FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 14, 2024

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MORTON SALT INC., Respondent. & QUINN NORWOOD, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2022-0135 A.C. No. 16-00970-549832 Docket No. CENT 2023-0109 A.C. No. 16-00970-571154 A Mine: Weeks Island Mine & Mill

DECISION AND ORDER

Appearances: Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202

Donna Vetrano Pryor, Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, CO 80202

Before: Judge Simonton

I. INTRODUCTION

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Morton Salt Inc. ("Morton Salt" or "Respondent") and Quinn Norwood, pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801.[1] These cases involve one Section 104(a) Citation No. 9646138 with a proposed penalty of $2,573.00 against Morton Salt, one Section 104(d)(1) Citation No. 9646139 with a proposed penalty of $12,754.00 against Morton Salt and a proposed penalty of $4,600.00 against Quinn Norwood. On September 21, 2023, the Secretary filed a Notice of Vacatur with the Court vacating 104(a) citation 9646138.

[1] In this decision, the joint stipulations, transcript, Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

The parties presented testimony and documentary evidence regarding the remaining citation 9646139 at issue at a hearing held on, November 6, 2023, in Lafayette, Louisiana. MSHA Inspector Chad Derouen and Special Investigator Mark Shearer testified for the Secretary. Landon Olivier, the mine's Safety Manager, and employees Quinn Norwood and Travis Mallette testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties' post-hearing briefs, I **AFFIRM** Citation No. 9646139 as issued.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Morton Salt is the operator of Weeks Island Mine, Mine ID 1600970.

2. Weeks Island Mine is an underground salt mine in Louisiana.

3. Morton Salt, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et seq.* (the "Mine Act").

4. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Mine Act.

5. The subject violations were properly served by a duly authorized representative of the Secretary upon an agent of Morton Salt on the date and place stated on the citations and may be admitted into evidence for the purposes of establishing their issuance.

6. The proposed penalty in CENT 2022-0135 will not affect Morton Salt's ability to continue in business.

7. Morton Salt demonstrated good faith in abating Citation No. 9649139.

8. On January 11, 2022, MSHA Inspector Chad Derouen reviewed video recordings from Morton Salt's cameras that included footage from underground and multiple surface areas.

9. Inspector Derouen created a timeline of events based on the video footage. He included the timeline on page 11 of his general field notes, DOL 0027.

10. Derouen's timeline accurately reflects what he observed in the video.

11. Mr. Derouen viewed this video in the presence of the following Morton Salt personnel: Landon Olivier, Ryan McBride, and Rob Freeman.

12. Morton Salt did not retain a copy of this video.

13. It is undisputed that a violation of 30 C.F.R. § 57.22601(a) occurred.

Tr. 6-7.

III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

Morton Salt, Inc., operates the Weeks Island Mine, an underground salt mine located in Louisiana. Tr. 8; Jt. Stip. 1. Because Weeks Island is a gassy mine that is known to liberate methane, the operator is required to ensure that all miners are on the surface before initiating blasting. Tr. 8. Management utilizes a tag-in/tag-out board ("tag board") to keep track of every miner that is underground. Tr. 21; Ex. S-4. Each individual miner is assigned a tag, and the tag's position on the board indicates whether the miner is in the mine or out of the mine. Tr. 21, 111. For contractors and other visitors like MSHA inspectors, miners are assigned a general tag that is recorded in a sign in and out book. Tr. 22, 112. The left two-thirds of the board is reserved for Morton Salt employees; the left side stores the tags, and the middle shows which employees are underground. Tr. 29-30, 111-12. The right third of the board is reserved for contractors' tags. Tr. 30, 112. When the tag is black or colored, the miner is in the mine and when it is white, the miner is on the surface. Tr. 183.

To comply with safety standards, management must ensure that the mine is clear and there is no one who remains underground before initiating blasting. Morton Salt developed a Standard Operating Procedure ("SOP") that outlines how to properly clear the mine. Tr. 106-07; Ex. R-G. If the supervisor is preparing to blast and there is still a tag that is flipped over on the board, it is his responsibility to contact that person and ensure they are out of the mine before proceeding with blasting. Tr. 26; Ex. R-G. According to the SOP, both the foreman and the powderman are required to check the tag board before initiating a blast. Tr. 50-51, 69; Ex. R-G. While the SOP states that the powderman must also check the tag board, the powderman is not a supervisor. Tr. 167. Miners receive blasting training during their new hire training and then refresher training yearly. Tr. 104. This training involves reviewing the SOP with a production supervisor who also demonstrates the process. Tr. 139-40.

Weeks Island generally blasts every day at the same time to make it easier for miners to know when the blast is going to occur. Tr. 146-47. Typically, a supervisor informs miners when blasting is going to occur on that day. Tr. 163. This information is communicated verbally to the miners on that shift, including contractors. Tr. 105-06. Four months prior to the incident, the time of blasting had been moved to 3:00 p.m., which is the end of the day shift. Tr 165. An hour before blasting is supposed to occur, miners will generally start exiting the mine. Tr. 147. When tying up the rounds for blasting, the leadman will sweep the mine areas to ensure there is no one left in the mine underground. Tr. 148.

On January 10, 2022, MSHA received a hazard complaint that Morton Salt blasted at the Weeks Island Mine while four contractors from American Mine Services were still underground and unaccounted for. Tr. 8. This blast took place around 3:00 p.m. Tr. 18. Prior to blasting, temporary production foreman (or leadman) Quinn Norwood and the powderman, in accordance with the SOP, went underground to drive through the mine and to tie-in the explosive rounds. Tr. 54-55. Video footage showed the contractors walking up to a shaft landing underground at 3:04 p.m. Tr. 31-32; Ex. S-3-11. The miners arrived back at the surface at 3:14 p.m. Tr. 61; Ex. S-3-14.

Inspector Chad Derouen conducted the investigation after the blast occurred on January 10, 2022, arriving at the mine at approximately 5:00 p.m., two hours after the blast. Tr. 17-18. Many of the people who had been present for the blast had already left, but the inspector was able to interview Quinn Norwood, who was the temporary production foreman that day. Tr. 19. As production foreman, Norwood was responsible for overseeing the production crew on shift and for blasting and clearing the mine. Tr. 20. Inspector DeRouen returned to Weeks Island the next day, January 11, to interview those present at the time of the blast including the four contract miners Tr. 23, 53. The contract miners told the inspector that they did not know the blast went off while they were underground, that they did not feel the blast, and that they only found out about the blast when they were back on the surface. Tr. 53-54. No methane had been detected from the blast. Tr. 56.

As part of his investigation, Inspector Derouen reviewed video footage of the room with the tag board and took notes based on his observations. Tr. 23; Ex. S-3. The footage was not retained by Morton Salt and was not presented at hearing. Jt. Stip. 12. The inspector testified that Norwood cleared the mine but "[d]idn't even look at the right side of the tag board" where the contractors' tags are located. Tr. 25; Ex. S-3-11. Norwood entered the room, and noticed there was a Morton Salt employee tag in the middle of the tag board that had not been turned over, indicating the employee was still in the mine. Tr. 26-27. Norwood then left the room to find that employee, and returned to the room to flip the tag to reflect that they were not in the mine. Tr. 27-28. Based on the actions in the video, the inspector did not believe that Norwood looked at the right side of the tag board where there were four contractors' tags that were flipped over to show they were still in the mine in either of the two times he was in the room to view the tag board. Tr. 27-28. The inspector did not see the powderman on the video, who is also tasked with checking the tag board under Morton Salt's SOP. Tr. 68. He testified that he did not speak with the powderman during the course of his investigation and did not know with certainty whether the powderman checked the tag board. Tr. 50-51.

When questioned by the inspector about the procedure he took to clear the mine, Norwood stated that he did not see the contractor tags on the board when he declared that the mine was clear and that he did not look at the right side of the board. Tr. 33-34; Ex. S-3-7. Norwood reportedly told the inspector that he "got in a hurry" when the inspector was conducting his interview. Tr. 32-33; Ex. S-3-7. Another employee also told the inspector that Norwood seemed to be "in a big hurry" to clear the mine. Ex. S-3-10.

The inspector testified regarding the hazards of blasting while there are still people underground. As a gassy mine, Weeks Island has a history of liberating methane after blasting. Tr. 37. Methane liberations are unpredictable, happen at various times and can cause secondary ignitions leading to a secondary blast. Tr. 36-37. Further, blasting can create sound and shock waves that can carry a long distance underground and have a concussive effect in confined spaces. Tr. 38. In certain circumstances, blasting can lead to flyrock or pieces of salt that can become projectiles. Tr. 39. The special investigator corroborated these hazards testifying that it is hazardous to leave miners underground during blasting because it exposes them to dangers such as fall of material, roof collapses, or if methane is unexpectedly liberated, explosions. Tr. 80.

In response to this violation, Inspector Derouen issued a citation, determining that it was reasonably likely to cause fatal injuries to four miners. Tr. 35-36, 39. He marked the violation as an unwarrantable failure because agents of the mine have a responsibility to miners under their watch which did not appear to be taken into consideration when it was time to blast. Tr. 40. The violation was also determined to be significant and substantial, because although there was no methane liberation in this instance, there is always the potential in a gassy mine for one that can lead to secondary explosions. Tr. 36-38. The inspector determined that the events which transpired on January 10, 2022, posed a high degree of danger. Tr. 40. The inspector marked the violation as high negligence because he believed that Norwood, as the foreman, had the experience to complete the task properly and failed to do so. Tr. 71. The investigator testified that this appeared to be an isolated incident and the condition was immediately abated. Tr. 59.

Special Investigator Mark Shearer also testified for the Secretary as to the findings of his special investigation. He did not speak to Quinn Norwood or view the video footage that the inspector did because it was no longer available. Tr. 76-78. The investigator recommended a 110(c) penalty be imposed on Norwood, because it was his job as the foreman to make sure that the mine was clear. Tr. 78. He credited the fact that Norwood removed the single Morton Salt employee tag as evidence that Norwood was present but found that Norwood did not look over the entire board. Because the tags were easy to recognize against the board itself and Norwood knew that there were contractors working that shift, the special investigator determined that the violation was blatant and obvious. Tr. 79–82. Shearer testified that the only way Norwood could have corrected the violative condition would have been to make sure they were out of the underground mine. Tr. 80. And even though Shearer had no specific information that Norwood knew at the time of the blast the miners were underground, it was the fact that there was so much overwhelming reason for him to know they were still underground that certainly factored into his decision to recommend a 110(c) penalty. Tr. 80-81. In other words, there is no excusing the fact that Norwood should have known those miners were still underground. The evidence was right in front of him on the board. It was just blatant and obvious. Tr. 82. Further, Shearer noted the actual location of the contract miners did not factor into his analysis because Norwood had no knowledge of their location at the time of the blast. Tr. 83-84. Shearer also found evidence that Norwood rushed through the blasting process, and that the operator recently changed the time of the blast from the start of the night shift to the end of the day shift as motivation for speeding up the process. Tr. 91-92.

Landon Olivier, the site safety trainer at the mine, accompanied the inspector when he investigated the violation and testified for the Respondent at hearing. Tr. 113. He confirmed that both Quinn Norwood and the powderman were disciplined for the incident. Tr. 113-14; Ex. R-H. As part of his own investigation, he interviewed the miners who had been underground during the blast, all said that they neither felt nor heard the blast. Tr. 115. He confirmed that the miners had been at the 1500 level of the mine, while the site of the blast was on the 1600 level. Tr. 115-17; Ex R-C. These levels are approximately 2,600 feet apart. Tr. 120. To get back to the surface, the miners needed to travel to the 1400 level, which is even farther from the blast site at approximately one mile away. Tr. 119, 121. In Olivier's opinion, the miners were not in a great degree of danger because they had been so far away from where the blasting took place. Tr. 122. He testified that Morton Salt had never been put on notice that greater efforts were needed for compliance regarding the regulation that miners should not be underground while blasting. Tr.

122. Finally, although the mine had liberated methane after blasting in the past, there had never been an explosion as a result of methane liberation during Olivier's employment. Tr. 127. He did acknowledge, however, that methane liberation is impossible to predict. Tr. 131-32.

Quinn Norwood testified for the Respondent regarding his involvement in the blasting incident. At the time of the blast, he was employed in the Miner A position, meaning that he performed all jobs in production. Tr. 139. He confirmed that he had received both powderman and blasting training. Tr. 139-40; Ex. R-E. As part of his responsibilities, he would act as a leadman and temporary production supervisor when supervisors were out. Tr. 142-143. This was the role he was in on the day of the blast. In the past, he has served for four weeks out of the year in this temporary role. Tr. 142-43. Norwood had participated in hundreds of blasts prior to January 10, 2022. Tr. 172, 177.

At hearing, Norwood testified that he was aware that contract miners were working the day of the blast, but he did not know they were still underground, and he did not see them in their work area when he was conducting his sweep. Tr. 156-57, 167-68. When he first checked the board, he saw that there was still a Morton Salt employee tagged in, based on the tag's location in the middle of the board. Tr. 153-54. Norwood left to check that the employee was not in the mine and returned to the board to flip the employee's tag over, looking at the board for a second time. Tr. 154-55. Before returning to the board to flip the tag, Norwood testified that he spoke to the powderman who told him that the mine was clear. Tr. 145, 171. He only saw the four contractor tags on the right side after the blast. Tr. 155, 179. Norwood denied rushing through the blasting procedures. Tr. 162.

Travis Mallette is a current Morton Salt employee who testified for Respondent. At the time of the incident, he was one of the contract miners who was underground. Tr. 188-89. He stated that he and his team knew what time the blasting was scheduled to occur on January 10, 2022, yet they were still underground at 3:00 pm. Tr. 190. He explained that he and the other miners took a bit longer to clean up than they normally would before leaving the mine to return to the surface. Tr. 195. He learned that the blasting had occurred after they returned to the surface, and that he did not feel or hear the blast. Tr. 191, 194. They had not been working on the 1600 level during the blast. Tr. 193.

IV. DISPOSITION

A. Citation No. 9646139

On January 12, 2022, Derouen issued 104(d)(1) Citation No. 9646139, which alleged:

> All development, production, and bench rounds shall be initiated from the surface after all persons are out of the mine. The Production Foreman on duty on the day shift, initiated three explosive face rounds from the surface while four Miners were underground, unaccounted for. Their tags remained on the tag in/tag out board when the board was examined and deemed "mine clear" by the Production Foreman. The Production Foreman engaged in aggravated conduct constituting more than ordinary negligence in that he knew the requirements of the standard

and still conducted blasting with four Miners underground. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1-1; Tr. 35-36.

Derouen designated the citation as a significant and substantial violation of 30 C.F.R. § 57.22601 that was reasonably likely to cause an injury that could reasonably be expected to be "fatal," would affect four miners, and was caused by Respondent's high negligence. Ex. S-1-1. He also designated the citation as an unwarrantable failure. Ex. S-1-1.

i. Fact of Violation

The parties do not dispute the material facts surrounding the violation. Jt. St. 13. 30 C.F.R. § 57.22601(a) states that "[a]ll development, production, and bench rounds shall be initiated from the surface after all persons are out of the mine. Persons shall not enter the mine until ventilating air has passed over the blast area and through at least one atmospheric monitoring sensor." Here, blasting occurred while there were still miners underground. Jt. Stip. 8. Accordingly, the fact of violation is affirmed.

ii. Gravity

Inspector Derouen designated the citation as significant and substantial and reasonably likely to cause an injury that could be reasonably expected to result in a fatal injury. Ex. S-1. He testified at hearing that he selected "reasonably likely" and "fatal" because miners exposed to the blast can incur fatal injuries from flyrock and other projectiles. Tr. 35-36, 38-39. Methane liberations are also unpredictable, and can cause secondary ignitions leading to secondary blasts, which can have a concussive effect through shock or sound waves potentially causing flyrock or pieces of salt that become projectiles and can affect the entire mine. Tr. 36-39. In the inspector's determination, this violation rose to the level of significant and substantial (S & S). Tr. 47.

In order to establish that a violation of a mandatory safety standard is S&S, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) the violation was reasonably likely to cause the occurrence of the discrete safety hazard against which the standard is directed; (3) the occurrence of that hazard would be reasonably likely to cause an injury; and (4) there would be a reasonable likelihood that the injury in question would be of a reasonably serious nature. *Peabody Midwest Mining, LLC*, 42 FMSHRC 379, 383 (June 2020). The Commission has explained that "the proper focus of the second step of the [S&S] test [is] the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 n.8 (Aug. 2016).

Since a violation of a mandatory safety standard has occurred, my analysis turns to the second step which requires a finding that the violation is reasonably likely to cause the occurrence of a discrete safety hazard. Here, I credit the testimony and experience of the inspector and the special investigator regarding the unpredictability of methane liberations, secondary blasts and potential concussive effects which can result in flyrock, projectile salt fragments, fall of material and roof collapses all of which put the entire mine at risk. Fortunately, there was no methane liberation as a result of this blast, but there is always potential for

liberation and for a secondary blast which increases the area where a miner may encounter a hazard beyond just the primary blast area. The specific hazard in an underground gassy mine is the unpredictable occurrence of an explosion as well as the above noted after-effects of a blast. It is noteworthy that Norwood himself testified that they cannot blast while miners are underground due to the mine's gassy nature, demonstrating a recognition on behalf of the operator of the risks associated with this act. The second step is satisfied.

The third step examines whether, based on the particular facts of the violation, the occurrence of the hazard would be reasonably likely to result in an injury. The Respondent contends that the particular facts of this violation reveal that the miners were working half a mile away from the blast and that there were no methane liberations, leaving the Secretary unable to satisfy the third element. R. Br. 13. While this may be true, these facts were only discovered after the blast had occurred and the hazards had been terminated. At the time of the blast, the miners were unaccounted for and their whereabouts unknown. This is exacerbated by the fact that when Norwood conducted his sweep of the mine, he did not find the miners in their normal work area where they would reasonably be expected to be found. I find it reasonably likely that four unaccounted-for miners were exposed to the hazards of an explosion; the repercussive impact of which would cause flyrock or salt projectiles, fall of roof materials or even collapse of roof for a period of fourteen minutes is reasonably likely to result in potentially fatal injury. In doing so, I conclude that the four unaccounted for miners were in fact exposed to the effects of a potentially fatal explosion because their location was unknown during those fourteen minutes.

Finally, the fourth element requires that the Secretary must prove a reasonably likelihood that the resulting injury would be of a reasonably serious nature. An injury of a reasonably serious nature does not require a specific type of injury. *S & S Dredging Co.*, 35 FMSHRC 1979, 1981-82 (July 2013) (holding the ALJ erred in requiring the Secretary to demonstrate an injury that would result in hospitalization, surgery, or a long period of recuperation to satisfy the fourth *Mathies* element). I determine that given the hazards noted above the injuries expected to result from being underground during a blast are reasonably likely to be of a reasonably serious nature.

I affirm that this violation is significant and substantial and is reasonably likely to cause fatal injuries to four miners.

iii. Negligence and Unwarrantable Failure

Under the Mine Act, operators are held to a high standard of care, and "must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d). MSHA's regulations define 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.

More serious consequences are imposed for violations constituting the unwarrantable failure of the operator to comply with mandatory health and safety standards. The term "unwarrantable failure" arises in section 104(d) of the Mine Act, describing serious misconduct that triggers the issuance of a citation under that section. 30 U.S.C. § 814(d). The Commission has defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987). The conduct that qualifies as unwarrantable failure is often characterized as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006) (citing *Emery*, 9 FMSHRC at 2001). The Commission has recognized the close relationship between a finding of high negligence and a finding of unwarrantable failure. *See Dominion Coal Corp.,* 35 FMSHRC 1652, 1663 (June 2013) (ALJ), *citing San Juan Coal Co.,* 29 FMSHRC 125, 139 (Mar. 2007).

While these descriptors are helpful guideposts, the inquiry of whether conduct is "aggravated" is ultimately a holistic analysis of both aggravating and mitigating circumstances. Such circumstances include (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

The inspector designated the violation as high negligence and as an unwarrantable failure to comply with the mandatory standard.

a. Extent of the Violative Condition

The first factor to consider is the extent of the violative condition. The extensiveness of a violation is determined by examining "the extent of the affected area as it existed at the time" and "the number of persons affected by the violation." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014).

There were four unaccounted for miners underground during the duration of the blast for approximately fourteen to fifteen minutes. The Respondent contends that Norwood's actions to track down a Morton Salt employee who was still tagged in should be considered as a mitigating factor. While I acknowledge that this reduced the number of miners who were exposed to the hazardous condition from five to four, it did not lessen the risks to the four miners who were still underground and unprotected. Thus, I do not consider this to be a mitigating factor.

b. Length of Time

The Commission has highlighted the duration of the violative condition as a "necessary element" of the unwarrantable failure analysis. *IO Coal Co*., 31 FMSHRC 1346, 1352 (Dec. 2009). A duration of seconds or minutes often mitigates the severity of the violation. *See, e.g., Dawes Rigging*, 36 FMSHRC at 3080. However, when a hazardous condition is "readily distinguishable from other types of danger due to [its] high degree of danger [and] its obvious nature," the brief duration of the hazard will not militate against a finding

of unwarrantable failure. *Knight Hawk Coal, LLC*, 38 FMSHRC 2361 (Sep. 2016) (quoting *Midwest Material Co*., 19 FMSHRC 30, 36 (Jan. 1997)) (internal quotations omitted).

The length of time that this violation existed was fourteen to fifteen minutes. While this may be viewed as a relatively short period of time this has to be balanced against the potentially fatal exposure to a blast, secondary explosion, exposure to flyrock or salt projectiles or roof collapse all of which are reasonably likely to cause a fatality. For this reason, the length of time of exposure in this case cannot be a mitigating factor.

c. Degree of Danger

The Commission has found that a high degree of danger presented by a violation constitutes an aggravating factor in support of a finding of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1355-56.

Here, the degree of danger was high. The inspector and the special investigator both testified regarding the multitude of hazards that exist from blasting while miners are underground, including fatal injuries from rockfalls and being hit by projectiles. Because the four contract miners were unaccounted for, the degree of danger is an aggravating factor.

d. Obviousness of the Violation

The obviousness of a violation can be an aggravating factor in the unwarrantable failure analysis. The contractor tags on the tag board were clearly in plain sight. Both the tags and the board have high contrast, which made them easy to identify visually. Most importantly, Norwood looked at the board not once but two times before proceeding with blasting. I find that this violation was obvious and as such, an aggravating factor.

e. Operator's Knowledge of the Violative Condition

An operator's knowledge of a violation is an important factor in unwarrantable failure analysis and is a requirement for a finding of high negligence under 30 C.F.R. § 100.3. *Maryan Mining, LLC,* 37 FMSHRC 1715, 1723 (Aug. 2015) (ALJ). Where an agent of an operator has knowledge or should have known of a safety violation, such knowledge should be attributed to the operator. *Martin Marietta Aggregates,* 22 FMSHRC 633, 637 (May 2000). The knowledge or negligence of an agent may be imputed to the operator. *Id.*

I find that the operator had knowledge of the violation. Quinn Norwood was the interim production foreman and was responsible for ensuring that the mine was clear and that no miner remained underground before blasting. Norwood admitted at hearing that he was aware that there were contract miners working at Weeks Island underground that day. While I credit his testimony that he would not have intentionally proceeded with blasting had he seen the contractor tags on the tag board, this does not excuse his oversight. This is exacerbated by the fact that when he did his sweep, he did not find the contractors where he expected them. I find that an experienced miner such as Norwood would have reasonably concluded that he needed to determine the whereabouts of the miners before blasting occurred.

Additionally, there is evidence that suggests the powderman, who is also required to check the tag board according to the SOP, did not check the board. Despite Norwood's testimony that the powderman told him that he checked the board, and the mine was clear, the powderman did not appear on the video recording that was viewed by the inspector. The Respondent as the operator should have known through their assigned agent, Norwood and employee powderman, that there were miners tagged-in resulting in a serious lack of reasonable care.

f. Abatement Efforts

Another relevant factor is whether the operator took action to abate the violative condition before the issuance of the citation or order. When an operator has been put on notice of a problem, "the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997).

While I credit Respondent for their efforts to train miners on their SOPs prohibiting blasting while miners are underground, that training did not prove effective in this instance where Norwood not once, but two times failed to see the contract miner tags on the board. This is exacerbated by the fact that he was aware the miners were not where he expected them to be when he did his pre-blast sweep of the mine. In addition, the powderman failed to follow the training as well in not checking the board as the SOPs required.

g. Notice to the Operator that Greater Efforts were Necessary

Finally, when an operator has previously committed similar violations, those violations are relevant to an unwarrantable failure determination to the extent that they give the operator notice that greater efforts are necessary for compliance with a safety standard. *Brody Mining,* 37 FMSHRC at 1691.

This citation is the first time Morton Salt has violated this particular standard. There is no evidence that Morton Salt was placed on notice that greater efforts were necessary for compliance with the standard.

h. Conclusion

Based on these factors, particularly the obviousness of the condition and the degree of danger, I affirm the inspector's designations that the violation was an unwarrantable failure and high negligence. Having "good reason" to believe that underground miners would not be impacted by a blast is not a substitute for verifying that they are no longer underground and are on the surface like the standard requires. Norwood examined the tag board twice before going forward with blasting. Missing the four contractor tags once constitutes high negligence. Missing the four contractor tags a second time is an unwarrantable failure and clearly demonstrates a serious lack of reasonable care.

I uphold the inspector's determination that the violation was a result of the operator's high negligence and unwarrantable failure.

B. Individual Liability

The Secretary also seeks to impose personal liability against Quinn Norwood for acting as an agent to operator Morton Salt. Section 110(c) liability for an agent is defined as:

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

30 U.S.C. § 820(c). "Knowingly" requires a finding that the agent knew or had reason to know of the violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16.

To establish individual liability, there is a three-part test: (1) that the agent knew or had reason to know about the violative condition; (2) that the agent was in a position to remedy the condition; and (3) that the agent failed to act to correct the condition. *Peabody Midwest Mining, LLC*, 44 FMSHRC at 526-27, 259. The agent's conduct or failure to act must be "aggravated." *Id.* at 527. Aggravated conduct encompasses more than just ordinary negligence.

Quinn Norwood was acting as the production foreman on the day of the incident. He had received all the proper training in order to perform the production foreman duties properly. The SOP implemented by the operator clearly states that the production foreman is responsible for ensuring that no one is underground when preparing to blast. It is also not disputed that Norwood was in a position to remedy the condition, and in fact did so for one Morton Salt employee who was still tagged in. He failed, however, to notice the four contractor tags remaining on the board indicating that four miners were still underground and proceeded to initiate the blast. This satisfies all three elements to establish individual liability.

Concerning Norwood's conduct, I find that it was aggravated. As the production foreman, Norwood had reason to know about the violative condition. He checked the tag board twice before proceeding with blasting, and somehow did not see the dark-colored tags against the board either of those times. Norwood testified that he knew there were contractors working that day and that he was aware they were on the 1600 level. However, he also testified that when he swept the mine prior to blasting, he did not find the four contractors where he expected them to be. An experienced blaster who participated in hundreds of blasts should know and follow the procedures in the SOP to achieve compliance with the standard. Further, the inspector's investigation revealed that Norwood stated that he was in a rush and another anonymous miner

noted that Norwood appeared to be in a hurry. While Norwood disputed this in his testimony, I credit the inspector's contemporaneous notes and Norwood's own admitted failure to see the contractor tags to support the finding that he was in a hurry.

Accordingly, I find that Norwood was personally liable as an agent of operator Morton Salt for the violation.

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 (Mar. 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).

For Citation No. 9646139, the Secretary proposed a regularly assessed penalty of $12,754.00. Morton Salt does not have a prior history of violating this standard. The parties stipulated that the penalty will not affect Morton Salt's ability to continue in business. Jt. Stip. 6 As discussed above, I find that this is an S&S violation that is reasonably likely to result in fatal injuries to four miners as a result of Morton Salt's high negligence and unwarrantable failure. Finally, I find that Morton Salt demonstrated good faith in abating the citation. In light of these considerations, I find that the proposed penalty of $12,754.00 is appropriate.

Quinn Norwood, as the agent named in this matter, has been assessed a proposed penalty of $4,600 for his actions with respect to Citation No. 9646139. The same penalty criteria apply to Norwood as an agent. Norwood does not have a prior history of violating this standard. Concerns regarding his ability to pay the penalty were not raised. The penalty reflects the gravity and the negligence of the violation, and I find that the proposed penalty of $4,600 is appropriate.

VI. ORDER

The Secretary vacated Citation No. 9646138 prior to the hearing. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g., RBK Constr. Inc.,* 15 FMSHRC 2099 (Oct. 1993). It is **ORDERED** that Citation No. 9646138 is **VACATED.**

Further, it is **ORDERED** that Citation No. 9646139 is **AFFIRMED** as issued. Morton Salt, Inc., is **ORDERED** to pay the Secretary the total sum of **$12,754.00** and Quinn Norwood is **ORDERED** to pay **$4,600.00** within 40 days of this order.[2]

David P. Simonton
Administrative Law Judge

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[2] Please pay penalties electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.