

NOTICE

1. Enclosed is a copy of a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission. The issuance date of this decision appears on the first page of the Decision.

THIS DECISION MUST BE POSTED ON THE MINE BULLETIN BOARD BY THE OPERATOR.

2. You may petition for review of this decision by the Commission. A PETITION FOR DISCRETIONARY REVIEW must be received by the Commission within thirty (30) calendar days after the issuance date of the decision to be considered [29 C.F.R. § 2700.5(f) and .70(a)]. If this decision is an ORDER OF TEMPORARY REINSTATEMENT, the Petition for Review must be received within 5 days of the receipt of the order [29 C.F.R. § 2700.45(f)].

If a party wishes to file a petition for discretionary review, you are encouraged to file it within the Commission's electronic filing system (<https://www.fmshrc.gov>). Petitions are not currently being accepted via fax during the Commission's pandemic related operational changes (<https://www.fmshrc.gov>). If you mail the petition, you should allow enough time for delivery by the thirtieth day. Petitions should be filed at:

DOCKET OFFICE
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Ave., N.W., Suite 520 N
WASHINGTON, D.C. 20004-1710
Telephone No. (202) 434-9950

3. The Federal Mine Safety and Health Review Commission's Rules of Procedure specify that a petition may be filed only on one or more of the following grounds:
 - A. **A finding or conclusion of material fact is not supported by substantial evidence.**
 - B. **A necessary legal conclusion is erroneous.**
 - C. **The decision is contrary to law or to the duly promulgated rules or decision of the Commission.**
 - D. **A substantial question of law, policy or discretion is involved.**
 - E. **A prejudicial error of procedure was committed.**

Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignment of error are based on the record. Statutes, regulations or principal authorities shall be relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass. For further details on the filing of documents and the review process, see 30 U.S.C. § 823(d) and Commission rules 5 through 9 and .70 through .78 [29 C.F.R. §2700.5-.9 and .70-.78].

4. **A Petition for Review must be served on the opposing party.**
5. **If a petition is filed, each party will be notified of the Commission's action on the petition.**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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DENVER, CO 80202-2500
TELEPHONE: 303-844-5266

July 2, 2026

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

v.

BIG SPRING SANDS LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2025-0091
A.C. No. 41-05690-610399

Mine: Big Spring Plant

DECISION AND ORDER

Appearances: Dolores G. Wolfe, Esq., U.S. Department of Labor, Office of the Solicitor,
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Before: Judge Simonton

I. INTRODUCTION

This matter is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Big Spring Sands LLC (“Big Spring” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801. In dispute is a single section 104(d)(1) order issued to Big Spring, as owner and operator of the Big Spring Plant in Big Spring, Texas.

Order No. 9994013 alleges Big Spring violated 30 C.F.R. § 56.14101(a) on October 8, 2024, when an MSHA inspector discovered that the operator’s CAT 980M front end loader was not equipped with an emergency brake capable of stopping and holding the equipment with its typical load on its maximum grade. The Secretary proposed a special assessment penalty of \$88,354.00, which Big Spring contested.

The parties presented testimony and documentary evidence regarding the order at issue during a virtual hearing held on February 13, 2026. The Secretary presented testimony from

MSHA Inspector Clifton Brayfield and Big Spring Supervisor Juan Milian. Respondent presented testimony from Big Spring President Jeff Flood.

After the hearing, the Secretary filed a Motion to Conform Pleadings to the Evidence seeking to amend Order No. 9994013 to allege a violation of 30 C.F.R. § 56.14101(a)(2) rather than § 56.14101(a) generally, and to change the words “service brake system” in the order to “parking brakes.” Big Spring contested the Secretary’s motion and filed its Reply to the Secretary of Labor’s Motion to Conform the Pleadings on March 27, 2026. Upon consideration of the parties’ arguments and the testimony presented at hearing, I granted the Secretary’s motion and ordered that Box 8 and 9.C. in Order No. 9994013 be amended to replace the language “service brake system” with “parking brake” and to allege a violation of 30 C.F.R. § 56.14101(a)(2), respectively. The parties then filed post-hearing briefs on April 20, 2026.¹

After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I **AFFIRM** Order No. 9994103.

II. STIPULATIONS OF FACT

1. Operations of the Respondent at the Big Spring Plant at which the order was issued are subject to the jurisdiction of the Mine Act.
2. Big Spring Plant is engaged in mining operations in which its products enter and affect interstate commerce.
3. Big Spring Sands LLC demonstrated good faith in abating the alleged violation and in a timely fashion.
4. MSHA Inspector Clifton Brayfield was acting in an official capacity and as authorized representative of the Secretary of Labor when the order was issued and there is no dispute that they are authentic.
5. On October 8, 2024, when MSHA Inspector Brayfield tested the parking brakes on the front-end loader that is the subject of the [order], it did not pass inspection.

Tr. 24:4–20, 270:8–273:11.

¹ The hearing transcript, the Secretary’s exhibits, the Secretary’s Post-Hearing Brief, and Big Spring’s Post-Hearing Brief are abbreviated, respectively, as: “Tr.,” “Ex. P-#,” “Sec’y Br.,” and “Resp’t Br.” Citations to exhibit page numbers are based on the page number of the actual individual exhibits, with the first page of the exhibit being cited as “Ex. P-#, p.1” and subsequent pages cited sequentially. The decision does not cite the bates numbers, or other numbering systems, that may be found on the exhibits themselves.

III. FINDINGS OF FACT

Big Spring Plant mines, cleans, and sells sand to customers. Tr. 31:17–32:5, 154:19–155:4, 155:22–156:5. This process begins during the evening shift with the use of excavators to extract sand from the ground pit of the plant and load it into large dump trucks. Tr. 31:17–32:2, 34:22–36:2, 48:10–49:21, 126:8–22, 154:19–25, 218:9–18. From there, the large dump trucks transport the sand up from the pit and dump it near a washout plant. Tr. 34:22–36:2, 48:10–49:21, 126:8–22. In this area, Big Spring utilizes the CAT 980H loader (“dirty loader”) to move the newly extricated sand into the washout plant for cleaning. Tr. 47:7–24, 49:13–21, 218:9–18, 267:24–268:2.

After the sand is cleaned, it is transported and dumped on to a concrete floor loading area near the plant’s hopper to await loading. Tr. 126:8–22, 218:1–9. Once the day shift arrives, Big Spring utilizes the CAT 980M loader (“clean loader”) to load the clean sand into the plant’s hopper which transports and loads the clean sand on to customer vehicles. Tr. 58:16–59:11, 97:25–99:3, 155:22–156:7, 218:1–9.

On October 8, 2024, MSHA Inspector Clifton Brayfield traveled to the Big Spring Plant—a surface mine and processing facility in Big Spring, Texas, as part of the plant’s standard quarterly inspection. Tr. 154:13–25; Ex. P–9. Big Spring Supervisor Juan Milian accompanied Brayfield on his inspection. Tr. 31:2–4, 53:17–54:2, 61:7–17; Ex. P–9, p. 2.

During the inspection, Brayfield saw the clean loader operating in the plant’s clean sand loading area. Tr. 154:22–155:9, 155:22–156:7. Brayfield then requested that Milian flag down the employee operating the CAT loader so that he could conduct an inspection of the vehicle. Tr. 61:7–17, 62:1–20, 163:19–25. Milian complied with Brayfield’s request and had the CAT loader operator stop the vehicle for inspection. Tr. 62:1–20, 63:12–22, 154–155, 163:19–25.

Brayfield began his inspection by asking Milian about the CAT loader’s broken windshield. Tr. 163:19–25. Brayfield then requested and received the CAT loader’s pre-shift inspection reports from the equipment operator and reviewed entries ranging from September 23, 2024, through October 8, 2024. Tr. 37:16–23, 64:1–14, 66:17–18, 131:20–132:3, 163:19–164:6, 164:11–165:1, 181:9–15; Ex. P–7. In reviewing each entry, Brayfield noticed that not only did each entry indicate that the CAT loader’s windshield was damaged, but it also noted that the CAT loader’s emergency brakes were defective and in need of repair.² Tr. 65:2–66:1, 164:1–13.

Brayfield then showed the pre-shift inspection reports to Milian, informed him that they noted that the emergency brakes on the CAT loader needed repair, and asked if he was aware of the defects identified on the reports. Tr. 65:2–66:1, 165:2–13, 166:3–25. Milian responded that he only reviews pre-shift inspection reports if an employee verbally informs him that they found a defect in the equipment. Tr. 165:2–13, 166:3–25, Ex. P–14. Brayfield then inquired why the CAT loader’s brakes had not been repaired despite being marked as defective on the pre-shift

² At hearing, the testimony established that the terms “parking brake” and “emergency brake” referred to the same braking system and were used interchangeably. *See* Order Granting the Secretary of Labor’s Motion to Conform Pleadings to the Evidence (Apr. 8, 2026).

inspection reports. Tr. 165:2–10, 167:1–13. However, Milian could not provide an explanation as to why. Tr. 167:1–13.

Brayfield then requested Milian and the equipment operator of the CAT loader to perform a brake test on the concrete floor loading area. Tr. 51:14–52:4, 72:25–73:20, 100:2–20, 109:15–110:5. First, Brayfield instructed the equipment operator to fill the CAT loader’s front bucket with dirt so that the brake test is done with the vehicle’s typical load. Tr. 74:9–12, 75:5–24, 109:15–110:5. Brayfield also ensured the CAT loader was placed on ground that had a slight decline in grade level, but not at its maximum grade as he was unsure whether the vehicle’s main brakes were functioning. Tr. 73:21–74:8, 74:23–75:4.

Brayfield then directed the equipment operator to put the vehicle in neutral and release the operating brakes to determine whether the emergency brakes alone would hold the CAT loader in place. Tr. 71:24–75:20. However, the test failed as the CAT loader began to roll despite having the emergency brake engaged. Tr. 71:24–75:20, 195:15–22. Brayfield then asked that the CAT loader be turned around so that same test could be performed in the opposite direction. Tr. 71:24–75:20. Once again, the CAT loader failed the test. Tr. 71:24–75:20, 195:15–22. Brayfield then directed Milian to immediately shut down the machine and remove it from the plant’s property, which Milian complied with. Tr. 130:8–20, 172:7–16, 220:5–18.

Based on these observations, Brayfield issued 104(d)(1) Order No. 9994103 to Big Spring on October 8, 2024, which alleged:

The Cat 980M front end loader vin number 01220 was not equipped with a [emergency brake] capable of stopping and holding the equipment with its typical load on the maximum grade it travels. When tested the front end loader failed to hold the break in both directions. This condition is obvious and extensive and would be evident to the most casual observer. Pre operational checks had notated the breaks not working as far back as September 23rd 2024. The loader is used daily to load material for the loadout for two twelve hour shifts seven days a week. The front end loader was in operation at the time of inspection exposing five miners working on the ground as well as customer trucks. The operator stated he looks at the pre-operational checks but the equipment operators tell him verbally of issues. Not having a working service break exposed the equipment operator to fatal injuries when ran over by the front end loader. This violation is an unwarrantable failure to comply with a mandatory standard. Video Taken.

Ex. P–14, pp. 1-2.

Brayfield designated the order as a “significant and substantial” violation of 30 C.F.R § 56.14101(a)(2) that was “reasonably likely” to result in a “fatal” injury to one person and determined that Big Spring exhibited a “high” level of negligence. Ex. P–14, p. 1.

IV. PRINCIPLES OF LAW, ANALYSIS, AND CONCLUSIONS OF LAW

To prevail, the Secretary must prove a cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

A. Violation of 30 C.F.R § 56.14101(a)(2) – Inadequate Emergency Brake on the CAT Loader

The Secretary argues that Big Spring violated section 56.14101(a)(2), a mandatory safety standard requiring that “[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.” Sec’y Br. at 12; 30 C.F.R § 56.14101(a)(2). Specifically, the Secretary alleges that Big Spring violated the safety standard by allowing its CAT 980M front end loader to operate without emergency brakes capable of stopping and holding the equipment with its typical load on the maximum grade it travels. Sec’y Br. at 13-14.

In response, Big Spring does not dispute that its CAT 980M front end loader’s emergency brakes were malfunctioning. Resp’t Br. at 1–10. Rather, Big Spring argues that Order No. 9994013 was over evaluated and requests “that the Court find that there was no flagrant violation of the regulations and . . . reduce the assessed penalty to the base amount of the citation with no increased assessment.” Resp’t Br. at 9–10.

Inspector Brayfield, Supervisor Milian, and Big Spring President Flood all testified that the CAT 980M loader’s emergency brake failed to hold with its typical load on the maximum grade it travels. Accordingly, I conclude that Big Spring violated section 56.14101(a)(2). Tr. 71:24–75:20, 195:15–22, 254:22–255:9.

B. Significant and Substantial (“S&S”) and Gravity Designations for Order No. 9994013

After finding a violation of 30 C.F.R § 56.14101(a)(2), I next consider whether the Secretary properly designated Order No. 9994013 as “Significant and Substantial” (“S&S”). Following the Commission’s recent guidance in *Consol Penn. Coal Co.*, when reviewing cases that involve the Secretary’s use of the S&S designation, Commission judges “must return to applying the law as written in section 104(d)(1) and as interpreted by appellate courts. That is, whether the violation cited, ‘is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.’” *Consol Penn. Coal Co.*, 47 FMSHRC 793, 822 (Sept. 2025). Therefore, “to substantiate an S&S designation, the Secretary must demonstrate that the violation: (1) could make a significant and substantial contribution to a mine hazard and (2) that miners are exposed or would be exposed to that hazard during continued mining operations.” (“*Consol Test*”) *W.G. Yates & Sons Construction Co.*,

2026 WL 1456621, at *4 (May 2026) (citing *Consol Pennsylvania Coal Co.*, 47 FMSHRC 793, 823 (Sept. 2025)).

First, the *Consol* test asks: could the violation make a significant and substantial contribution to a mine safety hazard? Here, in determining the hazard, Inspector Brayfield testified that miners travel within 50 feet of the clean loader and therefore—if the clean loader’s emergency brakes are inoperable—miners face the risk of being fatally struck by a “65,000 plus pound” piece of equipment. Tr. 178:4–179:12, 162:11-16. In light of Inspector Brayfield’s testimony, I determine that the cited clean loader could play a significant and substantial role in exposing miners to the hazard of being fatally struck or run over by a 65,000-pound piece of mobile equipment.

Second, the *Consol* test asks: were miners exposed, or would miners be exposed to hazards during continued mining operations? The Secretary argues that it is reasonably likely that a miner could have been seriously injured or killed as a result of the defective emergency brake on the clean loader because it was used in three separate operating scenarios that each exposed miners to the hazard of uncontrolled movement. Sec’y Br. at 15–16. Specifically, the Secretary points to: (1) “the loader was used in the area where it was tested to move product to the hopper, and the record shows that this was an active work zone where miners regularly traveled on foot[;]” (2) “Inspector Brayfield observed the loader in transit on a roadway and testified that it came within approximately 50 to 75 feet of two miners who were walking, creating a direct struck-by and crushing hazard if the loader rolled or failed to stop as expected[;]” and (3) “Brayfield observed the loader being used to build a berm in front of a steep drop-off; he testified that the loader came within inches of the edge, exposing the operator to a potentially fatal drop off if the parking/emergency brake failed to hold.” Tr. 62:14–20, 158:19–25; 159:3–8, 161:7-162:21; Exs. P–1, P-2, P-3, P-4, P–5. ³ In contrast, Big Spring argues that it is unlikely that a miner would be exposed to the cited hazard because: (1) “the operating brakes were functional;” (2) no individuals were near the machine during normal operation;” and (3) “the machine remained on a flat surface.” Resp’t Br. at 8.

First, although Big Springs argues that the clean loader’s operating brakes were functional, such consideration is irrelevant in determining whether a S&S designation is warranted. *Consol Pennsylvania Coal Co.*, 47 FMSHRC 793, 824 n.28 (Sept. 2025) (affirming that “ALJs should continue to analyze citations in the context of continued mining operations and without consideration of redundant safety measures”). Under continued mining operations personally observed by inspector Brayfield the parking brake would need to be functional to avoid a potentially serious hazard in the event the service brakes were to fail.

Second, with regard to individuals being near the loader in question during normal operations Milian testified that only one loader was in use during the day the inspection occurred and it was the loader with the brake issue. Tr. 51:14-20. Contrary to the inspector’s testimony Milian asserts that the cited clean loader never left the concrete loading pad. Tr. 49:7, 49: 23-50:4. Owner operator Flood also emphatically testified that the cited loader never left the

³ At hearing, counsel for the Secretary instructed a clerk of the court to annotate exhibits P-1 and P-4. Both the original and annotated versions of those exhibits are included in the record.

concrete pad. Tr. 265: 17-25. Flood also admitted he had little information about the berm that was built that day. Tr. 265:10-16. It is undisputed Flood was not present on the day the brake test was performed and thus could not have witnessed where that loader travelled that day. Millian's testimony regarding where the cited loader travelled on the day of the inspection is convoluted and unclear. While he maintained the cited clean loader was the only one in use that day, he references other loaders that worked on the berm. Tr. 47: 3-24. It is particularly noteworthy that just before this explanation he was asked the following question: "According to the inspection file, the front-end loader was used to create that berm; is that correct?" Milian illusively responded: "Not specifically on that area." Tr. 47: 3-6. I credit the inspector's clear and unequivocal testimony that he witnessed the cited clean loader travelling off the concrete pad that day down the roadway while passing within approximately 50-75 feet of two miners who were walking. Even without this testimony, Order No. 9994013 was cited as having one person affected and Big Spring does not dispute that the operator of the clean loader obviously would be exposed to the hazard. Resp't Br. at 1-10. Indeed, Inspector Brayfield's contemporaneous order notes specifically cite the danger, at a minimum, as being "when the operator gets out they will be fatally crushed." Ex. P-14, p. 3. It is critical to also note that while operating the loader that same miner could be at risk of severe injury or death in the event that the service brakes failed and he needed to engage a failed parking brake to avoid going off a road without a protective berm or running into the hopper for example.

Finally, while Big Spring argues that the clean loader remained on a flat surface, testimony from Brayfield and Milian confirm that the loader operated at a minimum of a four-inch grade. Tr. 55:22-56:12, 73:21-74:8, 74:23-75:4, 100:8-16.

In light of Inspector Brayfield's testimony, I determine that the cited clean loader under continued mining operations would, at the very least, expose the equipment operator to the hazard of being fatally struck or run over by a 65,000 pound piece of mobile equipment. As a result, the Secretary has demonstrated that Big Spring's violation was of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. Therefore, I conclude that Order No. 9994013 is correctly assessed as a "significant and substantial" violation that is "reasonably likely" to cause a "fatal" injury to at least one miner.⁴

C. Unwarrantable Failure and Negligence Designations for Order No. 9994013

The Commission has determined that an unwarrantable failure is "aggravated conduct constituting more than ordinary negligence for a mine operator in relation to a violation of the Act." *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987). It 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). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating or mitigating

⁴ Furthermore, based on the same facts noted in this analysis, I similarly conclude that a "significant and substantial" designation is warranted under the *Mathies* test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007) (citation omitted). Like S&S, the Secretary bears the burden of establishing the validity of an unwarrantable failure finding. *See Keystone*, 17 FMSHRC at 1838. In other words, “while an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge.” *Coal River Mining, LLC*, 32 FMSHRC 82, 88-89 (Feb. 2010) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009)).

As directed, I consider in turn each of the following factors: (1) the extent of the violative condition; (2) the length of time that it 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 abatement efforts; and (7) whether the operator was placed on notice that greater efforts were necessary for compliance with the cited safety standard. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC at 1350-57; *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

1. Duration of Violative Condition

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. *E. Assoc. Coal Corp.*, 32 FMSHRC 1189, 1198 (Oct. 2010). In deciding whether a violation should be attributed to an operator's unwarrantable failure, the Commission looks to the length of time or number of shifts that the violative condition existed. The Commission accepts direct and circumstantial evidence to establish duration. *Windsor Coal Co.*, 21 FMSHRC 997, 1003 (Sept. 1999); *Coal River Mining, LLC*, 32 FMSHRC 82, 92-93 (Feb. 2010) (explaining that even imperfect evidence of duration should be considered by the judge); *see also Peabody Coal*, 14 FMSHRC 1258, 1261-63 (Aug. 1992) (affirming the judge's duration finding based primarily on the inspector's observation of, and testimony regarding, the cited area).

The parties do not dispute that the cited clean loader's emergency brakes were malfunctioning for at least fifteen days prior to Inspector Brayfield's inspection. Sec'y Br.; Resp't Br. Indeed, the testimony of both Brayfield and Big Spring Supervisor Milian, as well as the pre-shift inspection reports, all indicate that the clean loader's parking brakes were marked as malfunctioning for at least fifteen days. Tr. 37:16-23, 64:1-14, 66:17-18, 131:20-132:3, 163:19-164:6, 164:11-165:1, 181:9-15; Ex. P-7. Accordingly, I find that that the malfunctioning emergency brake was present for at least fifteen days, which is more than sufficient to satisfy this factor as the Commission has held that a duration lasting more than one shift can weigh in favor an unwarrantable failure. *Windsor*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (holding a duration lasting more than one shift can weigh in favor of an unwarrantable failure); *CAM Mining*, 38 FMSHRC 1903, 1909 (Aug. 2016) (upholding an unwarrantable failure finding since the operator's failure to abate the hazard exposed at least two shifts of miners to highly dangerous conditions).

I ultimately find the duration factor particularly important with respect to the violation established in this case. The longer the violation went fully unaddressed, the greater likelihood that a fatal accident could occur as a result of the clean loader's malfunctioning emergency brakes. *Cf. Coal River Mining*, 32 FMSHRC at 92 (explaining that a longer duration of violation led to an increase in danger to miners). This factor thus weighs heavily in favor of an unwarrantable failure finding.

2. Extensiveness of the Violative Condition

When the Commission considers the extent of the violative condition, it evaluates the magnitude and scope of the violation, the number of persons affected, and the size of the affected area. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079-80 (Dec. 2014); *E. Assoc. Coal Corp.*, 32 FMSHRC at 1195.

Big Spring indirectly argues that that violative condition was not extensive because the closest individual to the clean loader during normal operations was five hundred feet away and it only operates in an isolated concrete pad area. Resp't Br. at 8; Tr. 107:4–12. In contrast, the Secretary argues that at least five individuals were affected as (1) “the loader was used in the area where it was tested to move product to the hopper, and the record shows that this was an active work zone where miners regularly traveled on foot[;]” (2) “Inspector Brayfield observed the loader in transit on a roadway and testified that it came within approximately 50 to 75 feet of two miners who were walking, creating a direct struck-by and crushing hazard if the loader rolled or failed to stop as expected[;]” and (3) “Brayfield observed the loader being used to build a berm in front of a steep drop-off; he testified that the loader came within inches of the edge, exposing the operator to a potentially fatal drop off if the parking/emergency brake failed to hold.” Sec'y Br. at 15–17; Tr. 62:14–17, 74:1–8, 63:19–22, 158:19–25, 159:3–8, 162:6–16; Exs. P–1, P-2, P-3, P-4, P–5.

First, although Big Spring argues that the clean loader only operates on the converted pad area, Milian admits that on rare occasions the clean loader would leave the concrete pad to complete miscellaneous tasks. Tr. 52:5–53:10. Second, although Big Spring claims that no individuals were near the clean loader during normal operations—with the closest individual being five hundred feet away—the testimony of Brayfield and Milian indicate instances in which either miners walk or operate forklifts anywhere from ten-to-two-hundred-feet from the clean loader Tr. 105:14–106:19, 138:7–17, 145:7–146:19, 161:7–163:3. Therefore, while Inspector Brayfield designated the violative condition as affecting only one miner, the Secretary has shown that at least two miners may be in close contact with the clean loader during normal operations. In light of these circumstances, I find the violative condition minimally extensive and thus weighs neutrally towards an unwarrantable failure finding.

3. Knowledge of the Condition

The Commission has held that knowledge is established by showing “the failure of an operator to abate a violation [that] he knew or *should have known* existed.” *Emery Mining Corp.*, 9 FMSHRC at 2002-03 (emphasis added); *see also* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the

Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975). In the absence of past violations, an operator's knowledge may be established "where an operator reasonably should have known of a violative condition." *IO Coal Company, Inc.*, 31 FMSHRC at 1356-57; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)). The Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Further, the knowledge or negligence of an agent may be imputed to the operator. See *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015).

The Secretary argues that Inspector Brayfield's "high" negligence and unwarrantable failure designation is warranted because: (1) Milian admitted to Brayfield he was aware that the parking brakes were not functioning properly prior to the inspection and therefore Big Spring "had actual knowledge of the defective condition and failed to take reasonable corrective action"; (2) pre-operational inspection reports documented that the parking brake was not working prior to the inspection; and (3) despite being responsible for overseeing mobile equipment, Milian did not review daily inspection reports every day. Sec'y Br. at 16-17; Tr. 165:2-13, 166:3-25, 167:1-13. Additionally, the Secretary argues that "[t]he Court should reject [Big Spring]'s attempt to blame the alleged statements of a former MSHA inspector for its failure to review the inspection reports . . . because [m]ine operators bear primary responsibility for safety compliance and cannot avoid citations or penalties by claiming reliance on inspector advice." Sec'y Br. at 17.

In contrast, Big Spring disputes the "high" negligence designation and argues the degree of negligence should be mitigated because: (1) Big Spring "took steps to ensure the safe operation of the subject loader mere weeks prior to the inspection at issue" and received "a clear inspection and adjustment of the parking break" which-based on its history with the clean loader's repairs-led it to believe "that a service appointment would generally result in months of proper operation"; (2) "Big Spring was operating on the mistaken belief that the inspection reports were simply to be housed so that an inspector can review them," rather than needing to be turned into management each day; and (3) Milian testified that he was not aware of the violative condition because the equipment operator did not flag the pre-shift inspection reports for him and thus Milian did not review them. Resp't Br. at 4, 7; Tr. 38:6-39:24, 71:9-23, 79:2-24, 80:13-81:7, 138:18-139:18.

First, Big Spring did present evidence and testimony indicating their efforts to have Warren CAT-a independent equipment inspection and maintenance company-regularly visit the Big Spring Plant to conduct maintenance on their mobile equipment. Tr. 128:3-20, 132:4-17, 136:10-17, 225:7-21, 240:2-11; Ex. P-16. Although Milian and Flood are inconsistent in their testimony as to the exact date that Warren CAT visited the plant, the Secretary did not present any evidence to contradict their claim and thus I find it credible. However, Big Spring did not present any evidence indicating that Warren CAT visited the mine within the fifteen-day window that the clean loader's emergency brakes were noted as malfunctioning. While I can understand Big Spring having an expectation that the clean loader's brakes should be operating well after

maintenance, that does not in any way justify the failure to review daily pre-shift inspection reports for up to two weeks prior to the subject MSHA inspection.

Second, although Big Spring argues that “it was operating on the mistaken belief that the inspection reports were simply to be housed so that an inspector can review them” based on an alleged prior instruction from an MSHA Inspector, Big Spring President Flood’s testimony directly contradicts that position. Flood testified that—when he inquired as to how other operators abided by their paperwork requirements—the MSHA Inspector stated that “daily inspections were mandatory” and “people do it differently.” Tr. 231:15–233:7. Flood then admits that Big Spring’s procedure of pre-shift inspection reports only being given to a supervisor when there is an issue was done at “[his] suggestion.” Indeed, Flood testified that he was the one who implemented their reporting procedure and directed Milian to abide by it. Tr. 232:11–233:7.

Lastly, the evidence and testimony presented at hearing regarding whether Milian admitted to knowing about the cited loader’s malfunctioning emergency brakes at the time of inspection is heavily disputed. However, even if it is assumed that Milian did not have actual knowledge of the cited condition, the undisputed fact that the pre-shift inspection reports listed the malfunctioning parking brakes for at least fifteen days prior to Brayfield’s inspection demonstrates that Milian—the Supervisor of the Big Spring Plant—should have been aware of the condition. Sec’y Br. at 17-18; Resp’t Br. at 5-6; Tr. 65:2–66:1, 164:1–13; Ex. P–7. In fact, Big Spring’s pre-shift inspection reports even have signature lines on each report specifically for the supervisor’s signature. Ex. P–7.

While I am sympathetic to Big Spring as they had only recently begun operations sixteen months prior, the Mine Act holds operators to a duty of care of that of a reasonably prudent person familiar with the mining industry. Tr. 228:10–14; *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). Therefore, Milian is held to the standard of that of a reasonably prudent person familiar with the mining industry and should have been aware of his responsibility to verify pre-shift inspection reports. Accordingly, because Big Spring should have known of the violative condition it demonstrated indifference or a serious lack of reasonable care by allowing the violation to continue unabated for fifteen days.

Based on the discussion above, I conclude that Big Spring exhibited a high level of negligence and find this factor strongly weighs in favor of finding an unwarrantable failure.

4. Obviousness of the Violative Condition

Regarding the obviousness of the violative condition, the clean loader’s pre-shift inspection reports clearly marked the defective parking brakes for the fifteen days prior to Inspector Brayfield’s inspection. Tr. 65:2–66:1, 164:1–13; Ex. P–7. Although Big Spring argues that Milian was unaware of the condition because he only reviews the pre-shift inspection reports after the equipment operator flags an issue to him, as discussed above, a reasonably prudent person familiar with the mining industry would be aware of the responsibility to verify pre-shift equipment reports and therefore Milian should have known of the violative condition. Resp’t Br. at 5–6; Tr. 38:6–39:24, 71:9–23, 79:2–24, 80:13–81:7, 138:18–139:18; *see* discussion

supra Part IV.C.3. Therefore, I find this factor weighs heavily in favor of an unwarrantable failure designation.

5. Degree of Danger Posed by the Condition

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals*, 10 FMSHRC 705, 709 (June 1998). The degree of danger has been considered a significant aggravating factor, but not a threshold requirement, in an unwarrantable failure analysis. *See e.g., WMD. Scepaniak, Inc.*, 37 FMSHRC 1539, 1547-48 (July 2015) (ALJ). Additionally, the degree of danger “increases when there is a chronic problem that is ignored.” *Consolidation Coal*, 35 FMSHRC 2326, 2343 (Aug. 2013).

In evaluating this factor, the focus is on the danger specifically posed by the violative condition, which in this case is undisputed. Specifically, the parties do not dispute the danger of the violative condition being a miner fatally struck or run over by the 65,000-pound clean loader. Sec’y Br.; Resp’t Br.; Tr. 106:20–107:3, 179:8–12. Furthermore, because the violative condition existed for at least fifteen days, the longer it went unaddressed, the greater the likelihood that a miner would be fatally struck by the clean loader. Tr. 65:2–66:1, 164:1–13; Ex. P–7; *Coal River Mining*, 32 FMSHRC at 92 (explaining that a longer duration of violation led to an increase in danger to miners); *Consolidation Coal*, 35 FMSHRC 2326, 2343 (Aug. 2013) (explaining that the degree of danger “increases when there is a chronic problem that is ignored”). Therefore, this factor weighs in favor of an unwarrantable failure designation.

6. Notice of Need for Greater Compliance Efforts

For this factor, the Commission has found that “[r]epeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the standard.” *IO Coal*, 31 FMSHRC at 1353 (citing *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (citation omitted)).

The Secretary argues that “[i]n the year preceding the inspection, Respondent was cited approximately eight times for equipment-related violations . . . [which placed] Respondent on heightened notice of the importance of maintaining mobile equipment in safe operating condition.” Big Spring does not address the Secretary’s argument. Resp’t Br. at 1–10.

In reviewing Big Spring’s history of previous violations in the fifteen months prior to the issuance of Order No. 9994013, the Secretary correctly notes that there is a total of eight equipment related violations. Sec’y Br. at 19; Ex. P–11. However, considering that Big Spring had only began operations fifteen months prior to the violation, I do not find the eight related violations to be sufficient to place Big Spring on notice that greater efforts were necessary to comply with section 56.14101(a)(2). This factor thus slightly weighs against the finding of an unwarrantable failure designation.

7. Abatement Efforts

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining*, 19 FMSHRC 5, 17 (Jan. 1997)). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989).

As discussed above, Big Spring was not placed on notice that greater efforts were necessary to comply with the cited standard. See discussion *supra* Part IV.C.6. Additionally, Big Spring did demonstrate general efforts to maintain its mobile equipment by having Warren CAT regularly visit the Big Spring Plant to conduct maintenance on their mobile equipment. Tr. 128:3–20, 132:4–17, 136:10–17, 225:7–21, 240:2–11; Ex. P-16; see discussion *supra* Part IV.C.3. However, Big Spring did not present any evidence indicating that Warren CAT visited the mine within the fifteen-day window that the clean loader's emergency brakes were noted as malfunctioning. Moreover, Big Spring presented no evidence that it attempted to abate the clean loader's obvious violative condition in advance of the issuance of Order No. 9994013. Big Spring Supervisor Milian claims that he was not aware that the clean loader's emergency brakes were malfunctioning because the equipment operator did not inform him of it. Tr. 38:6–39:24, 71:9–23, 79:2–24, 80:13–81:7, 138:18–139:18. Although a reasonable good-faith belief that a condition did not exist may excuse a lack of abatement efforts, I do not find that Milian's failure to inquire or review the clean loader's pre-shift inspection report for the fifteen days preceding Brayfield's inspection was based on a reasonable good-faith belief that a violative condition did not exist. See *IO Coal*, 31 FMSHRC at 1356; *Morris Sand & Gravel, Inc.*, 39 FMSHRC 1609, 1623 (Aug. 2017) (ALJ). As discussed above, a Mine Supervisor like Milian is held to the standard of that of a reasonably prudent person familiar with the mining industry and, accordingly, should have been aware of his responsibility to verify pre-shift equipment reports. See discussion *supra* Part IV.C.3.

Therefore, while I find it favorable that Big Spring made general efforts to maintain its equipment, there is no evidence to indicate that it made efforts to abate the specific violative condition on the clean loader during the fifteen-day window it was noted on the pre-shift inspection reports. Accordingly, I find this factor weighs neutrally towards an unwarrantable failure finding.

Based on the foregoing discussion, I have found that the violative condition in Order No. 9994013 was obvious, minimally extensive, had a high degree of danger, and was of sufficient duration to warrant a finding of unwarrantable failure. In addition, I have found that Big Spring Supervisor Milian should have known of the violative condition, that Big Spring failed to abate the condition prior to issuance of the order, and that a reasonable person familiar with the mining industry would have inquired or reviewed the clean loader's pre-shift inspection report for the fifteen days preceding the inspection. I therefore conclude that the violation in Order No.

9994013 was the result of Big Spring's high negligence and an unwarrantable failure to comply with section 56.14101(a)(2).

V. PENALTY

The Commission is not bound by the Secretary's proposed penalty and reviews penalty assessments *de novo*. *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263–64 (D.C. Cir. 2016). Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary proposes a special assessment penalty of \$88,354.00 for Order No. 9994013. Ex. P–12. Big Spring is a small operator employing an average of twenty-two employees and operating a total of 29,467 hours at the Big Spring Plant in 2024. *Mine Data Retrieval System*, MSHA, <https://www.msha.gov/data-and-reports/mine-data-retrieval-system> (last visited May 29, 2026). In the fifteen months preceding the issuance of this order, MSHA issued zero violations of section 56.14101(a)(2) to Big Spring's Big Spring Plant. *Id.* While Respondent presented no evidence regarding the proposed penalty's impact on its ability to continue in business, I am particularly mindful that this is a small operation which the current owners had only operated for some 15 months prior to the order being issued. Tr. 228: 10-14. During this time Respondent admitted that it took some time for them to manage the inspection process on the loader at issue based on what they learned about it needing more inspections over the course of 15 months. Tr. 251: 17-25. I concluded that Big Spring exhibited a high level of negligence and an unwarrantable failure to comply with the Mine Act. *See* discussion *supra* Part IV.C. Regarding gravity, I concluded that the violation was reasonably likely to result in a fatal injury to one person. *See* discussion *supra* Part IV.B. Finally, Big Springs demonstrated good faith in timely abating Order No. 9994013 by removing the clean loader from the plant and repairing the emergency brakes. Ex. P–14; Sec'y Br. at 20; Tr. 273:4. In considering the criteria set forth in section 110(i) of the Mine Act and all the relevant facts, I hereby assess a penalty of \$53,124.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 9994013 is **AFFIRMED** as written.

Respondent is **ORDERED** to pay a civil penalty of **\$53,124.00** for Order No. 9994013 within 40 days of this decision.⁵

A handwritten signature in black ink, appearing to read "David P. Simonton", with a stylized flourish at the end.

David P. Simonton
Administrative Law Judge

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⁵ 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>.