverse inference be drawn against Dynamic on the issue of whether the CAT loader’s tire and the portal bus’s brake,

steering, and exhaust systems were consistently listed in preshift examination reports. (Sec’y Br. at 24, 29.) The Secretary also raised this issue during the hearing. (Tr. 193:1–194:24, 205:3–13.) The Secretary admits that operators are not required to maintain records beyond 30 days, but argues that Dynamic should have kept the reports in anticipation of litigation in light of the company’s own contest of the violation. (Tr. 193:16–21; Sec’y Br. at 24 n.3, 20 & n.4.) Dynamic argues that Bigley could have collected copies of the reports when he issued the citation. (Tr. 193:24–194:11.)

Dynamic did not contest the violation until November 7, 2008, two months after the orders and citation in this case. (Tr. 194:15–17.) Moreover, Bigley did review, and testified to, the contents of some of the preshift reports. (Tr. 101:24–102:2.) At first blush, Dynamic seems justified in having destroyed the preshift reports that it is only legally required to maintain for thirty days. Under this logic, Dynamic would not have been obligated to maintain preshift reports in anticipation of litigation until November 7, well *after* the reports could legally be destroyed.

Dynamic’s argument might be persuasive if it retained *no* preshift reports or other documents for longer than the thirty-day requirement. In this case, Dynamic curiously failed to preserve preshift reports for the CAT loader or portal bus but did maintain preshift reports regarding the highwall driller that it believed *supported* its arguments. Moreover, Dynamic did maintain a copy of Miller’s notes from his August bus inspection, fully a month *earlier* than the preshift reports from the day of the September inspection. (Tr. 185:20–186:4; Ex. R-5.)

In light of Dynamic’s unexplained and questionable selective retention of records, I determine that when Dynamic destroyed the preshift reports, it knew it had an obligation to preserve them in anticipation of litigation. I conclude, therefore, that the Secretary is entitled to an adverse inference against Dynamic. Because operators are required to maintain preshift report records for 30 days, I further conclude that such adverse inference may only extend to 30 days prior to the day the orders and citations in these cases were written.

C. Order No. 6615025 – The Highwall Driller

1. Additional Finding of Fact - Defective Condition of the Highwall Driller’s Steps

Bigley testified that the wire ladder was broken “almost completely in two” and affected safety. (Tr. 35:21–23, 44:16, 46:5–17.) According to Bigley, physical inspection is the best method to inspect the safety of these wire strands. (Tr. 46:24–47:1.) While the strand may look physically intact, Bigley explained, when physically examined, an inspector can see where they are severed. (Tr. 47:1–5.) Further, Bigley stated that it is well known in the industry that the wire strands commonly break and that the steps could break “fairly easily” through miner use. (Tr. 47:9–10, 48:21–24.) When presented with Dynamic’s photograph of the wire ladder, Bigley was unable to confirm that the photographs represented the wire ladder he observed during his inspection. (Tr. 44:2–45:8.) Conversely, Miller testified that the steel cable would support the weight of a person. (Tr. 180:10–21.) Miller also indicated that even if seventy-five percent of

the weight bearing mechanism were broken, he would “jump up and down on it.” (Tr. 213:19–22.)

Miller is a former West Virginia mine inspector, and his testimony is due some weight determining whether the photographic evidence matches the citation. However, Bigley credibly testified that physical examination is the best way to determine the physical integrity of the wire step. Miller’s opinion—unlike Bigley—was based on his review of photographs of the step, rather than actual physical examination. Dynamic presented no evidence that either Miller or V&G’s Kennedy ever physically examined the wire steps. Moreover, Dynamic did not present any evidence that the inclusion of the term “bent” in preshift examination reports reflected an examination or physical manipulation of the steps.

Dynamic presented no evidence suggesting anyone from either Dynamic or V&G had ever physically grabbed and manipulated the ladder to test its physical integrity; at most, Dynamic’s photographs show a visual depiction of a part of the ladder. Bigley, on the other hand, physically inspected the ladder itself. I note that Bigley’s description of the alleged violation in Citation No. 6615025 does not exactly match the photograph.

The photographic exhibits submitted in this case depict at least part of the broken ladder. (Ex. R–4.) However, the Secretary’s and Dynamic’s witnesses disputed what is evident in each image. Upon my own review of the photographs, I do not find anything in them to be exculpatory or inculpatory. I accordingly afford them marginal weight. Notwithstanding Miller’s testimony and Dynamic’s exhibits, I do not find the photographic evidence dispositive of whether the ladder steps were in defective condition. Based on the above, I find the physical integrity of the steps had been compromised such that a step was reasonably likely to break when a miner used the ladder to access the cab.

2. Violation

Bigley issued Order No. 6615025 for broken steps on the cable ladder leading to the highwall drill’s operator cabin and the drill’s worn head guides.⁵ Order No. 6615025 alleges a violation of 30 C.F.R. § 77.1007(b), which requires operators to correct defects affecting drilling equipment safety before the drill is used. Bigley deemed this violation to be S&S and an unwarrantable failure to comply with a mandatory safety standard. Dynamic argues that the cable ladder steps had enough wire braids intact that the ladder step was unlikely to break.

To establish a violation, the Secretary must establish that the drill was in use or available

⁵ Bigley indicated the worn head guides were unlikely to result in serious injury or illness. (Tr. 46:3–9.) However, he stated he was required to include all defects from one piece of equipment in one citation or order and accordingly judged the gravity based on the steps, which were the worse of the two defects. (Tr. 45:18–25, 46:15–17.) In light of this testimony, I have examined the violation, S&S, and unwarrantable failure issues based on the condition of the cable ladder steps.

for use, that the ladder or head guides were defective, and the defect affected safety. Bigley observed a miner operating the drill when he began his inspection of the drill, establishing the first element of a violation.

The physical condition of the ladder had been compromised to the point that it was likely to break. A reasonably prudent mine operator would recognize that the ladder was defective and warranted correction. *Ideal Cement Co.*, 12 FMSHRC at 2415–16. Moreover, a reasonably prudent operator would recognize that an unexpected fall from four to seven feet affects safety because it could result in broken bones or joint sprains. *Cf. Sangravl Co.*, 33 FMSHRC ___, 2011 WL 2286880 at * 19 (May 2011) (ALJ) (finding that a five- to eight-foot fall onto concrete would “[s]urely . . . result in serious injuries.”) I therefore conclude that a violation of § 77.1007(b) occurred. *United States Steel Corp.*, 6 FMSRHC at 1434–35.

3. Gravity and S&S

As articulated above, Dynamic’s violation of a mandatory safety standard establishes the first element of the *Mathies* test for an S&S violation. Even a miner who notices a defective cable ladder during a preshift examination may forget about the defect as he or she boards and disembarks from the driller. *See, e.g., Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983) (“Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall.”) The heightened possibility of an unexpected fall caused by this violation constitutes a discrete safety hazard.

The miners in this case had relatively frequent exposure to the hazard in this violation. The drill operator mounts and dismounts the drill four or five times per day. Other miners—who did not participate in the preshift examination—may access the cab to discuss work plans with the drill’s operator. Though the drill does have additional points of access, a miner in the midst of drilling holes may easily forget to use them. Further, other miners consulting with the drill operator may use the access point closest to the operating cab. In addition, a fall from four to seven feet is reasonably likely to result in injuries such as a broken bone or sprained joint. *See Sangravl Co.*, 2011 WL 2286880 at *20 (finding a violation of § 56.11001 to be S&S in part because broken bones or internal injuries were the likely result of a five- to eight-foot fall). I therefore determine that the violation resulted in a discrete safety hazard associated with a reasonable likelihood of an injury of a reasonably serious nature, which establishes the three remaining elements of the *Mathies* test for an S&S violation. I therefore conclude that this violation was S&S.

4. Negligence and Unwarrantable Failure

Bigley’s testimony about his conversation with Webb is uncontroverted. Webb admitted that he knew the stairs were “damaged” and that they should have already been fixed. Webb was responsible for V&G’s work at Job 20 but took mining directions from Dynamic. Moreover, the drill in operation was Dynamic’s drill. I therefore conclude that Dynamic demonstrated a high degree of negligence.

Webb's admission that he knew the damaged stairs required repair is amplified by Dynamic's preshift reports recording a problem with the cable steps for at least three shifts for two days prior to the order in this case. Dynamic argues that the pre-shift reports did not list the ladder steps as "bent" on September 4, that Bigley admitted that "bent" steps differ from "broken" steps, and that "a reasonable conclusion would be that the step had been repaired." (Tr. 21:13-19, 52:15-19, 125:25-126:1; Resp't Reply br. at 3-4, 16.) As a result, Dynamic asserts, the Secretary cannot rely on the pre-shift reports as evidence of Webb's knowledge of the violation. (Tr. 21:13-19). However, Webb's statements to Bigley are telling: "Yes, yes, I know they've been writing that up. I know about those steps and I should have already had them fixed." (Tr. 36:2-3.) Moreover, Dynamic presented no evidence in support of its "reasonable conclusion" theory beyond the September 4 preshift report. Indeed, when Dynamic attempted to re-characterize Webb's statement as Webb having said that he thought it had been fixed, Bigley corrected him: "First of all, he didn't tell me that he thought it had been fixed. He said 'I know that that step was damaged and I should have already had it fixed.'" (Tr. 129:23-130:4.)⁶ I therefore conclude that a violation existed for at least three days and Dynamic had knowledge of the violation.

In addition, the operator made no effort to block off the defective steps and did not remove the driller from operation and provided no evidence that any employee ever physically manipulated the steps in a way that would have revealed severed wires. Despite the rather simple fix—blocking off the steps—I therefore conclude that Dynamic made no efforts to abate the violation. Further, Dynamic's own photographic exhibits, coupled with problems being marked on miner's preshift reports, establish that the violation was obvious. The record contains no evidence that greater efforts were necessary for compliance. Dynamic's knowledge of the violation, failure to abate the defect, and foreseeability of potential injury to miners constitute aggravated conduct more than ordinary negligence. *Spartan Mining Co.*, 30 FMSHRC 699, 714-15, 722-23 (Aug. 2008) (upholding unwarrantable failure findings based on supervisor's knowledge and foreseeability of danger). I conclude that this violation did constitute an unwarrantable failure to adhere to a mandatory safety standard. Order No. 6615025 is hereby **AFFIRMED**, as written.

5. Civil Penalty

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

⁶ Bigley also reiterated Webb's statement earlier in cross-examination, saying "[Webb] told me he knew the steps were damaged and need to be repaired and said that he should have already been repaired." (Tr. 124:17-19.)

The Secretary has submitted a report of Dynamic's history of violations that have become final orders over a fifteen month period preceding this violation. The report consists of thirty-two violations, eight of which were assessed as S&S violations, and none of which involve the standard breached in Order No. 6615025. Nothing in the record suggests the proposed penalty amount of \$4,000 that the Secretary seeks in these proceedings is inappropriate for the size of Dynamic's business or that it would infringe on Dynamic's ability to remain in business. Moreover, once this order was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed one miner to a reasonable risk of serious injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$4,000.

D. Citation No. 6615028 – The Portal Bus

1. Additional Findings of Fact - The Portal Bus

Both Church and Miller testified that the exhaust system on the portal bus was routinely broken, suggesting that the way the miners drove the bus contributed to the persistent exhaust system problems. (Tr. 72:19–73:2, 210:9–12.) Miller, however, neither trained the drivers nor prohibited aggressive drivers from operating the bus. (Tr. 207:6–22.) Indeed, no evidence demonstrates that Dynamic ever disciplined drivers for operating this equipment in a manner that Dynamic says resulted in the equipment being abused.

Moreover, Dynamic routinely uses unmodified school buses purchased at auction as portal buses. (Tr. 73:14–19, 91:14–15, 209:7.) School buses are designed for use on paved roads, not the rough roads of a mine site. Church himself admitted that school buses are not designed for off-road use, but are used at Coal Mountain Mine No. 1 because they allow Dynamic to transport miners more efficiently than in an off-road vehicle. (Tr. 83:5–11.) Dynamic had an on-site Surburban, but it was reserved solely for the mine owner's use during site visits. (Tr. 104:21–105:4.) I find, therefore, that Dynamic knew that old, unmodified school buses were not well-suited to the task for which they were used but chose to employ them in the interest of economy.

Dynamic's questioning of Inspector Bigley during cross-examination suggests that buses are designed to have passenger compartments that are sealed against the outside. (Tr. 141:18–142:6.) Yet Church testified to the contrary, indicating that Dynamic could not allow a broken-off exhaust system to remain unremedied because fumes came out of the motor and into the compartment where miners ride. (Tr. 84:5–8.) Based on the above record, I find that exhaust fumes consistently escaped into the passenger compartment of the portal bus.

Dynamic also suggests that Bigley's inspection of the steering joint was insufficient. (Resp't Br. at 7.) Here, however, Bigley's experience and Church's inconsistent testimony are determinative. Bigley has issued over thirty steering joint movement citations, and has extensive experience with performing these inspections through his CDL work. (Tr. 98:14–99:7.) Church provided no comparable details regarding his training or experience in testing the integrity of

steering joints. Moreover, Church admitted he had no first-hand knowledge about the steering joint violation at issue in this case. (Tr. 82:6–7.) Church also admitted he does not use a dial indicator to determine joint wear. (Tr. 66:21–22, 81:20–82:1.) Instead, Church allows two mechanics to check the joint in precisely the same manner as Bigley does. (Tr. 66:22–67:2, 82:10–13.) Based on the record above, I determine that the steering joint was defective because it exhibited more than an eighth of an inch of movement as a result of Bigley’s hand pressure test, thus meeting MSHA’s out-of-service criteria.

Dynamic also suggests that the portal bus’s brake system was not defective. Relying on photographs of the engine compartment, Miller and Church stated their belief that the brake reservoir contained brake fluid. (Tr. 77:7–9, 78:13–79:8, 79:22, 80:11–14.) However, unlike Bigley, neither Church nor Miller provided any testimony regarding their own physical examination of the engine compartment.

In addition, Church suggested the bus’s brake system was designed to allocate sixty percent of its stopping power to the front wheels, which would cause the front brakes to catch a few seconds before the rear wheels. (Tr. 64:13–16, 75:19–23, 85:25–86:4.) Bigley, who has extensive experience performing maintenance on oversize vehicles, was unfamiliar with any such allocation of braking power. (Tr. 93:25–94:2.) According to Bigley, large vehicles employ precisely the *opposite* allocation of stopping power because locked front wheels and rolling rear wheels create a safety hazard. (Tr. 94:7–10.) Church himself admitted that front brakes locking while the rear wheels continue to roll leads to accidents. (Tr. 75:9–15.) Indeed, neither Church nor Miller anywhere explains why a large vehicle like the portal bus would logically employ such an uncommon allocation of stopping power. Based on the above, I find that the portal bus’s braking system was defective.

2. Violation

Bigley issued Citation No. 6615028 for the portal bus’s defective brake system, exhaust system, steering joint, and gas pedal. Order No. 6615028 alleges a violation of 30 C.F.R. § 77.1606(c), which, as stated above, requires operators to correct defects affecting haulage equipment safety before the equipment is used. Bigley deemed this violation to be S&S and assessed moderate negligence. Dynamic argues that the Secretary has not proven the elements for any of the above cited systems.

To establish a violation, the Secretary must prove that the bus was in use or available for use, that the brake system, exhaust system, steering joint, or gas pedal was defective, and that the defect affected safety. Bigley observed a miner driving the bus when he began his inspection, establishing the first element of a violation.

Each of the above defective systems would affect the driver’s ability to safely operate the bus, and a reasonably prudent mine operator would recognize these hazards warranted corrective action. *See Ideal Cement Co.*, 12 FMSHRC at 2415–16. In addition, a reasonably prudent mine operator would recognize that an out-of-control bus affects safety because a bus collision could

result in fatalities to miners aboard the bus, on foot, or in other vehicles. I therefore conclude that a violation of § 77.1606(c) occurred.

3. Gravity and S&S

Dynamic's mandatory safety standard violation establishes the first element of the *Mathies* test for an S&S violation. Here, the portal bus's dismal condition affected each of the systems—the steering, the brakes, the accelerator—on which a driver relies for safe operation and avoidance of accidents. Moreover, carbon monoxide from the exhaust system is known to have a deleterious effect on human health; consistent exposure to exhaust fumes itself constitutes an additional discrete safety hazard.

The miners on board the bus in this case had relatively frequent exposure to the hazard in this violation. Dynamic uses portal buses to transport miners to and from their mine portals for every shift of every day. See *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989) (“The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued.”) (citations omitted). It borders on a truism to say a bus crash is reasonably likely to result in serious injury or death, given that school buses do not have seat belts for passengers. I therefore determine that the violation resulted in discrete safety hazards associated with a reasonable likelihood of an injury of a reasonably serious nature. Cf. *West Sand & Gravel Co.*, 21 FMSHRC 1418, 1423 (Dec. 1999) (ALJ) (“[H]aving found that the welding truck, with diminished steering and braking capacity, operated around much heavier equipment and pedestrians, on uneven and muddy gravel surfaces, I find it reasonably likely that the truck driver could suffer serious injury from being struck by another vehicle, or hit and seriously injure a pedestrian in his path.”) This determination establishes the three remaining elements of the *Mathies* test for an S&S violation. I conclude that the violation was S&S.

4. Negligence and Unwarrantable Failure

In this case, Bigley assessed Dynamic's negligence as moderate. Bigley based his determination on his conversation with the bus driver, his review of the preshift reports, and his estimation that Sloan did not know that the bus was in such a state of disrepair. The Secretary, however, has asked that the citation be modified to reflect high negligence and to reflect the operator's unwarrantable failure to comply with the standard. (Tr. 18:5–8; Sec'y Br. at 8 n.1.)

At the hearing, Miller and Church both indicated that the manner in which the miners drove the buses contributed to bus maintenance problems, yet Miller never took any disciplinary steps to remedy their driving practices. Further, Bigley's uncontroverted testimony about his conversation with the bus driver likewise suggests that Dynamic should have taken greater efforts to maintain the bus in safe operating condition. This evidence, coupled with Dynamic's evidence that miners were known to abuse the portal bus by driving aggressively, demonstrates a greater level of negligence than initially determined by the inspector. Consequently, Citation No.

6615028 is hereby **MODIFIED** to assess a high level of negligence.⁷

However, the Secretary did not prove that Dynamic engaged in aggravated conduct constituting more than ordinary negligence. Here, Bigley himself indicated that he had no evidence that Sloan knew the bus was in this bad of shape. Indeed, the foreman denied any knowledge of “any of these conditions” related to the bus. (Tr. 100:18–19.) Consequently, I conclude that this violation does not constitute an unwarrantable failure.

5. Civil Penalty

The Secretary originally proposed a \$23,229.00 civil penalty for this violation. (Sec’y Prop. Assessment at 2; Sec’y Pre-Hearing Report at 6.) In her post-hearing brief, the Secretary seeks a civil penalty of at least \$50,000 for this violation based on evidence adduced at trial demonstrating a high level of negligence. (Sec’y Br. at 8 n.1, 30.) Of the thirty-two violations in Dynamic’s history of violations report, four involved the standard breached in Order No. 6615028. One of those violations was found to be S&S. Nothing in the record suggests that the proposed penalty of \$50,000 that the Secretary seeks is inappropriate for the size of Dynamic’s business or that it would infringe on Dynamic’s ability to remain in business. Dynamic did not respond to the Secretary’s requests for a higher penalty although it had ample opportunity to do so. Once this citation was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed at least twelve miners to a reasonable risk of death. However, Bigley himself admitted he had no evidence of Dynamic’s actual knowledge. In considering all of the facts and circumstances in this matter, I hereby assess a civil penalty of \$30,000.

E. Order No. 6615029 – The CAT Loader

1. Violation

Bigley issued Order No. 6615029 for the CAT loader’s defective tire, engine doors, and handrails. Order No. 6615029 alleges a violation of 30 C.F.R. § 77.404(a), which requires operators to maintain machinery and equipment in safe operating condition and to remove unsafe equipment from service. Bigley deemed this violation to be S&S, occurring as a result of Dynamic’s high negligence. Dynamic argues that the Secretary has not proven the CAT loader to be unsafe.

⁷ In her pre-hearing report, her opening statement at hearing, and her post-hearing brief, the Secretary requests that I designate the violation to be the result of Dynamic’s unwarrantable failure, even though the violation was issued as a section 104(a) citation with “moderate” negligence. (Sec’y Pre-Hearing Report at 6; Tr. 18:5–8; Sec’y Br. at 8 n.1.) The Federal Rules may permit the amendment of pleadings to conform to the evidence and raise an unpleaded issue, *see* Fed. R. Civ. P. 15(b)(2). However, I need not reach this issue because I determine that the Secretary has not presented evidence of “aggravated conduct” greater than ordinary negligence.

To establish a violation, the Secretary must prove that the loader's tire, engine doors, or handrails were not maintained in safe operating condition and that the loader was not removed from service.⁸ Bigley observed a miner operating the loader when he began his inspection, establishing the second element of a violation.

The first element is also established. Both the Secretary and Dynamic spent considerable effort at the hearing and in their post-hearing briefs discussing whether this tire—after being cited and removed—was unsafe. However, the CAT loader tire's considerably worn appearance *prior* to Bigley's order is sufficient to establish that the tire was in unsafe operating condition. As the PPM indicates, the presence of worn tires may indicate that a machine is not being maintained in safe operating condition. Here, circumferential cuts and gashes exposing tire plies were evident before Bigley issued his order; at no point did Dynamic claim that the tire plies were not exposed or that prior to the citation it knew how many plies could safely be exposed. The loader lifted tons of overburden, placing significant stress on the loader's front tires. In addition, the loader operated in a rocky pit; rocks cause a significant amount of damage to tires on a loader. A reasonably prudent mine operator familiar with these facts and circumstances would recognize that the potential hazard of a worn tire exploding warranted corrective action. *Cf. S&M Constr. Inc.*, 19 FMSHRC 566, 578 (Mar. 1997) (ALJ) (finding that a trailer tire with 90 pounds of air pressure and exposed nylon cords affected safety). Miller himself stated that a worn tire may be unsafe, testifying that when he checked off-road tires for safety, if it "looked bad, I would get a representative of the manufacturer to look at the tire." (Tr. 158:22–24.) Miller's testimony, as well as Sloan's admission to Bigley that he knew the tire was defective and that Dynamic was pursuing a replacement tire, support a finding that the tires were in unsafe condition. As a result, I determine that Dynamic did not maintain the CAT loader in safe operating condition. I therefore conclude that a violation of § 77.404(a) occurred.

2. Gravity and S&S

Having established Dynamic's violation of a mandatory safety standard, the first element of the *Mathies* test, I now turn to the questions of gravity and whether this violation was S&S. The degraded condition of the tire resulted in a discrete safety hazard. Assuming continued operation, a rock could puncture the tire in its weakened sidewalls. With the tire placed under enormous pressure from lifting a load, an exploding tire could easily contribute to the collapse of the loader, a collision with an adjacent rock truck, or propel a rock into other vehicles or exposed miners on foot. *See Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (explaining that the third element of the *Mathies* test asks whether the safety hazard, rather than the violation itself, is reasonably likely to cause injury). As Bigley indicated, any of these hazards could result

⁸ The witness testimony and post-hearing briefs provide some contradictory discussion regarding the safety of the engine doors and handrails. Because I determine that the loader's tire was defective and that a reasonably prudent mine operator would have recognized the potential hazard of a worn tire exploding, thus warranting corrective action, I need not make additional factual findings regarding the safe operating condition of the engine doors or handrails.

in serious injury or death. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (noting the importance of an inspector’s judgment in making an S&S determination). Accordingly, the hazard associated with this violation was properly cited as a reasonably likely risk of serious injury to more than one miner. I conclude that this violation created a discrete safety hazard associated with the reasonable likelihood of a reasonably serious injury. *See S&M Constr. Inc.*, 19 FMSHRC at 579 (finding a violation was S&S where a tire bulged, was missing tread, and inner cords and belts were visible). I therefore determine that this violation was S&S.

3. Negligence and Unwarrantable Failure

In this case, Bigley’s testimony about his conversation with Sloan is uncontroverted. Sloan admitted he knew the tire was defective and explained that the company had contacted the manufacturer about obtaining a replacement tire. Yet before Bigley issued his order, no representative of the manufacturer or distributor ever physically inspected the tire to ensure it was safe for continued operation. (Tr. 153:2–4, 169:18–22, 191:19–22.) Based on this record, I find Sloan’s admissions to Bigley establish that Dynamic knew the tire to be defective and had sought a replacement Superhawk tire from either the manufacturer or GCR prior to Bigley’s September 10 citation. Further, I find that Dynamic took no steps to have any expert physically examine or ensure the safety of the tire prior to issuance of the order. I therefore conclude that Dynamic’s violation demonstrated a high degree of negligence.

In addition, Dynamic destroyed preshift reports for the loader that may have demonstrated how long Dynamic had known the tires to be defective; I have drawn an adverse inference that the preshift reports would have shown the defects to have existed. Based on this inference and Sloan’s statement to Bigley, I therefore conclude that Dynamic had knowledge of the violation. Given Dynamic’s failure to have any tire expert physically inspect the tire and or remove the loader from operation, I conclude that Dynamic made no efforts to abate the violation. Further, Dynamic’s own photographic exhibits, coupled with Sloan’s statements, establish that the violation was obvious and suggest greater efforts were necessary for compliance.⁹ Here, Dynamic knew the tire to be defective and that the worn tire presented a risk warranting inspection, yet continued running the loader—subjecting miners to safety hazards—because it

⁹ According to Dynamic, Rick Neely, a representative from the tire distributor, GCR, examined the tire after the order. (Tr. 161:17–23, 190:19–191:18.) Dynamic submitted an undated e-mail from Mr. Neely sent to a former Dynamic safety foreman, Dave Street, claiming that the Superhawk tire was sound. (Ex. R–2; Tr. 14:1–24, 164:12–18, 191:19–21.) Miller further testified regarding his post-citation discussions with Neely regarding Neely’s inspection of the tire. (Tr. 165:8–168:2, 168:22–169:6.) However, neither Neely’s letter nor Dynamic’s testimony at hearing established Neely to be an expert in tire construction. Miller himself admitted that Neely “didn’t have a whole lot of information” about the Superhawk’s construction. (Tr. 167:16–21.) MSHA Mechanical Engineer Angel, a qualified tire expert, also discussed the Superhawk tire with Neely and determined that Neely lacked an understanding of the tire’s construction. (Tr. 232:23–25.) Accordingly, I credit Angel’s testimony and afford no weight to either Neely’s e-mail or Miller’s testimony regarding his conversation with Neely.

did not have a replacement tire in stock. I conclude this violation constituted an aggravated failure to adhere to a mandatory safety standard and to be aggravated conduct that is more than ordinary negligence. *Spartan Mining Co.*, 30 FMSHRC 699, 714–15, 722–23 (Aug. 2008) (upholding unwarrantable failure findings based on supervisor’s knowledge); *San Juan Coal Co.*, 29 FMSHRC 125, 134–35 (Mar. 2007) (indicating that an operator’s failure to address a violation, or subordination of abatement efforts to other work, support an unwarrantable failure finding) (citations omitted); *E. Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) (“[I]f an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.”); *see also S&M Constr. Inc.*, 19 FMSHRC at 579 (finding aggravated conduct more than ordinary negligence where tire’s defective condition was obvious, lasted more than two days, no efforts were made to remove the tire, and the vehicle was allowed to continue in operation with the defective tire.) Accordingly, Order No. 6615029 is hereby **AFFIRMED**, as written.

4. Civil Penalty

The Secretary seeks a civil penalty of at least \$4,000 for this violation. Of the thirty-two violations in Dynamic’s history of violations report, two involved the standard breached in Order No. 6615029. Both were determined to be S&S, and one of those violations was the result of Dynamic’s unwarrantable failure to comply with the standard. Nothing in the record suggests that the Secretary’s proposed penalty of \$4,000 is inappropriate for the size of Dynamic’s business or that it would infringe on Dynamic’s ability to remain in business. Once this order was issued, nothing suggests that Dynamic failed to make a good faith effort to achieve rapid compliance with the safety standard. Dynamic was highly negligent, and the violation exposed two miners to a reasonable risk of death. In considering all of the facts and circumstances in this matter, I hereby assess a civil penalty of \$4,000.

VI. Order

In light of the foregoing, it is hereby **ORDERED** that Order Nos. 6615025 and 6615029 be **AFFIRMED** and that Citation No. 6615028 be **MODIFIED** to reflect a high level of negligence. Dynamic is **ORDERED** to pay a civil penalty of \$38,000 within 40 days of the date of this decision.

Alan G. Paez
Administrative Law Judge

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