

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 8, 2024

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

v.

NALLY & HAMILTON ENTERPRISES,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2022-0079
A.C. No. 15-19884-553944

Docket No. KENT 2022-0084
A.C. No. 15-19884-556030

Mine: Colmar

DECISION AND ORDER AFTER HEARING

Before: Judge Young

Appearances: Thomas J. Motzny, Esq., and Taylor D. Cooper, Esq., U.S. Department of Labor, 618 Church Street Suite 230, Nashville, Tennessee 37219, for the Petitioner

Joseph H. Mattingly, III, Esq., Joseph H. Mattingly III, PLLC, P.O. Box 104 W. Main St., Lebanon, Kentucky 40033, for the Respondent

S. Thomas Hamilton, Esq., Saltsman, Willett, Deaton & Hamilton, P.S.C., 212 E. Stephen Foster Avenue, Bardstown, Kentucky 40004, for the Respondent

SUMMARY

Citation No. 9138188 – Failure to Follow Ground Control Plan (30 C.F.R. § 77.1000)

Fact of violation	Affirmed	pp. 12–14 (Slip op.)
S&S	Yes	p. 14
Negligence	Moderate	pp. 14–15
Unwarrantable Failure	No	pp. 15–20

Order No. 9138189 – Failure to Perform Adequate On-Shift Exam. (30 C.F.R. § 77.1713(a))

Fact of violation	Vacated	pp. 20–24
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INTRODUCTION

This case is before me pursuant to section 104(d) of the Mine Safety and Health Act of 1977 (“Mine Act” or “Act”).¹ On January 11, 2022, two miners were driving a pickup truck on the main mine road at the Colmar Surface Mine in Bell County, Kentucky, where they worked for Respondent Nally & Hamilton Enterprises, Inc. A tree fell from the top of a highwall and crushed the cab of their vehicle. One miner was killed, and the other suffered catastrophic injuries. *See infra* Section I.A.

After investigating the accident, the Mine Safety and Health Administration (“MSHA”) issued three citations for failure to follow the mine’s ground control plan, failure to perform an adequate on-shift examination for hazards, and failure to report the accident immediately to MSHA.² Ex. S-1, S-2, S-4.

For the reasons set forth below, I find that the operator did not follow its ground control plan. I conclude that the violation was significant and substantial (“S&S”) with moderate negligence but was not the result of the operator’s unwarrantable failure.

I also find that the hazard in this case could not have been discovered from a daily on-shift examination required under 30 C.F.R. § 77.1713(a) of the active working areas of the mine and vacate the order finding that examination to have been inadequate.

I. **FACTS**

A. The Accident

Respondent operates the Colmar Surface Mine in Bell County, Kentucky. On January 11, 2022, miners Joshua Pendleton and Cecil Todd Collett were working the first shift at the Colmar Mine, which began at 7 AM and normally ended at 5 PM. Tr. Vol. I, 23.

Pendleton and Collett were transporting blasting materials from the operator’s powder magazine to a blasting site. Tr. Vol. I, 25. They were traveling in a pickup truck on the main mine road at around 3 PM when a tree fell on the pickup truck, crushing the cab. Tr. Vol. I, 25–27. MSHA estimated that the tree was approximately 67 feet tall and weighed more than 6,000 pounds. Tr. Vol. I, 100–01.

¹ In this decision, the transcript is abbreviated as “Tr. Vol. I” and “Tr. Vol. II” for the first and second days of the hearing, respectively. The Acting Secretary’s exhibits are abbreviated as “Ex. S-#” and the Respondent’s exhibits are abbreviated as “Ex. [Letter].” The Acting Secretary and Respondent’s Posthearing Briefs are abbreviated as “Acting Sec’y Br.” and “Resp’t Br.,” respectively.

² Before the hearing, MSHA vacated Citation No. 9138183 (docketed at KENT 2022-0079) for failure to promptly report an accident in accordance with 30 C.F.R. § 50.10(a). Tr. Vol. I, 15. The decision to vacate was not made as part of a compromise, mitigation, or settlement of a penalty but was a prudent exercise of prosecutorial discretion.

Collett was killed in the accident. Tr. Vol. I, 109. Pendleton's serious injuries included a cracked sternum, fractured femur, a "crushed" right lung, a ruptured hamstring, and serious damage to his hip and leg, including muscles which were "tor[n] loose" from the top of his leg. Tr. Vol. I, 27. Pendleton was in severe pain and screamed for help for Collett before passing out from the pain. Tr. Vol. I, 26.

John Brown, a miner operating a bulldozer about 500 to 1,000 feet from the site of the accident, heard the tree fall and looked up. Tr. Vol. I, 56-57. He saw that the tree had struck a pickup truck and ran to help. Tr. Vol. I, 57. When he got to the truck, he checked the driver's side and found Collett unresponsive. Tr. Vol. I, 59. Brown did not know that another miner was in the truck until he heard Pendleton call out to him. Tr. Vol. I, 59.

Brown was not able to get the truck door open to free Pendleton. Tr. Vol. I, 59. He ran back to his bulldozer, called for help on the mine radio, and got a bar and a chain to try to free Pendleton. Tr. Vol. I, 59.

Pendleton was told that it took other miners 45 minutes to extricate him and Collett from the truck. Tr. Vol. I, 27. MSHA Special Investigator Silas Brock,³ who was sent to investigate the accident, said he was told the mine had tied chains to the roof of the truck and lifted it with a piece of equipment to free Collett and Pendleton. Tr. Vol. I, 68, 94.

The tree had fallen from a stand of four trees near the edge of the highwall. Tr. Vol. I, 83, 190. The highwall was approximately 50 feet tall. Tr. Vol. I, 85.

Before the accident, nobody at the mine seemed to take much notice of the trees left on the highwall. *See* Tr. Vol. I, 37-38. Pendleton did say that it would have been "unusual" for trees to be left close to the edge of a highwall. Tr. Vol. I, 31. But nobody from MSHA seemed to have noted the trees either. For example, MSHA Inspector David Faulkner— who was in the process of performing an E01 inspection of the Colmar Mine and had been to the mine multiple times between October 2021 and the date of the accident—had never expressed concern about the trees despite traveling past them multiple times. Tr. Vol. I, 213-14, 217-19.

The four trees had been left on top of the highwall, between an access road that had been cut on top of the ridge and the pit that had been mined beyond the trees. Ex. S-10. The access road was made before the mine opened by a bulldozer to drill "prospect holes" to assess the coal in the underlying seam. Tr. Vol. I, 84-85, 166; Ex. S-10.

At the time of the accident, the access road was not regularly accessed by miners from below, and no miners went up to work on the access road or on the highwall as part of their regular duties. *See* Tr. Vol. I, 82 (Inspector Brock stating he did not think miners would

³ Two of the witnesses who testified in this hearing have the surname "Brock." In this decision, MSHA Special Inspector Silas Brock will be referred to as "Inspector Brock." Colmar Mine Foreman Jody Brock will be referred to as "Foreman Brock." The two men are not related. *See* Tr. Vol. I, 67. Another similarly named individual, MSHA Roof Control Supervisor Argus Brock, did not testify but was mentioned at the hearing. *See e.g.*, Tr. Vol. I, 64. Mr. Argus Brock is also not related to Inspector Brock. Tr. Vol. I, at 65.

“regularly access the top of [the] highwall”); Tr. Vol. I, 189–190 (Colmar Mine Foreman Jody Brock stating the highwall was not one of the areas where miners were “going to be working” at the time of the accident).

The mining in the area of the accident had taken place in 2021. Tr. Vol. I, 32. Mining in this pit had concluded by mid-August of that year. Tr. Vol. I, 174–75. At the toe of the highwall, Respondent had placed rock and dirt that it intended to use in reclamation. Tr. Vol. I, 36, 170. The material formed an elevated area between the main haulage road and the highwall. Tr. Vol. I, 40–41. Witnesses and the attorneys questioning them variably referred to the area where the reclamation spoil had been placed as a “bench,” a “berm,” or a “barricade.” *See e.g.*, Tr. Vol. II, 72 (Foreman Brock equating the material to “a bench or a berm”); Tr. Vol. II, 31 (in question, an attorney for the Acting Secretary referring to the area as “the barricade or the berm”).

Miners traveled the haulage road daily on their way to the parking lot and while working at the mine. Tr. Vol. I, 28, 57–58. Depending on their work, miners would travel that road from eight to 75 or 80 times per day. Tr. Vol. I, 28.

The berm was not constructed to serve as a safety bench or with any intent to prevent large objects from falling from the highwall into the road. Tr. Vol. I, 36–37. *See also* Tr. Vol. II, 72 (Foreman Brock stating the primary purpose was reclamation). It did serve as a barricade between the highwall and the road and effectively prevented smaller objects from falling onto the road. Tr. Vol. I, 43, 49, 139–140. However, the backfill area was not wide enough to prevent trees that could fall from the top of the highwall from landing on the road. Tr. Vol. I, 101–02.

Inspector Brock was joined in the investigation by two of MSHA’s assistant district managers and a surface inspector.⁴ Tr. Vol. I, 66. He described the accident scene as “horrific.” Tr. Vol. I, 67.

The Kentucky State Office of Mine Safety and Licensing conducted its own investigation while MSHA was on the site. Tr. Vol. I, 71–72. The state agency used a drone to take photographs of the stand of trees at the top of the highwall and the pit that had been mined and shared the photographs with MSHA. Tr. Vol. I, 71–72. *See also* Ex. S-10, S-11, S-12, S-13, S-14.

It is unclear what exactly caused the tree to fall in this case. Inspector Brock’s opinion, for example, was that the root ball became dislodged, causing the tree to slide down the edge of the highwall and, once it hit the elevated area at the base of the highwall, fall forward onto the roadway. Tr. Vol. I, 138–39.

Moreover, while much of the evidence in this case was not in dispute, the location of the tree in relation to the edge of the highwall was disputed. The Acting Secretary argued it was located closer to the edge of the highwall than Respondent. *See* Ex. S-10 (showing both a black circle marked by Inspector Brock and an orange square marked by Foreman Brock indicating the

⁴ The two assistant district managers were Craig Plumley and Dennis Cotton, and the surface inspector was Larry Brent Boggs, none of whom testified at the hearing. Tr. Vol. I, 66.

areas where each believed the tree was located prior to falling); Tr. Vol. I, 81–82; Tr. Vol. II, 79–80, 95–96.

There was also a dispute over whether the tree was alive or dead at the time of the accident. *Compare* Tr. Vol. I, 29 (Pendleton testifying the tree looked “alive,” “was green,” and had visible rings on the inside); Tr. Vol. I, 204–05 (Foreman Brock testifying the tree “was alive,” did not have “dead limbs,” and appeared solid); with Tr. Vol. I, 95 (Inspector Brock stating the tree appeared “dried out, seasoned out. There was nothing green about it. You could tell by the bark it was it was a dead tree.”); Tr. Vol. I, 153 (Inspector Brock stating the tree was “[d]ry and brittle”). *See also* Ex. S-19 (showing the inside of the tree after the accident).⁵

B. The Freeze/Thaw Cycle and the Condition of the Highwall

At the hearing, witnesses described the effect the “freeze/thaw” cycle can have on the integrity of the ground on and around highwalls. *See* Tr. Vol. I, 68–69 (Inspector Brock), 183–84 (Foreman Brock); Tr. Vol. II, 43 (Consulting Engineer and Respondent’s expert witness Dayne Willis). As the soil freezes and thaws, it expands and contracts, and the changes in temperature can create fissures in the rock and can separate soil from tree roots and rocks. Tr. Vol. I, 68–69; Tr. Vol. II, 43. This can create mud slides and other unplanned earth movement. Tr. Vol. I, 68–69, 97–98.

In the days and weeks leading up to the accident, witnesses reported there were wintry conditions with cold weather, rain, and snow. Tr. Vol. I, 23–24, 55–56, 182–83, As Inspector Brock stated, there was “a lot of freezing and thawing” at that time of year. Tr. Vol. I, 68. Moreover, witnesses testified and evidence was presented showing there was ice on the highwall at the time of the accident. Tr. Vol. I, 97–98, 183; Ex. S-20, S-21.

The terrain in the area from which the tree had fallen was very steep, but photographs taken from the ground showed that the contour was not discernible from that vantage point. Tr. Vol. I, 122–23. *See also* Ex. S-16, S-17, C, J, K (photographs taken from the ground). From the top of the highwall, behind the place where the tree had been before it fell, the area appeared to be stable. Tr. Vol. I, 152.

C. The Ground Control Plan and Drop Bench

The mine’s ground control plan required trees and vegetation to be removed a safe distance from the edge of the highwall unless a “drop bench” has been provided. Ex. S-7 at 5; Tr. Vol. I, 134–35. A drop bench is a shelf cut into the vertical highwall to catch material falling

⁵ It should be noted that neither party’s witnesses were arbor experts or had formal education in trees. Tr. Vol. I, 152; Tr. Vol. II, 88. However, Inspector Brock testified that he “grew up in these hills [and knew] a dead tree from a live tree.” Tr. Vol. I, 95.

Foreman Brock stated he could tell whether a tree is dead or alive because he “was around them for a long time.” Tr. Vol. II, 88. He also had prior experience working at a sawmill. Tr. Vol. I, 204–05. Moreover, Foreman Brock was responsible for cleaning up the fallen tree, which he stated would have snapped during that process “if it was dead.” Tr. Vol. I, 205.

from the top of the highwall. Tr. Vol. I, 135–36. While Inspector Brock stated a drop bench is only required for a high wall that is more than 70 feet tall, high walls with a lower height can incorporate drop benches. Tr. Vol. I, 86, 106, 135.

There are no regulations which define the requirements for a drop bench, including its composition, width, or height. Tr. Vol. II, 17. Instead, Respondent’s expert and Consulting Engineer Dayne Willis stated the requirements for a drop bench are “site specific” based on variables such as “the materials you're talking about and . . . the topography that you're dealing with, the configuration of the mine cuts, [and] the room you have to work with.” Tr. Vol. II, 17–18.

According to Inspector Brock, the typical drop bench is 20 feet wide, but they may be up to 40 feet wide. Tr. Vol. I, 135–36. Here, the elevated area made of backfill material was 53 feet wide. Tr. Vol. I, 137.

Pendleton testified the purpose of the backfill was “just to re-slope the . . . [area] back close to natural as possible.” Tr. Vol. I, 36. While he stated the berm was not a safety bench, it did serve the safety purpose of keeping haulage trucks from exiting the road. Tr. Vol. I, 36, 43. Moreover, while not a purpose of the berm, it did catch “small things like rocks” coming down the highwall. Tr. Vol. I, 43, 50.

Per Inspector Brock, the backfill area was not a “drop bench,” partly because the contour of the backfill was not consistent with the expected contour of a highwall, and partly because the berm (comprised of “soil, dirt, crushed up rocks”) was not made of the same material as the highwall (“solid rock”). Tr. Vol. I, 139. *See also* Tr. Vol. I, 107 (Inspector Brock stating this area was not a drop bench and that “[a] drop bench would be part of the highwall itself.”).

The mine’s foreman, Jody Brock,⁶ referred to the area as a “safety bench.” Tr. Vol. I, 198. He said the backfill area served a safety purpose. Tr. Vol. I, 199–200. In addition to being staged for reclamation, it was put in place to keep people away from the toe of the highwall and to keep objects from rolling off the highwall onto the haul road. Tr. Vol. I, 199–200.

Willis stated he would define the area of backfill as a “drop bench” even though it was wider than a typical drop bench.⁷ Tr. Vol. II, 22–23. He stated this area complied with the mine’s ground control plan and thus no removal of vegetation was required. Tr. Vol. II, 25–26. While the material was intended for use in reclamation, it also could have served a safety purpose. Tr. Vol. II, 60.

⁶ As noted in Slip op. at 3, note 3, *supra*, Colmar Mine Foreman Jody Brock will be referred to as “Foreman Brock” in this decision.

⁷ Willis also testified that a drop bench could be called a “safety bench or a catch bench.” Tr. Vol. II, 22.

D. Inspections and Examinations of the Mine and Highwall

In accordance with federal and state regulations, employees at the mine regularly performed pre-shift and on-shift examinations of the active working areas of the mine.⁸ *See* Ex. S-6 (records of pre-shift and on-shift examinations in the days leading up to and including January 11, 2022). The on-shift examination would typically be conducted throughout the duration of each shift and would document conditions noted during that shift. Tr. Vol. I, 177.

Foreman Brock testified that the purpose of these reports was to “[m]ake sure the berms and highwalls and everything’s safe.” Tr. Vol. I, 176. He would also document things that were “out of the ordinary or if there’s a foul, or something that’s happened” during the shift in these reports. Tr. Vol. I, 176. Regarding his on-shift examinations, Foreman Brock stated he would look to see if there was something out of the ordinary during his visual examinations of the highwall from the road, but noted he paid more attention to the areas where active mining was going to occur. *See* Tr. Vol. I, 189-90 (Foreman Brock stating he paid more attention to the areas “[w]here everybody’s working at”).

In the days up to and including the date of the accident, January 11, 2022, employees at the mine consistently performed pre-shift and on-shift examinations of the road. *See* Ex. S-6 (containing Pre-Shift Mine Examiners Reports and Daily and On-Shift Reports from January 1 through January 11, 2022). The pre-shift examination report Foreman Brock completed on the morning of January 11 noted the highwall “[a]ppears to be stable at this time.” Tr. Vol. I, 179. *See also* Ex. S-6 at 1. The on-shift examination report completed by the night shift foreman for the previous shift similarly noted the highwall “[a]ppeared to be stable at time of exam.” Tr. Vol. I, 179. *See also* Ex. S-6 at 2. Foreman Brock also recalled making an examination and briefly “look[ing] up” at the patch of trees on the highwall on the morning of the accident. Tr. Vol. I, 189.⁹

⁸ As discussed in Sections II.B. and III.B. *infra*, federal regulations require an examination of the “active working areas” of a mine at least once per shift. 30 C.F.R. § 77.1713(a). Kentucky state regulations also require a pre-shift examination of areas. KY. REV. STAT. 352.280(2); Tr. Vol. I, 115.

⁹ At the hearing, Foreman Brock testified that he completed the pre-shift examination report for January 11, 2022, between 5 and 6 AM. Tr. Vol. I, 179, 181–82. *See also* Ex. S-6 at 1. He also stated the night shift foreman completed an on-shift examination report for the previous shift. Tr. Vol. I, 180–81. *See also* Ex. S-6 at 2. That examination started at 4:30 PM the evening prior. Tr. Vol. I, 180.

In her Posthearing Brief, the Acting Secretary acknowledged the apparently missing on-shift examination report for January 11, 2022:

As best as can be discerned from the documents, there is no report representing an on-shift examination for the day shift on January 11, 2022. The previous on-shift examination for January 10, 2022, shows the time of the examination from 5:00

(continued . . .)

The mine was regularly inspected by MSHA, and an inspection was underway at the time of the accident. Tr. Vol. I, 147–48. MSHA Inspector David Faulkner was conducting an active regular E01 inspection at the Colmar Mine at the time of the accident. Tr. Vol. I, 213–14. While he was not on-site on the day of the accident, he had been to the mine multiple times before. Tr. Vol. I, 214. He recalled traveling on the road on which the accident occurred and observing the highwall from that vantage point, albeit briefly, on his visits to the mine before the accident. *See* Tr. Vol. I, 224 (Inspector Faulkner stating he “just drove past” the site of the accident).

An inspector typically performs a general review of the site for imminent dangers (an “imminent danger round”) at the beginning of an inspection. Vol. I, 145. No imminent dangers or hazards were noted or cited at the pit during the inspections Inspector Brock reviewed in the accident investigation. Tr. Vol. I, at 146.

E. Citations Issued By MSHA

After its accident investigation, MSHA issued a citation under section 104(d)(1) of the Act, alleging that Respondent had been highly negligent in failing to remove the tree a safe distance from the edge of the highwall. Tr. Vol. I, 109-10; Ex. S-1. MSHA also issued an order under section 104(d)(1) of the Act alleging that Respondent had been highly negligent in failing “to identify, report, and correct the trees that created hazardous highwall conditions” in its on-shift examinations. Tr. Vol. I, 111; Ex. S-2. A third citation under section 104(a) of the Act was also issued alleging that Respondent had failed to immediately report the accident to MSHA, but as previously stated, this citation was vacated at the hearing. Tr. Vol. I, 15; Slip op. at 2, note 2, *supra*.

II. APPLICABLE LEGAL STANDARDS

A. The Ground Control Plan

Respondent had an approved ground control plan for the Colmar Surface Mine that was in effect for over six months by the time of the accident. *See* Ex. S-7 (Ground Control Plan acknowledged by MSHA June 30, 2020). It was required to design and maintain its operations in accordance with that plan:

Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which

⁹ (. . . continued)

a.m. to 5:30 p.m. *See* S-7 at DOL 00198. Likely, because of the accident Foreman Brock overlooked filling out the form on January 11, 2022, for the day shift.

Acting Sec’y Br. at 16, note 9.

When asked by the Secretary’s attorney whether he completed an on-shift examination for January 11, 2022, by virtue of signing the pre-shift examination report, Foreman Brock answered yes. *See* Tr. Vol. I, 181.

shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000.

The relevant provision of the operator's ground control plan states, "Unless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall." Ex. S-7 at 5.

B. Requirement to Perform On-Shift Examinations

Respondent was also required to inspect the active working areas of its mine at least once during every shift:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a).

This regulation is "broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979). As discussed in Section III.B. *infra*, the operator is only required to perform an on-shift examination in the active working areas of the mine. Whether an adequate examination has been performed is determined using the "reasonably prudent miner" test: "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Nally and Hamilton Ent., Inc.*, 37 FMSHRC 1764, 1784–85 (Aug. 2015) (ALJ) (quoting *Tuscaloosa Resources*, 36 FMSHRC 1615, 1618, 1636 (June 2014) (ALJ)).

C. Significant and Substantial ("S&S")

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

In order for a violation to be considered S&S, the following four elements must be met:

(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) (integrating the refinement of the second *Mathies* step in *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)).¹⁰ See also *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (articulating the original four *Mathies* steps).

Following the *Peabody/Newtown* refinement of the *Mathies* steps, the second step requires a two-part process of (1) determining the specific hazard the standard is aimed at preventing, and (2) determining whether a reasonable likelihood exists that the hazard against which the mandatory standard is directed will occur. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016).

D. Negligence

Negligence is defined as “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). The Mine Act holds operators to a high standard of care and requires them “to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.*

E. Unwarrantable Failure

In *Emery Mining Corporation*, 9 FMSHRC 1997 (Dec. 1987), the Commission held an “unwarrantable failure” is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal, Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test).

When determining whether conduct is “aggravated” in the context of an unwarrantable failure, a Commission judge holistically analyzes the specific facts and circumstances in the case at issue. *IO Coal Co.*, 31 FMSHRC 1346, 1350 (Dec. 2009). The seven “aggravating” factors which must be considered are:

¹⁰ In her Posthearing Brief, the Acting Secretary argued “[t]he *Newtown/Peabody* reformulation is inconsistent with the Mine Act’s definition of S&S” and the second step as originally articulated in *Mathies* should be followed instead. Acting Sec’y Br. at 12. However, the Acting Secretary also stated “the second step . . . was met under either test.” *Id.* at 13. Because the Commission’s application of the *Peabody/Newtown* refinement is binding precedent, I must apply that formulation of the second step of the S&S analysis.

(1) the extent of the violative condition, (2) the length of time the violation existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge 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.

Manalapan Mining Co., Inc., 35 FMSHRC 289, 293 (Feb. 2013) (citing *IO Coal*, 31 FMSHRC at 1351-57; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999)).

III. DISPOSITION

The essential question governing several issues in this matter is one of perspective. From the perspective of the time immediately following the accident, it is obvious that the trees on the edge of the highwall, including the tree that killed Collett and severely injured Pendleton, should have been removed.

Similarly, from the perspective of someone closely observing and inspecting the trees on the ridgeline at the edge of the highwall, it might have been obvious that the freeze/thaw cycle cited by the Acting Secretary's witnesses had compromised the ground in which the trees were rooted. An examiner or inspector at the top of the highwall could have realized how large the trees were and might have concluded that the trees presented a looming danger that should have been removed.

Nobody involved in this case—not Foreman Brock, nor Inspector Faulkner, nor any other witness—had the benefit of those perspectives. The core issue is thus whether Respondent's agents should have availed themselves of the opportunity to alter their perspective so that the real danger presented by the circumstances here might have been anticipated.

A. Citation 9138188 – Failure to Comply with Approved Ground Control Plan

The Citation describes the condition or practice as:

The mine operator did not follow the Ground Control Plan acknowledged on June 30, 2020, that required all trees be removed a safe distance from the top of the highwall and did not provide a drop bench. On page three, General Precaution No. 6 of the Ground Control Plan states, “Unless a drop bench is provided, trees and other vegetation will need to be removed a safe distance from the top of the highwall.” The tree was present on the highwall since the area was mined in August 2021. Two weeks prior to the accident, from January 2, 2022, to January 11, 2022, over three inches of rain and approximately eight inches of snow, coupled with a freeze-thaw cycle, resulted in wet, muddy conditions that loosened support of the trees. On January 11, 2022, two miners were traveling in a pickup truck on the mine haul road when a tree, with a calculated weight of 6,241 pounds, fell from the top of the highwall and struck the pickup truck cab. The pickup truck driver died, and the passenger sustained serious injuries.

The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not complying with their Ground Control Plan. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-1.

1. Respondent Failed to Comply with Its Ground Control Plan

Respondent cites the language of its ground control plan and argues that it complied with the plain language of the plan. Resp't Br. at 14. The plan says: "Unless a drop bench is provided, trees and other vegetation will have to be removed a safe distance from the top of the highwall." Ex. S-7 at 5.

Respondent argues that it complied with the plan because the unconsolidated backfill between the edge of the haul road and the toe of the highwall was provided, and intended, to prevent material falling from the highwall from endangering miners on the haul road. Resp't Br. at 13–14. It contends that this material constituted a "drop bench" in accordance with its ground control plan. *Id.* at 14.

The tree that fell was a hazard that could have imperiled any of Respondent's miners at any time. *See* Acting Sec'y Br. at 6 ("trees and other vegetation still presented a hazard at the top of the highwall"); Tr. Vol. II, 39 (Respondent's expert witness Willis stating the tree that fell was a hazard). The miner injured in the accident, Pendleton, testified that he would travel the road approximately eight times a day. Tr. Vol. I, 28. The area where the accident occurred is near the parking lot used by miners. Tr. Vol. I, 76. The zone of danger thus included an area where miners regularly worked and traveled.

The Acting Secretary argues that Respondent did not comply with the plan because the tree that fell was not a safe distance from the edge of the highwall. Acting Sec'y Br. at 6. This is logically and legally correct.

Logically, one cannot accept that a tree was removed a safe distance from the edge of the highwall if it fell from that distance and seriously injured two miners – one of them fatally. Legally, general safety standards – including plans developed by the operator and approved by MSHA – require *effective* compliance.

Not only is this true as a general legal principle, but it is also expressly true here. The standard requiring a ground control plan requires that the plan "will *insure* [sic] safe working conditions." 30 C.F.R. § 77.1000 (emphasis added).

The requirement to "insure [sic] safe working conditions" is a mandate over and above the particular requirements contained in the plan itself, which means although an operator may comply with all parts of its submitted and acknowledged plan, it may still be in violation of the standard if the plan does not provide a safe workplace. While it is true the Secretary must acknowledge the plan, it is the

operator first and foremost who must make certain the plan “insure[s] safe working conditions,” and if the plan does not, the operator violates the standard.

Central Appalachian Mining, LLC, 29 FMSHRC 430, 437 (June 2007) (ALJ). *See also Thunder Basin Coal Co.*, 46 FMSHRC ___, slip op. at 6, No. WEST 2023-0157 (Feb. 22, 2024) (ALJ) (quoting the first sentence of this quote from *Central Appalachian Mining, LLC*, 29 FMSHRC at 437).

The standard, and the plan developed in conformance to it, require the operator to protect miners from hazards. Here, that was not done.

The “bench”—or, as the Acting Secretary has characterized it, the “barricade,” *see* Acting Sec’y Br. at 8—did not provide effective protection from falling material in this case. It was effective in catching some smaller objects and might have been the functional equivalent of a drop bench or safety bench for such objects. However, the material did not prevent the tree from entering the roadway.

I thus agree with the Acting Secretary’s definition, to a point. The material in this case functioned more like a barricade in that it was material intended to be used in reclamation, not a bench that was designed to protect miners from all potential hazards. It is undisputed that the material was not engineered or designed principally to protect miners from falling material. *See* Tr. Vol. II, 60 (Willis testifying the material was intended for use in reclamation but could have served a safety purpose).

A drop bench, or safety bench, is typically cut into the highwall to catch material falling from the top of the highwall. Tr. Vol. I, 224. Here, the functional protection was an added benefit that generally operated to keep miners away from the toe of the highwall (although it did appear to catch some material before it contacted the haul road), not an engineered solution designed to protect miners from the threat posed by tall trees left at the edge of the highwall.

But the Acting Secretary’s definition is not especially important to the resolution of this issue. It is doubtful that any engineered bench could have ensured that this tree would not have contacted the haul road. As the operator notes, a typical drop bench is only 20 feet wide, while this area was 53 feet wide at its widest. Resp’t Br. at 14. *See also* Tr. Vol. I, 135–37.

Relying on the definition alone suggests that the operator would have complied with the standard, if only the berm/backfill/barricade had been better designed to catch falling material or constructed more solidly. The evidence cannot support such a conclusion. The 67-foot-tall tree was simply too large to have been intercepted by any reasonable structure.¹¹

¹¹ Of course, the tree could have fallen in a different direction. *See* Tr. Vol. II, 50–51 (Willis stating no one could have predicted how the tree would have fallen or at what angle). But relying on such fatalism is no different than suggesting that it might have fallen at a different time. A mine operator must anticipate events that are reasonably likely to occur and must assume that those events will transpire at the worst possible time.

Whether the operator does so by constructing a safety bench or by removing vegetation and objects a safe distance from the edge of the highwall, Respondent's duty here was to protect its miners from injury. A bench's effectiveness should not be judged by the manner of its construction, or by its size. The standard specifies neither a height nor a minimum width nor a means of construction.

What is important—in fact, determinative—is the ineffectiveness of this barrier against the tree that fell from the highwall. I therefore find that an effective drop bench was not provided, and that at least one tree was not removed a safe distance from the edge of the highwall. I therefore find a violation of section 77.1000 for failing to conform to the requirements of the ground control plan.

2. It is Beyond Serious Question that the Violation of the Ground Control Plan was S&S

I have found a violation of a mandatory safety standard, which satisfies step one of the S&S analysis. *See* discussion *supra* Section III.A.1. Here, the hazard the standard is aimed at preventing is miners being struck by material falling from the highwall. The violation of the safety standard contributed to this hazard because the tree had not been removed a safe distance from the edge of the highwall. *See id.* Thus, step two is satisfied. The size of the tree that fell from where it was left was reasonably likely to cause, and in fact did cause, serious and fatal injuries to two miners, satisfying steps three and four. Accordingly, this violation was S&S.

3. Respondent's Negligence Was Moderate

Commission judges are not bound to adhere to the degrees of negligence set forth in Part 100 of the Secretary's regulations but may evaluate negligence in a holistic manner. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015); *accord Mach Mining, LLC v. Sec'y*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

At the hearing, Inspector Brock stated he believed this was heightened negligence because “the hazard should have been so obvious to the operator that it should have been corrected before an accident like this happened.” Tr. Vol. I, 142.

Here, a reasonable mine operator, familiar with the protective purpose of the Act and the ground control plan, would have taken steps to evaluate the integrity of the ground and the support for the trees at the top of the highwall more thoroughly.

The operator was therefore negligent. But the degree of negligence here is less than the high level of negligence the Acting Secretary suggests.

In its Posthearing Brief, Respondent lists several mitigating factors that it argues compels a lower negligence assessment, which I discuss below:

- *The fact that the area of the accident was not in an active mining area.* Resp't Br. at 17. The Record supports this conclusion. *See e.g.*, Tr. Vol. II, 74 (area where the accident occurred was not an active mining area, but a haul road area).
- *The presence of the 53-foot-wide elevated bench and berm constructed at the foot of the highwall to mitigate any danger from falling rocks, debris, trees, or vegetation.* Resp't Br. at 17. While not a "drop bench" per se, the berm constructed here did serve a safety purpose and was wider than a drop bench. *See supra* Section I.C. (discussing the safety purposes of the bench and noting it was wider than Inspector Brock's definition of a 20-foot-wide safety bench).
- *The fact that the alleged "violative condition" was so inconspicuous that not even MSHA's own mine inspector recognized it during his inspection of the Colmar Mine in the days prior to the accident.* Resp't Br. at 17. "Inconspicuous" is something of a reach, but MSHA's own inspector, like the mine's personnel, took no notice of the trees until after one had fallen. *See* Tr. Vol. I, 37–38, 217–19.
- *The rapidly changing weather conditions that even the Secretary acknowledges were a contributing factor to the accident.* Resp't Br. at 17. The effect of the freeze/thaw cycle could not be discerned from the ground in this case, though in the future, the operator should consider changing conditions wrought by the cycle when examining for hazards. *See e.g.*, Tr. Vol. I, 68–69 (Inspector Brock discussing the "huge effect" the freeze-thaw cycle can have on a highwall). *See also supra* Section I.B. (discussing the freeze-thaw cycle).
- *The unforeseeable manner in which the subject tree fell from the highwall where under nearly any other fall path would likely have been caught in the safety bench at the foot of the highwall.* Resp't Br. at 17. The fact that the tree toppling from the highwall with fatal consequences was unforeseen does not mean that it was "unforeseeable," and the material was not a "safety bench" designed to prevent what happened here, but the hazard's gravity was not apparent from the road or the area below the highwall. *See supra* Section I.C. *See also* Slip op. at 13 (noting the 67-foot-tall tree was too large to be caught by the 53-foot-wide bench here).

Examining objectively what was known and evident before the accident, I therefore conclude that the operator's negligence here was moderate. From the perspective afforded by the roadway, the tree would not have appeared to be a hazard and would not have looked tall enough to menace the roadway. Tr. Vol. II, 49-50. I therefore conclude that the operator's negligence was moderate.

4. The Operator's Violations Were Not a Result of its Unwarrantable Failure

The Commission requires its judges to consider seven factors to determine whether a violation resulted from an operator's unwarrantable failure. *IO Coal Co.*, 31 FMSHRC at 1351. Commission judges are required to consider all the factors but are granted discretion in weighing the factors. *Northshore Mining Co. v. Sec'y*, 46 F.4th 718, 729 (8th Cir. 2022). I have considered

the required factors and find that the violation did not result from the operator's unwarrantable failure.

a. The Violative Condition Was Not Extensive

The purpose of the extensiveness criteria in the unwarrantable failure analysis is to consider "the scope or magnitude of a violation." *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). *See also Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014) (noting this factor "has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued.").

In this context, the extensiveness of the hazard is not especially important. A single tree could have—and in fact, did—result in the tragic fatal accident that occurred here. Thus, the fact that only a small stand of trees remained in a dangerous position on the highwall is not an aggravating or mitigating factor for the violation.

b. The Length of Time that the Violative Condition Existed is Not an Aggravating Factor

Similarly, the duration of the violation is not crucial in evaluating the operator's culpability here. On the one hand, the fact that the trees remained at the edge of the highwall for months after the area was mined could be considered as an aggravating factor. But the Acting Secretary's own witnesses focused on the freeze/thaw cycle as a contributing factor to the hazard. It is not known when the ever-changing freeze/thaw cycle may have caused the tree to lose its grip on the surrounding ground, or whether other conditions contributed to the tree's roots failing to hold it to the ground.

The duration of the violation must nonetheless be considered, even where the evidence is imperfect. *Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010). I have considered the available evidence and find that the duration of the violation is not an aggravating factor for the violation, because the point at which the danger arose cannot be determined. However, I do consider that the operator could have considered the effect of the passage of time on the ground conditions and did not ever examine the top of the highwall after mining was complete.¹²

While Respondent was not required to conduct daily on-shift examinations of this area, *see* discussion *infra* Section III.B., at some point it should have taken advantage of the road at the top of the highwall to examine conditions there. From that vantage point, the size and location of the tree would have been apparent, and the operator might have had second thoughts about leaving the stand of trees there, even if the ground did not appear to be compromised from the road below.

¹² The Acting Secretary noted the relevant time period for duration was from at least July 2021 to January 2022 based on Foreman Brock's testimony on how long the patch of trees had been on top of the highwall. *See* Acting Sec'y Br. at 21. I find the mere fact the trees were present for months—and likely years, given their large size—before the accident not determinative in the duration analysis because of the effect the freeze/thaw cycle can have on the ground conditions. *See supra* Section I.B. (discussing the freeze/thaw cycle).

But its failure of imagination here is not an aggravating factor in isolation. Over time, the apparent lack of any issues indicating a ground control problem at the top of the highwall may have bred complacency, but it did not reflect indifference or disregard for safety. *See* Tr. Vol. I, 189 (Foreman Brock testifying that he examined the highwall from the vantage point of the road during his on-shift examinations of the mine road). *See also* Ex. S-6 (pre-shift and on-shift examination records for the days leading up to and including January 11, 2022, noting the highwall’s “stable” appearance from the vantage point of the road).

c. The Violation Posed a High Degree of Danger

The fatal accident in this case conclusively establishes the highly dangerous condition created by the trees remaining on top of the highwall. This is the most important aggravating factor for two reasons.

First, “[t]he factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure.” *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Second, even “a finding of ‘moderate negligence’ does not foreclose an unwarrantable failure finding.” *Excel Mining, LLC v. Dep’t of Labor*, 497 Fed. Appx. 78, 79 (D.C. Cir. 2013), *citing Eastern Associated Coal Corp.*, 13 FMSHRC 176, 186-87 (Feb. 1991). Thus, where a hazard is highly dangerous, the operator must exercise greater care.

The size of the trees should have prompted a concern about the instability of the highwall and the stress the trees could place on the ground as conditions changed through erosion or the freeze/thaw cycle. The failure to include the area at the top of the highwall in periodic examinations of some sort is therefore an aggravating factor because of the extraordinary danger posed by a huge tree perched precariously near the edge of the highwall. The weight it carries in the analysis, though, is reduced by the other conditions set forth below.

d. The Hazard Was Not Obvious

The lack of obviousness is the crucial mitigating factor here. In hindsight, it is apparent that the trees remaining at the edge of the highwall created a severe risk of injury. It is known—now—that deteriorating ground conditions could place miners on the haul road or working on reclamation in grave danger. *See supra* Section I.B. (discussing the freeze/thaw cycle). The ground slope depicted in the photographs also may have made it very unlikely that the tree would fall away from the haul road. *See* Ex. S-16, S-17, C, J, K.

But that slope would only be visible from the air or from the top of the highwall. *See* Ex. S-14. (aerial drone photograph showing perspective from above the slope). From the ground, before the accident, the trees were part of the general background everyone perceived at the mine. This included Inspector Faulkner, who visited and inspected the mine but never himself traveled to the top of the highwall to examine the conditions there, and never perceived or cited the trees as a hazard from his perspective on the ground below.

From that everyday perspective, it was not possible to tell how far the trees were from the edge of the highwall. Witnesses varied in their testimony about how close they were to the edge. *See* Tr. Vol. I, 81–82; Tr. Vol. II, 79–80, 95–96. *See also* Ex. S-10.

Nor was it possible to assess ground conditions at the top of the highwall from the ground below. *See* Slip op. at 5. MSHA used a drone to photograph the area from the air during its accident investigation. *See* Slip op. at 4.

Finally, the ground-level view miners and Inspector Faulkner had of the trees obscured their size. At the distance where anyone working or traveling would have perceived the trees, they did not appear as a large, looming threat. *See* Tr. Vol. II, 49–50 (Willis stating the tree would not have been perceived by an inspector as a hazard because it would not have looked tall enough to reach the roadway from the vantage point of the road).

Where a competent inspector would have seen and noted a hazard, it should be viewed as obvious. *The American Coal Co.*, 39 FMSHRC 8, 18 (Jan. 2017). It does not necessarily follow that a condition is not obvious because it was not cited by an inspector, but the common obliviousness to the danger is borne out by the actions of all material witnesses to the pre-accident conditions in the area. I therefore find that the hazard was not obvious from the ground.

e. The Operator Was Unaware of the Violative Condition Before the Accident

This factor is closely related to obviousness because there was no evidence that the operator had actual knowledge of the hazard. However, the operator could have had constructive notice that the trees presented a serious risk to miner safety.

There is not any evidence suggesting that the operator was aware of facts that should have led it to conclude that the ground conditions at the top of the highwall had deteriorated to the point where one or more trees might fall from the edge. Nor has the Secretary provided sufficient “predicate circumstances” to establish that the operator should have known of the violative condition. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1199 (Oct. 2010). I therefore find that the operator did not have actual or constructive knowledge of the danger posed by the trees.

f. Respondent Did Make Some Effort to Protect Miners Below the Highwall from Falling Material

As noted above, the operator’s “drop bench” was not an effective protective measure in this context and did not satisfy the requirements of the ground control plan. *See* discussion *supra* Section III.A.1. Nevertheless, I disagree with the Acting Secretary that the purpose, nature, construction, height, or location of the barricade rendered it wholly ineffective as a safety measure.

Witnesses testified that the barricade did catch material that had fallen from the highwall. *E.g.*, Tr. Vol. I, 43, 50. Photographs supported this. *See* Ex. S-13, S-14 (both aerial drone photographs showing rocks on top of the barricade).

The barricade was at least partially effective as a preventive measure that acted to protect miners from falling material.

The operator therefore did not evince a reckless disregard for or wanton or willful indifference to the safety of its workforce. Where an operator maintained a good faith, though mistaken, belief that its measures would be effective, a finding of unwarrantable failure may be rejected, provided the operator's belief was reasonable. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citing *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1629 (Aug. 1994)).

Nor is it improper to credit the operator for the barricade because it was primarily intended to facilitate reclamation. Respondent is permitted to operate efficiently, provided it also does so safely. A reclamation plan that also promotes safety is consistent with the Act, even if the failure to foresee the inadequacy of the barricade as a protection against this accident was negligent.

g. The Operator Was Not on Notice that Greater Efforts at Compliance Were Necessary

The Acting Secretary argues that the operator was placed on notice that greater efforts at compliance were necessary here because it had previously been cited for an unwarrantable failure violation in similar circumstances ten years earlier, at a different mine. Acting Sec'y Br. at 21. The contention is meritless for several reasons.

The judge in the previous case did find that the violation in question was the result of the operator's unwarrantable failure. *Nally and Hamilton Ent., Inc.*, 37 FMSHRC at 1798-1800.¹³ But that finding was based on a previous citation at this mine for the same violation and the fact that roots, root balls, and vegetation were obvious and visible from the ground. *Id.* 1789. The violation also occurred in an active pit, with miners working below. *Id.*

Most importantly, MSHA itself made no connection between the prior cited condition at another mine and the conditions at this one until it submitted its post-hearing brief in this case. *See* Acting Sec'y Br. at 21. Thus, the prior case is of limited significance here.

Much greater weight must be attributed to the fact that this mine was regularly inspected, and this condition was never questioned, much less cited, by the inspector. The lack of any communication to the operator about this condition serves only to underscore the fact that the violation was not obvious to the naked eye from the ground below.

¹³ This decision was reviewed by the Commission in 2017. *Nally and Hamilton, Ent., Inc.*, 39 FMSHRC 1938 (Oct. 2017). The Commission's review was limited to the judge's finding that a different violation from the one cited in this case was not S&S, a question on which the Commission was evenly divided. *Id.* at 1938-39.

The fact that an inspector did not previously cite a violative condition is no defense to a finding of violation. But in this case, it does show that a reasonable person whose principal responsibility is the observation and citation of violations of safety and health standards failed to see the trees as a hazard at any point.

The majority of MSHA inspectors are generally diligent, professional, and observant in their work. There was no evidence that Inspector Faulkner—who had been an MSHA surface mine inspector for more than 15 years at the time of the accident—did not adhere to this standard. Inspector Faulkner was assigned as the regular inspector for this mine, so I find the fact that he did not ever note the trees as a potential hazard affirms that the operator’s own view, though erroneous, was not reckless or unreasonable.

Because only the extremely dangerous nature of the hazard may be used as an aggravating factor, and because that danger was not manifest until after the accident, I conclude that the violation was not the result of the operator’s unwarrantable failure.

B. Order No. 9138189 – Failure to Perform Adequate On-Shift Examination

Respondent contends that it was not required to inspect the area above the highwall for hazards because it was not an active working area. Resp’t Br. at 15. The evidence shows that mining of this highwall had been complete since August 2021. Tr. Vol. I, 174–75. The area had not been inspected by MSHA since at least then, and the operator had never been cited for failing to conduct on-shift examinations of the top of the highwall.

MSHA cited the operator for violating section 77.1713(a) because it claimed that the failure to inspect significantly and substantially contributed to the hazard of one of the trees falling from the top of the highwall into an area where miners worked or traveled. The Order describes the condition or practice as:

During on-shift examinations since at least as early as January 1, 2022, the mine operator did not identify, report, and correct the trees that created hazardous highwall conditions. The mine operator did not follow the Ground Control Plan that required all trees be removed a safe distance from the top of the highwall. Two weeks prior to the accident, from January 2, 2022, to January 11, 2022, over three inches of rain and approximately eight inches of snow, coupled with a freeze-thaw cycle, resulted in wet, muddy conditions that loosened support of the trees. During the accident investigation, loose mud and rock material continued to fall from the highwall adjacent to the mine road. During inclement weather, it is incumbent for the mine operator to diligently examine and carefully focus on changing highwall conditions along the mine haul road where miners travel daily. On January 11, 2022, two miners were traveling in a pickup truck on the mine haul road when a tree, with a calculated weight of 6,241 pounds, fell from the top of the highwall striking the pickup truck cab. The pickup truck driver died, and the passenger sustained serious injuries.

The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not identifying, reporting, and correcting hazardous ground conditions and permitting work in the affected area. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-2.

MSHA must first establish a duty to inspect the area. The Commission has held that, under section 77.1713(a), an on-shift examination is only required for active working areas of the mine. *Black Castle Mining Co.*, 36 FMSHRC 323, 325-26 (Feb. 2014); *Red River Coal Co.*, 39 FMSHRC 368, 386 (Feb. 2017) (ALJ).

In *Black Castle*, a miner was fatally injured when his bulldozer ruptured an unmarked gas line in the area where the bulldozer was being operated. 36 FMSHRC at 324. MSHA alleged this was a violation of section 77.1713(a) because the gas line was not adequately marked and “should have been reported and corrected during the required daily inspection.” *Id.* at 324-25.

In that case, the Acting Secretary argued “active working area” under section 77.1713(a) should “include all areas where it is reasonably foreseeable that miners will work or travel when carrying out their work-related tasks.” *Id.* at 326. The Commission also noted “active workings” is defined in 30 C.F.R. § 77.2(a) as “any place in a coal mine where miners are normally required to work or travel.” *Id.* at 326.

When considering the Acting Secretary’s proposed definition, the Commission stated the relevant question was “whether it was reasonably foreseeable that a miner would be in the accident area when carrying out his or her work related tasks during the shift(s) covered by the operator’s examination.” *Id.* at 326. The operator in *Black Castle*, however, had no reason to anticipate the fatally injured miner would be at the location of the accident because it was not part of his assigned work area and “had nothing to do with his work assignment,” and mine employees were even “surprised” the miner was in that area. *Id.* (internal quotations omitted).

The Commission ultimately affirmed the judge’s finding that the area where the miner was operating the bulldozer was not an “active working area” based on either the definition proposed by the Acting Secretary or the definition of “active workings” in section 77.2(a). *Id.* at 327. Notably, however, the Commission chose not to adopt a definition for the term “active working area” in section 77.1713(a) or to incorporate the definition of “active workings” set forth in section 77.2(a) in 77.1713.¹⁴

¹⁴ In its *Black Castle* decision, the Commission neither chose to adopt definition of “active working area” nor incorporated the definition “active workings” in section 77.2(a) into section 77.1713(a). See 36 FMSHRC 327-28 (discussing why the area at issue was not an “active working area” under either definition). However, the administrative law judge (“ALJ”) who first heard this case discussed both definitions. *Black Castle Mining Co.*, 32 FMSHRC 132, 135-36 (Jan. 2010) (ALJ). The ALJ noted that the Respondent’s argument that the accident did not occur in an “active working area” relied on another ALJ decision, *Central Ohio Coal Co.*, 12 FMSHRC 1014 (May 1990) (ALJ). However, the ALJ noted this argument was not persuasive (continued . . .)

Here, Respondent contends it did not violate section 77.1713(a) because “the area where the accident occurred was not an active mine area at the time of the accident.” Resp’t Br. at 15. In contrast, the Acting Secretary argues “[t]he area was subject to the on-shift examination because it was the mine’s main travel road.” Acting Sec’y Br. at 16.

I find that the area above the highwall itself was not an “active working area” at the time of the accident. As Respondent correctly noted, both its and the Acting Secretary’s witnesses testified at the hearing that no mining was occurring in the pit at the time of the accident. Resp’t Br. at 15. *See also* Tr. Vol. I, 174–75. Moreover, the access road at the top of the highwall was not regularly accessed by miners, and no mine employees were working on or at the top of the highwall. *See* Tr. Vol. I, 82; Tr. Vol. I, 189–90.

All these facts suggest that Respondent had no reason to anticipate miners would be working in the pit below the highwall until reclamation began. Thus, under the logic of *Black Castle*, the area above the highwall where the trees were located is not an active working area under section 77.1713(a), and Respondent had no duty to examine the trees from the top of the highwall.

The road on which Pendleton and Collett were traveling was an “active working area” under section 77.1713(a). It does not matter that active mining did not occur here because Respondent’s employees traveled on the road as part of their jobs. Pendleton and Collett were performing their work duties of transporting explosive materials when they were on the road at the time of the accident. Tr. Vol. I, 25. Witnesses also testified that miners would routinely travel on the road to get to and from the parking lot and through the course of their shifts at the mine, with some miners making numerous trips on the road during a shift. *E.g.*, Tr. Vol. I, 28. Under the logic of *Black Castle*, this road was an area where the operator anticipated and expected miners to travel as part of their shifts, and miners did in fact travel on that road frequently every working day.

The pre-shift and on-shift examination records show that the road on which Pendleton and Collett were traveling was regularly inspected by Respondent’s employees, including on January 11, 2022, the date of the accident. *See supra* Sections I.A., I.D. *See also* Ex. S-6. Accordingly, I find there can be no dispute that Respondent itself considered the mine road to be an area for which an on-shift examination was required. Thus, Respondent satisfied the first

¹⁴ (. . . continued)
because *Central Ohio Coal Co.*, was not a binding decision. 32 FMSHRC at 136.

In *Central Ohio Coal Co.*, the operator was cited a violation of section 77.1713(a) in which the MSHA inspector equated “active working area” as used in section 77.1713(a) with “active workings” as defined in 30 C.F.R. § 77.2(a). 12 FMSHRC at 1016. The ALJ ultimately rejected the Secretary’s contention that “active working area” as used in section 77.1713(a) and “active workings” in section 77.2(a) should be equated because it would render the reference to “active surface installation” in section 77.1713(a) “superfluous” and found an “active working area” to be “the working areas where coal is mined and extracted.” *Id.* at 1017–18.

prong under section 77.1713(a) that it perform an examination of the active working area during each shift.

Section 77.1713(a), however, not only requires Respondent to perform an on-shift examination of the active working areas, but to also examine for, note, report, and correct any hazardous conditions observed as part of that inspection. Affirming MSHA's citation that Respondent violated section 77.1713(a), thus, ultimately hinges on whether the fallen tree and other trees located in the patch on the highwall were hazardous conditions that the operator should have noted, reported, and corrected during its on-shift examinations of the mine road. *See* Acting Sec'y Br. at 15 (arguing section 77.1713(a) was violated because the tree which fell was a hazardous condition). I find they were not.

While MSHA suggests that the trees were visible from the road where miners work or travel, this is an insufficient basis for finding a violation of section 77.1713(a). If the danger could have been perceived from the road, where miners did regularly work and travel, the result might be different. *See Kentucky Fuel Corp.*, 36 FMSHRC 159, 171–72 (Jan. 2014) (ALJ) (finding a violation of section 77.1713(a) when the operator failed to document in its examinations the “readily apparent” condition of a catch bench that was full and unable to sufficiently catch loose material); *Extra Energy, Inc.*, 34 FMSHRC 3285, 3293 (Dec. 2012) (ALJ) (finding a violation of section 77.1713(a) when the foreman failed to note “obvious conditions” and in which the MSHA inspector stated the hazardous condition “was easily visible to the most casual observer” in the citation itself).

However, evidence presented at the hearing establishes a reasonably prudent miner could have not perceived the danger of the trees on the highwall from the vantage point of the mine road. I have already found the hazard of the trees was not obvious from the road. *See* discussion *supra* Section III.A.4.d. Thus, this case is different from the previous *Nally and Hamilton* case cited by the Acting Secretary because the inspector could see roots and other material hanging from the edge of the highwall while he was standing in the pit. *See Nally and Hamilton Ent., Inc.*, 37 FMSHRC at 1789.

There was conflicting testimony about where the tree was located, suggesting it was not readily apparent from below how close the tree was to the edge of the highwall. I also find the tree was not obviously visibly ill or dead—which, if true, could suggest a greater likelihood of it falling and thus needing to be corrected—given conflicting testimony and the tree's health status not being conclusively established by either party at the hearing.¹⁵

¹⁵ As noted in Slip op. at 5, note 5, *supra*, Foreman Brock—who testified that the tree was alive—had prior experience with trees through his work at a sawmill. I find his testimony to be credible. Based on that and other testimony and evidence presented, including pictures and the weight of the tree, *see* discussion *supra* Section I.A., I would find the tree was alive at the time it fell.

However, this conclusion that the tree was alive at the time of the accident has no bearing on my conclusion that the tree was not a hazard that a reasonably prudent miner would recognize and thus note, report, and correct when performing an on-shift examination of the road. The

(continued . . .)

There was no duty to include the area above the highwall in the operator's daily on-shift examinations, and there is no credible record evidence showing that the danger here could or should have been perceived from the main mine road where miners regularly traveled. Absent such a duty, I vacate Citation 9138189.

C. Penalty

While I have found the operator's negligence to be moderate and that the violation here did not result from its unwarrantable failure, the consequences following the operator's failure of imagination here are tragic and profound. One miner was killed, and another so severely injured that he had not returned to work at the time of the hearing in this matter and has likely been permanently disabled. *See supra* Section I.A.

I assess the penalty independently, considering the six factors in section 110(i) of the Act. I agree with the Acting Secretary that the operator is a large operator and that it acted promptly and in good faith to abate the violation once cited. The remaining trees were removed within one week of the accident.

The operator has stipulated that the penalty proposed by the Acting Secretary would not affect its ability to remain in business. Tr. Vol. II, 7. I have also considered the operator's history of violations and find no basis for adjusting the penalty based on that history. *See* Ex. S-9.

I have found that the operator was only moderately negligent in its breach of the duty of care. *See* discussion *supra* Section III.A.3. However, I find that the gravity is such that a substantial penalty is necessary to ensure that examinations and safety planning for this operator consider all potential hazards that could threaten miners in active mining areas, especially those found on the perimeter of active working areas or places where miners regularly work or travel.

It is apparent that Respondent did not appreciate fully the danger posed by the trees, and its ground control plan was not followed in the manner best designed to protect miner health and safety. Upon consideration of the statutory factors, I therefore assess a penalty of \$16,000 for the violation of 30 C.F.R. § 77.1000.

The assessed penalty will encourage the operator to consider more thoughtfully all potential hazards that could pose a grave danger to its workforce when designing and executing its ground control plans. The penalty will also encourage the operator to periodically examine vegetation left near the edge of highwalls that might contribute to a catastrophic ground failure.

¹⁵ (. . . continued)

relevant question is whether the tree's appearance suggested there was something wrong with it that posed a danger of falling, and that appearance would have been visible to an individual looking up at the tree from the road. I find the tree appeared to be in a fine, healthy, and stable condition when viewed from the road before the accident because there is no evidence to the contrary.

In the future, Respondent should consider facts such as slope, ground integrity and composition, the size of the remaining vegetation, whether any remaining trees are alive or dead, and how close to the edge any vegetation or other material might be. Respondent should also determine whether vegetation left near the edge of highwalls after mining could be loosened or dislodged by weather, erosion, or other foreseeable events.

It might not be necessary to examine the top of every highwall during each examination, or to clear trees from every highwall as an alternative. The presence of trees may help with reclamation. Ironically, the presence of live trees often may be helpful in controlling the fall of loose, unconsolidated material from areas above highwalls, because the roots function to hold the tree to the ground.¹⁶

Nevertheless, it is much better to know what can be known than to assume what conditions might be like—especially during the seasonal changes of concern to MSHA because of the freeze/thaw cycle and its potential effect on the stability of highwalls. Where, as here, there is a road permitting access to the area above the highwall, it is thus better to evaluate the condition at least periodically. With advances in technology, it might also be feasible to use drones to inspect the areas above highwalls for changes in ground conditions or potential hazards.

It cannot be known whether such examinations would have identified the conditions which led to the accident here. But the failure to discover the condition permitted an obscured hazard to manifest at the worst possible time, with grave consequences. The penalty reflects Respondent's failure to appreciate the gravity of that danger and take the steps required to protect its workforce under the elevated standard of care provided by the Act.

IV. CONCLUSION

For the reasons above, Citation Number 9138183 is **VACATED** and Docket No. KENT 2022-0079 is **DISMISSED**. Citation Number 9138189 is also **VACATED**.

¹⁶ At the hearing, Consulting Engineer Willis testified he would generally expect a root system to stabilize trees to the ground. Tr. Vol. II, 47.

The U.S. Department of Agriculture has also published a guide on the Forestry Reclamation Approach, a set of best practices developed by reclamation scientists to restore abandoned and unused mine lands into forests. U.S. DEP'T OF AGRIC. FOREST SERV., THE FORESTRY RECLAMATION APPROACH: GUIDE TO SUCCESSFUL RESTORATION OF MINED LANDS (Mary Beth Adams ed., 2017), https://www.fs.usda.gov/nrs/pubs/gtr/gtr_nrs169.pdf.

Citation No. 9138188 is **AFFIRMED** as an S&S violation of 30 C.F.R. § 77.1000 with moderate negligence for Respondent's failure to comply with its ground control plan. A penalty of \$16,000 is assessed for this violation. Respondent is **ORDERED TO PAY** the sum of \$16,000 within 30 days of the date of this order.¹⁷



Michael G. Young
Administrative Law Judge

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¹⁷ Please pay penalties electronically at [Pay.Gov](https://www.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.