

**August 2015**

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## **COMMISSION DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, D.C. 20004-1710

August 25, 2015

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

v.

BRODY MINING, LLC

Docket Nos. WEVA 2009-1000  
WEVA 2009-1306

BEFORE: Cohen, Nakamura, and Althen, Commissioners<sup>1</sup>

## **DECISION**

BY: Cohen and Nakamura, Commissioners

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The Secretary of Labor is appealing various determinations that the Administrative Law Judge made with regard to seven Mine Act violations by Brody Mining, LLC, which the Judge affirmed with modifications to the Secretary’s negligence, unwarrantable failure, and/or significant and substantial (“S&S”) allegations. 33 FMSHRC 1329 (May 2011) (ALJ). For the reasons that follow, we vacate and remand the challenged determinations for further proceedings consistent with this decision.

### **I.**

#### **General Factual and Procedural Background**

The seven orders were issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Brody’s No. 1 mine, located in Boone County, WV. The orders resulted from inspections conducted by MSHA Inspectors Charles H. Ward and James Jackson on five different dates between January 15 and March 3, 2009.<sup>2</sup> We address the Judge’s findings

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<sup>1</sup> Chairman Mary Lu Jordan and Commissioner Michael G. Young reassumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision-making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

<sup>2</sup> The Judge’s decision also affirmed an eighth order, involving a failure to wear eye protection, discovered as the result of a separate inspection by Jackson (33 FMSHRC at 1357-62), but neither party appealed the determinations the Judge made with respect to that violation.

that the Secretary is challenging with regard to: (1) an accumulations violation the Judge found to be neither S&S nor attributable to Brody's unwarrantable failure to comply;<sup>3</sup> (2) three orders derived from violations related to ventilation, all of which the Judge found not to be due to Brody's unwarrantable failure to comply, two of which he reduced the findings on negligence to no and moderate negligence, respectively, and one of which he reduced the gravity finding; and (3) three orders in which the Judge found the violations to be due to only moderate negligence, despite concluding that the operator's conduct constituted an unwarrantable failure to comply.

## II.

### **Whether the Judge Erred in His Tail Piece Accumulations Violation Determinations**

#### **A. Violation**

On January 22, 2009, Inspector Jackson issued Order No. 8079179 to Brody for violating 30 C.F.R. § 75.400,<sup>4</sup> alleging that the operator had permitted loose coal, coal dust, and float coal dust to congest a belt line tail piece and pile up along the side of the belt where miners would not normally work or travel. 33 FMSHRC at 1352; Gov't Ex. 10; Tr. 143. A belt line tail piece is where coal is dumped from the feeder that is used to transfer coal from a continuous miner. Tr. 117. Jackson estimated that the accumulation was 31 feet long, four feet wide, and six to seventeen inches deep. In the order Jackson further stated that accumulations under the belt were in contact with the belt and tail piece rollers. 33 FMSHRC at 1352; Gov't Ex. 10.

The inspector designated the violation as S&S based on his observation that the color of the coal under and around the belt indicated that the coal was drying out and heating up, and thus the belt friction had the potential to cause an ignition and fire. Tr. 119-20. Jackson also designated the violation as attributable to Brody's unwarrantable failure, alleging that the operator's reckless disregard was established by the fact that, given the amount of coal he observed, it must have accumulated over the course of more than the present shift. Tr. 120-22. The inspector also took into account that Brody had been cited 29 times during the preceding four months for section 75.400 violations, and that the mine's primary escapeway was not available, due to flooding, should miners have to evacuate as the result of a fire precipitated by the accumulations. Tr. 122-23.

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<sup>3</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

<sup>4</sup> Section 75.400 provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."



## **B. Judge's Decision**

While the Judge affirmed that the accumulations constituted a violation of section 75.400, he did not affirm any of the special findings, concluding that the violation was neither S&S nor due to Brody's unwarrantable failure to comply with section 75.400. He also rejected the Secretary's position that Brody's negligence rose to the level of "reckless disregard." Consequently, he reduced the Secretary's proposed penalty of \$70,000 to \$4,450. 33 FMSHRC at 1352-57.

In concluding that the Secretary had failed to establish that the violation was S&S, the Judge applied the Commission's four-step analysis set forth in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), as he had described earlier in his decision. 33 FMSHRC at 1349, 1356. In addition to finding a violation of section 75.400, he concluded that even if the coal accumulations were wet, they were susceptible to being heated to a point at which they would ignite. He went on to find, however, that nearby fire suppression systems made the likelihood of miner injury from any resulting fire remote. As a result, he concluded that the violation was not S&S and discounted the gravity of the violation. *Id.* at 1356.

In rejecting the Secretary's claim that Brody's conduct with respect to the accumulations violation was unwarrantable, the Judge found the Secretary's evidence not to be "convincing." *Id.* at 1354. With respect to the level of Brody's negligence, the Judge concluded that it was significantly mitigated in this instance because both the mine in general and the area in question were wet, and thus the accumulations were less likely to combust. *Id.* at 1354-55.

## **C. Disposition**

### **1. Significant and Substantial**

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, the Commission further explained:

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

6 FMSHRC at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard that must be significant and substantial.

*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). In evaluating that contribution, it is assumed that normal mining operations will continue. See *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574-75 (July 1984); see also *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

We review the Judge's application of the *Mathies* criteria under the substantial evidence standard.<sup>5</sup> The violation of section 75.400 that was found below (33 FMSHRC at 1354) and not appealed by Brody establishes the first step of *Mathies*. With regard to whether the violation posed a hazard, the Judge did not explain his findings in a consistent manner, so his conclusion that the second step of *Mathies* was satisfied in this instance is not supported by substantial evidence.

The Judge found "[t]here is an articulable and credible danger that even wet coal accumulations can be heated by belt friction to the point of ignition." 33 FMSHRC at 1356. This is generally consistent with Jackson's testimony that while the area of the mine in question was generally wet, the coal he observed in contact with the belt's rollers, by virtue of its lighter color in contrast to nearby wet coal, appeared to have become dry from that contact. This led him to fear that the process that would result in a fire had already begun. Tr. 118-20.

Elsewhere in his decision on this violation, however, the Judge refused to credit Jackson's conclusions regarding the physical state of the accumulations and the danger they thus posed in this instance. The Judge noted that Jackson failed to touch the coal to check whether it was dry or warm. 33 FMSHRC at 1355.

In addition, the mine's superintendent, Glenn Fields, who accompanied Jackson that day, testified that Brody had rock dusted the tail piece area the day before, as it did every day with regard to the area in which the tail piece was located, in order to dilute float coal dust. Fields stated that the white substance Jackson saw could have been that rock dust. Tr. 202-05, 209-10. The Judge cited this evidence of rock dust on the accumulations as a possible reason for the lighter color of the coal. 33 FMSHRC at 1355.<sup>6</sup>

Remand of the S&S issue is thus necessary for the Judge to resolve the internal inconsistencies in his findings regarding the state of the accumulations. See *Drummond Co.*, 13 FMSHRC 1362, 1368-69 (Sept. 1991). To the extent possible the Judge should make

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<sup>5</sup> When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>6</sup> The Judge cites Jackson as being asked what color "rock dust" is, and answering "black." 33 FMSHRC at 1353. As Fields explained, rock dust is actually white. Tr. 210. This may have been why the Judge refused to credit Jackson on the significance of the color of the coal near the roller. We note that Jackson's seemingly inconsistent answer to the question immediately following it indicates that he may have merely misspoken in answering the first question. Tr. 142.

findings regarding whether the rock dust ameliorated any immediate danger posed by the accumulations. *See, e.g., Twentymile Coal Co.*, 36 FMSHRC 1533, 1537 (June 2014) (affirming finding that application of rock dust was not sufficiently concentrated to effectively dilute coal dust).

The Judge further erred in his S&S analysis by basing his conclusion that there was not a reasonable likelihood of serious injury on the presence of fire suppression equipment. According to the Judge, the presence “of a dedicated water spray fire suppression system along the belt line, carbon monoxide detectors, and secondary fire hose system at regular intervals” made the likelihood remote that miners would be injured in the event of a fire or smoke caused by belt friction in the accumulations. 33 FMSHRC at 1356. When deciding whether a violation is S&S, courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation. *See Buck Creek*, 52 F.3d at 136; *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011), *aff’d*, 717 F.3d 1020 (D.C. Cir. 2013); *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1124-25 (May 2014).

In light of the foregoing, we vacate the Judge’s determination that the section 75.400 violation was not S&S and remand the case for a reexamination of the testimony and other evidence under the *Mathies* criteria.

## **2. Unwarrantable Failure**

In *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 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*, 52 F.3d at 136 (approving Commission’s unwarrantable failure test).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Whether the conduct is “aggravated” in the context of unwarrantable failure is determined by looking at (1) the extent of the violative condition, (2) the length of time it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009).

All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission has made clear that it is necessary for a Judge to consider all relevant factors. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable

determination for further analysis and findings when Judge failed to analyze all factors). While a Judge may determine, in his or her 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.” *IO Coal*, 31 FMSHRC at 1351.

As we explain in detail below, with regard to the unwarrantability of the tail piece accumulations violation the Judge made unclear findings on some factors, summarily dismissed the significance of other factors, and entirely ignored additional factors. Consequently we are vacating and remanding his determination that the accumulations violation was not attributable to Brody’s unwarrantable failure for a reexamination of the evidence and further analysis by the Judge.<sup>7</sup>

**a. The Length of Time the Accumulations Existed**

The Commission has emphasized that the duration of the violative condition is a necessary element of the unwarrantable failure analysis. See *Windsor Coal Co.*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). This is particularly the case with accumulations violations. See, e.g., *Buck Creek*, 52 F.3d at 136 (holding that accumulations that were present for more than one shift, after a pre-shift examination had been performed, were properly designated as unwarrantable); *Consolidation Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (unwarrantable failure found where accumulations existed over several shifts).

Here, there was a significant dispute over the duration of the accumulations. In Jackson’s estimation, the coal he observed on and around the tail piece was so extensive that it could not have accumulated simply from the 30 feet of coal he understood had been mined so far on that shift (at least without the belt malfunctioning, which it had not). Jackson thus concluded that some of the accumulations had carried over from prior to that shift. Tr. 120-22. Fields, however, testified that just one shuttle car, loaded with between nine and ten tons of coal, could cause the amount of accumulations cited in a matter of minutes, particularly when the coal was wet, as it was here. Tr. 201-02.

We are uncertain from the Judge’s decision how he resolved this conflict. The decision states in relevant part:

I cannot conclude that the accumulations Jackson saw were the result of spillage from the limited mining that occurred in the time between the pre-shift report and his inspection, as Brody argued. Although there is more inferential support for this than for the contrary view advocated by the Secretary, the weight of the

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<sup>7</sup> We recognize that the Judge’s unwarrantability findings are largely bound together with his conclusions regarding Brody’s level of negligence in this instance. However, the Secretary did not appeal the Judge’s determination that Brody was only moderately negligent with respect to this violation, so we do not review that determination.

evidence is still not convincing. Without more convincing evidence, and given that it is the Secretary's burden to prove this point, I cannot conclude that Brody's actions reflected an unwarrantable failure to abide by the standard.

33 FMSHRC at 1354. On remand the Judge should examine the evidence submitted and explain his consideration of the length of time the accumulations existed in the context of his unwarrantable failure analysis. *See Coal River Mining, LLC*, 32 FMSHRC 82, 93 (Feb. 2010) (even where conclusive findings are not possible, imperfect evidence of duration should still be considered by the Judge when making an unwarrantable failure determination).<sup>8</sup>

**b. The Degree of Danger Posed by the Accumulations**

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129-30 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). As discussed with regard to the Judge's S&S findings and analysis, here too there are unresolved conflicts in the evidence. On remand the Judge, after examining the evidence with regard to whether the Secretary established that the coal in contact with rollers was drying out and thus posed an ignition risk, must discuss the degree of danger, if any, posed by the cited accumulations. *See Windsor*, 21 FMSHRC at 1007.

**c. Prior Notice that Brody Needed to Make Greater Efforts to Comply**

The Commission has stated that repeated similar violations are 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 a standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997). This is particularly true with respect to accumulations violations. *See Consolidation Coal*, 23 FMSHRC at 595 ("a high number of past violations of section 75.400 serve to place an operator on notice that it has a recurring safety problem in need of correction."). "The purpose of evaluating the number of past section 75.400 violations is to determine the degree to which those violations have 'engendered in the operator a heightened awareness of a serious accumulation problem.'" *San Juan Coal Co.*, 29 FMSHRC

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<sup>8</sup> It appears that the Judge may have inferred from MSHA's failure to challenge Brody's pre-shift examination records that the accumulations had not reached the violative stage when the pre-shift examination was conducted on the previous shift. *See* 33 FMSHRC at 1354 ("There is no basis to discount Brody's evidence that it conducted an effective pre-shift examination as reflected in Exhibits R-4 and [Gov't]-10"). Inferences drawn by a Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (citations omitted). Here, the Judge may need to rely on inferences drawn from the evidence in reaching a conclusion on the length of time the accumulations existed, including the possibility that the accumulations may have been present for so long that they were dusted earlier. *See Windsor*, 21 FMSHRC at 1003-04.

at 131 (operator cited 47 times during 39-month period) (quoting *Mid-Continent*, 16 FMSHRC at 1226).

Without further explanation, the Judge stated that he was not “convince[d]” that the violation here was unwarrantable despite the operator having received 39 citations for section 75.400 violations over the four months prior to January 22, 2009. 33 FMSHRC at 1355 n.26. Elsewhere in his decision, however, with respect to the other accumulations order, No. 8079224, which had been issued only one month later, the Judge found the following:

Brody had been cited for Section 75.400 violations twenty-three times in the previous two-month period. I find that Brody was on notice from this relevant and recent history that it should put forth greater effort to comply with Section 75.400. From this I conclude that Brody was generally indifferent to the requirements of Section 75.400.

*Id.* at 1385.

We are unable to reconcile these two seemingly inconsistent conclusions regarding the effect of Brody’s recent history of accumulations violations on the question of whether these subsequent violations could be attributed to the operator’s unwarrantable failure. On remand the Judge will have the opportunity to discuss and clarify Brody’s history of accumulations violations in terms of the issue of unwarrantable failure. The finding in Order No. 8079224 that Brody was “generally indifferent” to accumulations problems would seem to require a similar finding here.

**d. Remaining Relevant Factors**

The Judge’s unwarrantable failure analysis did not address the physical extent of the accumulations. The purpose of taking into account the extensiveness of a violation under the unwarrantability analysis is to factor in the scope or magnitude of a violation. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1260-61 (Aug. 1992) (holding that five accumulations of loose coal and coal dust were extensive). On remand the Judge should consider that the inspector measured the accumulations to be 31 feet long, four feet wide, and six to seventeen inches deep, and that they were in contact with the belt and tail piece rollers.

Related factors are whether the operator had knowledge of the existence of the violative accumulations, or whether the hazardous nature of the accumulations was obvious and thus the operator should have known it was violating section 75.400. While the Secretary did not take the position that Brody had actual knowledge of the cited conditions, he did argue that the physical extent of the accumulations made them obvious to the operator. On remand the Judge should address the Secretary’s argument, as well as evidence that during the pre-shift examination of the belt, it was reported that the tail piece needed spot cleaning. *See* 33 FMSHRC at 1353 (citing Tr. 206; Gov’t Ex 10; B. Ex. 4).

We thus vacate and remand the Judge's findings with respect to whether the tail piece accumulations violation was S&S and attributable to Brody's unwarrantable failure. Should the Judge arrive at different conclusions with respect to either or both issues, he should reassess the penalty imposed to be consistent with his new findings.

### **III.**

#### **The Judge's Determinations Regarding the Ventilation Plan-Related Orders**

##### **A. The Three Violations**

In early 2009, the Brody ventilation plan required an airflow of at least 3,000 cubic feet per minute ("CFM") at the face. Tr. 26-27, 74, 379-80. On January 15, 2009, MSHA Inspector Ward measured less than 2,000 CFM at two of the faces, and noticed that flypads in the intersections were not positioned properly, and thus were not working as intended to divert and direct sufficient air to those faces.<sup>9</sup> Tr. 26, 74, 379-80. Ward issued Order No. 8075863 to Brody for failing to follow its ventilation plan with regard to the 3,000 CFM minimum, and thus violating 30 C.F.R. § 75.370(a)(1).<sup>10</sup> Tr. 25-26. Brody hung additional flypads to abate the violation. Tr. 73. Ward also issued Order No. 8075864, alleging that Brody had failed to note the condition of the flypads on its most recent preshift examination, thereby violating 30 C.F.R. § 75.360(b)(3). Tr. 41-43, 80; B. Ex 2.

When Ward returned to the mine for an inspection on February 11, 2009, he measured the amount of air at the face, and found it to be a little over 1,000 CFM. He attributed the deficiency to loose material having been pushed into the face area resulting in a restriction of the air flow behind a line curtain. Tr. 46-49. Consequently, he issued Order No. 8075874, alleging another violation of section 75.370(a)(1). Gov't Ex. 6. Shortly thereafter, Brody's Safety Manager, Carl Blankenship, who was accompanying Ward that day, moved the curtain back one row of bolts to create more space between it and the face, which abated the violation. Tr. 46-47, 84, 390-91.

All three violations were initially designated as S&S, but the Secretary deleted those designations prior to the hearing. 33 FMSHRC at 1334, 1340 n.15, 1363 n.34; Tr. 12. With regard to the gravity of the violation, each order indicated that it was reasonably likely to result in lost workdays or restricted duty for at least five miners (14 miners in the case of the inadequate preshift violation). Gov't Ex. 2, 4, 6.

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<sup>9</sup> Flypads are plastic strips used for curtain material, hung in overlapping increments so as to permit equipment to pass through as necessary while still serving to direct airflow. 33 FMSHRC at 1335 n.7.

<sup>10</sup> 30 C.F.R. § 75.370(a)(1) provides in pertinent part that an "operator shall develop and follow a ventilation plan approved by the [MSHA] district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

The orders also attributed the violations to Brody's unwarrantable failures. Ward considered Brody's conduct aggravated under the circumstances based on the number of ventilation plan citations or orders that he had personally issued to the mine in the preceding six months (including two on January 13, 2009), his efforts to alert Brody that it had a problem with low air flow at curtains, the total number of ventilation plan citations the mine had received over the previous four months, and the fact that the mine is one that liberates a large quantity of methane. Tr. 29-34, 46, 48; Gov't Ex. 3.

## **B. Judge's Decision**

The Judge affirmed all three of the violations. The Judge found none of the violations unwarrantable, however, and concluded that the negligence associated with the two direct ventilation plan violations were moderate and no negligence, respectively. He reduced the penalties from the total of \$17,435 proposed by the Secretary to a total of \$1,850 for the three violations. 33 FMSHRC at 1334-44, 1363-68.<sup>11</sup>

In finding the first ventilation plan violation not to be unwarrantable and to be the result of only moderate negligence, the Judge was persuaded by the fact that when Inspector Ward checked, he detected neither any methane nor a decreased oxygen content in connection with the low air at the faces. Despite recognizing that the lack of methane appeared to be nothing more than a "fortuitous circumstance," the Judge considered it as a factor that mitigated against attributing the violation to the operator's unwarrantable failure. The Judge further concluded that Ward put too much emphasis on the mine's overall methane liberation rate in writing the order. *Id.* at 1336-39.

The Judge also found the associated preshift violation not to be unwarrantable, concluding that it was "derivative" of the ventilation plan violation caused by the defective fly pads. *Id.* at 1344. However, he concluded that the lack of methane did not mitigate the failure to conduct a pre-shift examination that should have detected the flypad problem. Thus, he affirmed the designation of high negligence with respect to that violation. *Id.* at 1343-44.

In finding the later ventilation plan violation also not to be unwarrantable, and in this case the result of no negligence at all, the Judge was again persuaded by the fact that Ward had detected no methane or decreased level of oxygen in connection with the low air flow. The Judge again concluded that the mine's overall methane liberation rate had little relevance. While the Judge acknowledged Brody's recent history of ventilation plan violations, he found that it had nothing to do with the nature of the ventilation plan violation in this instance. *Id.* at 1365-68.

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<sup>11</sup> The Judge reduced the penalty for Order No. 8075863 from \$5211 to \$350. He reduced the penalty for Order No. 8075864 from \$7774 to \$1400. He reduced the penalty for Order No. 8075874 from \$4440 to \$100.



## **C. Disposition**

### **1. Unwarrantable Failure**

As with the tail piece area accumulations violation, we are remanding the Judge's findings that the three violations related to the ventilation plan were not attributable to the operator's unwarrantable failure. While the Judge in these instances made more complete findings with regard to at least some of the various relevant unwarrantable failure factors, his decision does not discuss key evidence in reaching those findings. He also did not consider other relevant factors. Accordingly, his conclusions on unwarrantable failure are not supported by substantial evidence.

#### **a. The Degree of Danger Posed by the Violations**

With regard to the danger posed by the three violations at issue here, the Judge considered the lack of evidence at the time of the violations of any immediate effect on methane or oxygen content not only to negate the importance of the mine's overall liberation methane rate, but to serve to mitigate the circumstances of the violation. *See* 33 FMSHRC at 1338 ("the fact that there was no 'harm' does affect the assessment of the 'foul'"). In light of not only the evidence in the case but also our precedents, this was plain error.

Section 103(i) of the Mine Act provides that any mine that liberates in excess of one million cubic feet of methane or other explosive gases during a 24-hour period is subject to a minimum of one spot inspection every five working days. 30 U.S.C. § 813(i). At the outset of the hearing, it was established that the Brody mine had a history of liberating 1.5 million cubic feet of methane per day. Tr. 30, 34. Brody did not dispute that it thus easily exceeded the statutory threshold to be what is known as a "gassy" mine. Tr. 318.

Brody's own witness, third shift move boss Jay Heiss, explained the significance of the mine's high methane liberation. He described methane as being something "to keep your eye on [be]cause that is a gassy mine and gas can come and go whenever." Tr. 293. Inspector Ward confirmed that from his working experience in mines, including at a gassy mine, methane could accumulate very quickly. Tr. 96-97.

Consequently, the fact that Ward detected no methane at the time of the two ventilation plan violations does not establish that the violations posed no danger to miners. Contrary to the Judge's conclusions, the Commission places significant weight on the mine's gassy status in determining the degree of danger of the violations.<sup>12</sup>

The hazard caused by the improperly hung fly pads had not been noted in the previous preshift examination. If it had not been caught by the inspector, it might well have persisted throughout the shift. During the shift, methane could have been liberated.

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<sup>12</sup> We have recognized that a sudden release of methane in a gassy mine can occur without warning. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985); *see also Twentymile*, 36 FMSHRC at 1536.

This is not to say that the mine's gassy status automatically rendered any ventilation plan violation dangerous for unwarrantable failure analysis purposes, or that the lack of methane detected during the MSHA inspection was irrelevant to that question. In this case, the Secretary deleted his initial designation of the violations as S&S, and the Judge reduced the gravity of the violations, findings that the Secretary did not appeal with respect to the two direct ventilation plan violations. 33 FMSHRC at 1339, 1368; Tr. 12. Moreover, the ventilation plan provision violated was a relatively short-lived part of the plan.<sup>13</sup> On remand, in determining whether the violations were unwarrantable, the Judge needs to take into account all relevant evidence to determine the degree of danger the violations posed.

**b. The Length of Time the Violations Existed**

With regard to the length of the time the first violation of the ventilation plan existed, the Judge made an implicit finding that it had existed since at least the time of the previous pre-shift examination. 33 FMSHRC at 1343. However, he did not take into account the duration of the violation in his unwarrantable failure analysis. On remand he should do so.

With regard to the later violation, the Judge concluded that the conditions “did not exist long enough to put Brody on notice.” *Id.* at 1367. To the extent that the Judge is relying upon Ward's testimony that he was told that the material had been pushed into the area shortly before he arrived (Tr. 47), and that no evidence to the contrary was submitted, that would support the Judge's conclusion. However, the Judge also states that the condition was only “a short-term” one because it was fixed in six minutes. 33 FMSHRC at 1368. It was fixed only because the inspector discovered the condition and ordered it abated. That is not a relevant consideration with regard to the length of time the condition existed; absent the inspection and abatement order, the violative condition would have continued. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997) (“Post-citation efforts are not relevant to the determination whether the operator has engaged in aggravated conduct in allowing the violative condition to occur”). On remand the Judge should clarify the basis for his conclusion regarding the length of time the later ventilation plan violation existed.

**c. Obviousness and Whether Brody Knew or Should Have Known of the Violative Conditions**

The Judge in his unwarrantable failure analysis failed to address the obviousness of the conditions that caused the violations of the ventilation plan – the improperly hung flypads and that a large pile (8 feet by 2 feet by 18 inches) of loose material had been pushed into the face area by Brody. On remand the Judge should do so.

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<sup>13</sup> According to Ward, the 3,000 CFM requirement was a relatively recent addition to the Brody ventilation plan, as it was included in the plan only after he encouraged the operator to add it soon after he began inspecting the mine during the previous quarter. Tr. 29-30. Moreover, Ward conceded that because the plan was changed in 2010 to one focusing on air quality instead of quantity, the low air readings would no longer constitute a violation of the ventilation plan when, as in these instances, no methane was detected. Tr. 85-86.

In addition, the Judge made seemingly inconsistent findings regarding Brody's knowledge of the conditions, with respect to the two direct ventilation plan violations. *Compare* 33 FMSHRC at 1338 (“[i]t is appropriate to attribute to Brody knowledge of the low airflow and how to properly deploy fly pads”) with 33 FMSHRC at 1367 (“[t]here is no evidence to suggest that Brody knew or could have known that this otherwise innocuous circumstance [of debris between the face and the line curtain] could affect the airflow”). If on remand the Judge affirms these findings, he needs to explain the differences in his two conclusions and, with respect to his latter finding, square it with the principle “that general mine management retains responsibility for safety and health compliance.” *IO Coal*, 31 FMSHRC at 1354 (citing *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)).

Moreover, in considering the knowledge element of unwarrantable failure, a Judge is to consider not only the operator's actual knowledge but also whether the operator “had reason to know” or “should have known.” *Eastern Assoc.*, 13 FMSHRC at 187. The pile of material which Brody pushed into the area between the face and the line curtain was large enough to cause ventilation to be reduced to one-third of what it should have been. In light of that fact, the Judge should reconsider on remand whether Brody had reason to know that its action would cause a violation of the ventilation plan.

**d. Prior Notice that Brody Needed to Make Greater Efforts to Comply**

As discussed above, an operator's history of similar violations puts the operator on notice that greater efforts are necessary for compliance with a standard. Here, the Judge acknowledged that Brody had a recent history of violating its ventilation plan, but refused to find it an aggravating factor in his unwarrantable failure analysis. As the Judge was aware, Brody had a history of 31 citations for violations of its ventilation plan in the 10-week period between October 28, 2008, and January 15, 2009. 33 FMSHRC at 1364; Tr. 32-34; Gov't. Ex. 13. However, the Judge concluded that the Secretary had provided nothing in the way of a nexus between the specific circumstances of the violations here and Brody's previous violations. 33 FMSHRC at 1367.

The Judge erred. The Commission in *IO Coal* rejected the position that, for prior plan violations to be relevant for unwarrantable failure determination purposes, the violations must involve precisely the same provision and have occurred in the same area. 31 FMSHRC at 1353-54 (roof control violations); *see also Enlow Fork*, 19 FMSHRC at 11-12 (rejecting argument that cited accumulations must be of the same material as in previous instances to be relevant to the question of whether the operator had been put on notice that greater compliance efforts were necessary). A ventilation plan is composed of many different provisions; it would not further the goal of safety to ignore the fact that an operator had a history of plan violations simply because previous violations had involved different provisions of the plan.

The Judge also failed to take into account that Ward had met with mine representatives to discuss the mine's difficulties with maintaining the required air behind line curtain. Tr. 32-33, 383-84. The Commission has held that “past discussions with MSHA” about a problem “serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard.” *San Juan*, 29 FMSHRC at 131 (citing *Consolidation Coal*, 23 FMSHRC at 595).

The inescapable conclusion based on the evidence is that Brody was on notice that greater efforts were necessary to comply with its ventilation plan. This must be factored into the unwarrantable failure analysis in this case.<sup>14</sup>

## **2. Separate Issues Posed by the Pre-Shift Violation**

### **a. Unwarrantable Failure**

The Judge summarily determined that the pre-shift violation was not unwarrantable based solely on his conclusion that the underlying ventilation plan violation was not unwarrantable. He stated that “[t]here is no separate allegation or separate proof that this faulty pre-shift examination order was anything more than a derivative action.” 33 FMSHRC at 1344. This was erroneous in a number of respects.

The Secretary correctly argued to the Judge that such factors as the obviousness of the condition of the flypads were relevant not only to whether the violation of the ventilation plan was unwarrantable, but also to determining whether the inadequate examination that failed to detect that condition was separately unwarrantable. Importantly, in addressing Brody’s negligence in connection with the pre-shift violation, the Judge was correct when he concluded that the pre-shift violation required a separate analysis, because the “[f]ailure to conduct and document an effective pre-shift report carries its own potential consequences and does not depend on the conditions” of the associated violation. *Id.* at 1343. The need for a separate analysis is just as applicable in the context of unwarrantable failure. *See Sierra Rock Prod., Inc.*, 37 FMSHRC 1, 4 (Jan. 2015) (“separate unwarrantability analyses are required, even for factually related violations, where the violations involve mandatory standards that impose separate and distinct duties on an operator. The relative significance of a fact or circumstance may change when different violative conduct is at issue”) (citation omitted).

### **b. Gravity**

Similarly, in reducing the gravity finding associated with the pre-shift violation, the Judge held that the gravity of the violation was dependent upon the gravity of the flypad violation that led to its issuance. 33 FMSHRC at 1343. The seriousness of a pre-shift violation is evaluated apart from any seriousness of any hazard that may have been detected by an adequate pre-shift examination. *See JWR Res., Inc.*, 28 FMSHRC 579, 603-04 (Aug. 2006). Consequently, we vacate and remand the gravity and unwarrantability findings the Judge made with respect to the pre-shift violation.

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<sup>14</sup> Brody would have the Commission hold that the history of prior ventilation plan violations should have no bearing on the unwarrantability of the pre-shift violation. A history of prior plan violations, however, should increase the operator’s overall vigilance with respect to failures to follow the plan, including, of course, during any required mine examination.

### **3. Negligence in Connection with the Two Ventilation Plan Violations**

The Secretary is appealing the Judge's reduction in negligence with respect to the first ventilation plan violation from MSHA's designation as "high" negligence to "moderate" negligence. *See* 33 FMSHRC at 1336-37. With respect to the later violation, the Secretary objects that the Judge made an even greater reduction, from MSHA's designation of high negligence to "no" negligence. *See id.* at 1365-66. The Secretary contends that the Judge misapplied MSHA's penalty regulations in determining the level of negligence, and that the errors the Judge made in finding neither violation attributable to Brody's unwarrantable failure also undermine the conclusions he reached regarding Brody's negligence. We vacate and remand the negligence findings for the two ventilation plan violations challenged by the Secretary so that the Judge may reexamine the evidence and come to conclusions with regard to the degree of Brody's negligence under Mine Act section 110(i) in connection with each of the violations.

Section 110(i) of the Mine Act authorizes the Commission to assess penalties for violations of the Act, and includes the operator's negligence as one of the criteria the Commission is required to consider in assessing a penalty.<sup>15</sup> To start the process, MSHA proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). MSHA has published regulations explaining its role in the penalty process, including how it arrives at proposed penalty amounts. *See* 30 C.F.R. Part 100.

The Part 100 regulations address how MSHA calculates most proposed penalties in light of the statutory criteria the Commission must consider, and explains how MSHA views each of the criteria. *See* 30 C.F.R. § 100.3. With regard to the negligence criteria, MSHA has adopted a formulaic approach, categorizing negligence into five different levels, from "no" negligence to "reckless disregard," based on the existence of a mitigating circumstance, or multiple such circumstances, for the violation. 30 C.F.R. § 100.3(d); *see generally Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3106 (Dec. 2014) (Comm'r Cohen, concurring).

In this case, the Judge looked to MSHA's definitions in its penalty regulations in determining Brody's negligence with respect to each violation, focusing in each instance on the extent to which there were mitigating circumstances. As we recently explained, however, the Part 100 regulations apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff'd* 5 FMSHRC 287 (Mar. 1983) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed

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<sup>15</sup> The six statutory factors the Commission must take into account in assessing a penalty are (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."').<sup>16</sup>

In light of the Commission holding that Commission judges are not required to apply the definitions of Part 100, judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act

"Negligence" is not defined in the Mine Act. The Commission, has, however,

recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

*JWR*, 36 FMSHRC at 1975; *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances. Instead, the Judge may consider the totality of the circumstances holistically.

Moreover, because Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to a specific evaluation of potential

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<sup>16</sup> As stated in his concurring opinion in *Hidden Splendor*, 36 FMSHRC at 3105-08, Commissioner Cohen urges the Commission to hold not merely that the definitions of the degrees of negligence contained in 30 C.F.R. § 100.3(d) and Table X contained therein are not binding on the Commission, but that these definitions are too restrictive, and should not be used by Commission judges. In these definitions, the distinctions between "low" negligence, "moderate" negligence and "high" negligence are made by counting the number of mitigating circumstances. Thus, in this case the Judge ruled out the possibility of high negligence in Order Nos. 8075863 and 8075874 because Table X provides that a finding of high negligence can be made only if there are no mitigating circumstances. 33 FMSHRC at 1331, 1336-37, 1365. Counting the number of mitigating circumstances is an appropriate approach for MSHA inspectors at mine sites who must make determinations regarding negligence efficiently and quickly. However, it is too mechanical and restrictive an approach for Commission judges who have the opportunity to "evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence." 36 FMSHRC at 3108.

mitigating circumstances, and therefore a Commission Judge may find “high negligence” in spite of mitigating circumstances or may find “moderate” negligence without identifying mitigating circumstances. In this respect, the Commission has recognized that the gravamen of high negligence is that it “suggests an aggravated lack of care that is more than ordinary negligence.” *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).<sup>17</sup>

On remand the Judge will need to examine the two violations and determine the degree of negligence on the part of the operator that led to the violations. The Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator’s obligation to comply with the ventilation plan provisions in question. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3095-97 (Dec. 2014), *appeal docketed*, No. 15-1008 (D.C. Cir. Jan. 15, 2015) (examining operator’s claim of mitigating circumstances in reviewing Judge’s high negligence finding); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator’s conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (repeated violations of regulation merited increase in level of negligence ascribed to operator).

Regarding Order No. 8075863, it appears the Judge reduced the negligence from “high” to “moderate” based solely on the finding of what he conceived to be a single mitigating circumstance – the lack of any measurable level of methane at the time of the MSHA inspection. 33 FMSHRC at 1336-37. That was error. The absence of methane at the time of inspection is not relevant to negligence, and, in a holistic review, a single mitigating circumstance does not *per se* reduce an operator’s negligence from high to moderate.

An absence of methane at the moment of the MSHA inspection does not mitigate Brody’s negligence in ventilating the No. 5 face at a level less than half the required volume and in ventilating the No. 6 face at a level which was only two-thirds of the required volume. *Id.* at 1334-35. The fact that no methane was measured at the time of the MSHA inspection was merely a fortuitous circumstance. As the Judge recognized, there was no evidence that the absence of methane at the time of the inspection resulted from Brody’s care or diligence. *Id.* at 1338. This is a gassy mine which liberates about 1.5 million cubic feet of methane a day. *Id.* at 1336-37. But for the MSHA inspection, the cutting of coal at the face could have liberated methane which the inadequate level of ventilation would not have removed.

Order No. 8075874 was issued because the ventilation behind the line curtain in the No. 4 face measured 1050 cubic feet per minute – only one-third of the required 3000 cubic feet per minute. *Id.* at 1364. The low airflow was caused by Brody pushing loose gob material into the face area which caused a restriction of the airflow behind the line curtain. *Id.* The Judge found no negligence associated with this violation, both because of the absence of methane at

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<sup>17</sup> When a Judge finds an operator negligent, the Judge would take the degree of negligence, which would be on a scale between low negligence and reckless disregard, into account in assessing an appropriate penalty. Of course, because Judges are required to explain substantial divergences from the penalty proposed by the Secretary, if the Judge makes a substantial penalty adjustment based upon a negligence finding, the Judge must explain his/her determination.

the time of the MSHA inspection (an allegedly mitigating circumstance), and because he found that Brody did not have actual knowledge that pushing the gob to the face had caused a restriction in the airflow. *Id.* at 1365-66. As discussed above, the absence of methane at the moment of the MSHA inspection is irrelevant to a determination of an operator's negligence. Regarding Brody's lack of actual knowledge of the insufficient airflow, this is only part of the inquiry. An operator is also negligent if it should have known that its actions would cause a violation. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 482 (Mar. 2015) (affirming a Judge's finding of reckless disregard where "the operator should have known that [the miner]'s injuries were immediately reportable"). The pile of gob which Brody pushed into the face area behind the line curtain was large enough to reduce the airflow to one-third of what it should have been.

Some of the same evidence that the Judge will examine with respect to the unwarrantable failure factors will be relevant to the question of the degree of the operator's negligence. *See Topper Coal*, 20 FMSHRC at 350 (characterizing "high negligence" as suggesting an aggravated lack of care that is more than ordinary negligence, and noting that, in particular, "an operator's intentional violation constitutes high negligence for penalty purposes"); *see also San Juan Coal Co.*, 29 FMSHRC at 136 (remanding for Judge to explain why operator's high negligence in connection with violation did not rise to an unwarrantable failure). Nevertheless the issues of negligence and unwarrantable failure must be treated separately, because they are distinct issues even though they may focus on the same or similar circumstances. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

In summary, we are remanding the three ventilation plan-associated violations for the Judge to reexamine the evidence and make new findings with respect to: (1) whether each of the violations was attributable to Brody's unwarrantable failure; (2) the operator's negligence in connection with the two instances of its violation of the ventilation plan provision; and (3) the gravity of the preshift violation. New findings on any of those issues will necessitate a reassessment of the penalty for the involved violation.

#### IV.

#### **The Three Unwarrantable Failure Violations for Which the Judge Found Only Moderate Negligence**

These three orders involve violations that the Judge found to be attributable to Brody's unwarrantable failure. The Secretary contends that a finding that a violation is due to an operator's unwarrantable failure mandates that the Judge explain why he found only moderate negligence on the part of the operator in connection with the violations, instead of finding that the operator was highly negligent or exhibited reckless disregard, as the Secretary had requested with respect to each violation. For the three violations, the Judge assessed total penalties of approximately \$26,000 after the Secretary had requested a total of approximately \$131,000 in penalties.



## **A. Judge's Decision**

The Judge affirmed Order No. 8079178, issued for Brody's violation of 30 C.F.R. § 75.380(d)(1), which requires that each escapeway in a mine be maintained in safe condition to always assure passage of anyone, including disabled persons. Gov't Ex. 8. The Judge agreed with MSHA Inspector Jackson that on January 22, 2009, the primary escapeway on the mine's No. 3 section was not passable by miners for approximately 175 feet. In that stretch, the mine floor was covered in 12 to 20 inches of water, dark in color, that obscured the coal and rock on the floor that evacuating miners would need to avoid. The Judge found the violation to be S&S and due to Brody's unwarrantable failure, but also found that because an alternate escapeway was available, Brody's negligence was only moderate. The Judge thus decreased the level of negligence from MSHA's highest level of "reckless disregard," which the Secretary had sought in this instance. 33 FMSHRC at 1348-51. The Judge reduced the Secretary's proposed penalty of \$56,929 to \$18,750.

The Judge affirmed Order No. 8075906, issued by Inspector Ward when he found, during a March 3, 2009 inspection, that a Brody shuttle car had an exposed opening, one foot by one foot in size, to a cable reel sprocket, due to a missing guard. Gov't Ex. 7. The absence of the guard, and the fact that it had been lying in the operator compartment of the car for at least two weeks, led the Judge to conclude that the violation of 30 C.F.R. § 75.1722(a) was both S&S and attributable to Brody's unwarrantable failure.<sup>18</sup> Again, however, the Judge found Brody's negligence in connection with the violation to be only moderate, and not the high negligence alleged by the Secretary. He assessed the penalty at \$450, in contrast to the Secretary's proposed penalty of \$4,000. 33 FMSHRC at 1373-78.

The last of the orders was Order No. 8079224, issued by Inspector Jackson on February 26, 2009, for another accumulations violation that the Judge affirmed in part. The order alleged that loose coal, coal dust, and float coal dust, up to 18 inches deep and 12 feet long, was on and around the oil tank, oil filters, valve chest, electrical components, and hydraulic hoses of a feeder. Gov't Ex. 11. The Judge held that the violation had not been shown by the Secretary to be S&S but that it was unwarrantable, given Brody's recent history of accumulations violations. Again the Judge found the level of Brody's negligence to be moderate, instead of finding that the operator had acted in reckless disregard as alleged by the Secretary, whose proposed penalty of \$70,000 the Judge reduced to \$7,000. 33 FMSHRC at 1382-85.

## **B. Disposition**

The Secretary is appealing the moderate negligence findings, citing *San Juan Coal Co.*, 29 FMSHRC at 136. In *San Juan*, the Secretary argues, the Commission held that a conclusion that a violation is attributable to unwarrantable failure tends to be associated with a finding of no less than high negligence. As a result, the Secretary maintains that the three orders here should

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<sup>18</sup> 30 C.F.R. § 75.1722(a) requires that "[g]ears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

be remanded for the Judge to explain how he found only moderate negligence in the context of affirming the unwarrantable failure designations of the three violations.

In *San Juan*, the Commission remanded a Judge's determination that a violation was not attributable to the operator's unwarrantable failure in a case in which the Judge had found the operator to be highly negligent in connection with the violation. *Id.* The Secretary thus argues that the converse of the *San Juan* situation, present here, also requires remand.

It is not necessary to rule on the Secretary's suggestion in this case,<sup>19</sup> because, as with the two ventilation plan violations, the Judge predicated his negligence analysis as if 30 C.F.R. § 100.3(d)'s definitions of operator negligence governed Commission proceedings. In each instance he presumably felt constrained by the Part 100 definitions. Therefore, we vacate and remand these three negligence findings as well for an analysis of the evidence under the negligence principles outlined above, and reassessment of the penalties if necessary. As discussed, that analysis focuses on the duty of care imposed by the regulation violated.

Furthermore, with respect to Order No. 8079178, the escapeway violation, the Judge recognized that the availability of an alternative means of escape did not prevent a finding of violation of the standard, or foreclose a finding that the violation was S&S. He nevertheless concluded that the existence of an alternative working escapeway could be taken into account in determining the level of Brody's negligence. *See* 33 FMSHRC at 1348, 1349-50, 1350-51. However, the regulation in question, 30 C.F.R. § 75.380(d)(1), imposes a maintenance obligation with respect to *each* designated escapeway, so for negligence analysis purposes the availability of alternative means of escape is irrelevant and may not be taken into account on remand.

We find further specific error with regard to Order No. 8075906, the guarding violation. The Judge found that Brody management had known for two weeks that the guard plate on the shuttle car was not in place. 33 FMSHRC at 1375 n.4, 1378. He reduced the level of negligence from "high" to "moderate" based on mitigating circumstances even though he found that "[t]he weight of mitigation here is quite low." *Id.* at 1375. The Judge erred by failing to weigh the "quite low" mitigation against the fact that Brody management had known for two weeks that the guard plate was not in place on the shuttle car. Moreover, one of the mitigating circumstances found by the Judge was that the missing guard plate was on the off side of the shuttle car, and the operator had a company policy forbidding anyone from walking on the off side of a shuttle car while it is in operation. *Id.* at 1370, 1374. However, the fact that Brody had a company policy against walking on the off side of the shuttle car is not relevant to Brody's

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<sup>19</sup> We note, though, that in *Excel Mining, LLC v. Department of Labor*, 497 Fed. Appx. 78, 79-80 (D.C. Cir. 2013), the court, drawing on Commission case law, stated that "just as a finding of 'high negligence' does not *necessarily* compel a finding of an 'unwarrantable failure,' a finding of 'moderate negligence' does not foreclose a finding of an 'unwarrantable failure.'" (emphasis in original) (citations omitted). The court thus recognized that conclusions such as those reached by the Judge here are not automatically suspect. However, because it appears that in that case the negligence findings under review were couched in MSHA's Part 100 terms (*Excel Mining, LLC*, 34 FMSHRC 99, 113-14 (Jan. 2012) (ALJ)), instead of as a result of a negligence analysis under section 110(i) of the Mine Act, we do not find the court's analysis compelling.

duty of care to comply with the guarding standard in this case in that Brody management knew that the guard plate was not in place for two weeks.

V.

**Conclusion**

For the foregoing reasons, we vacate and remand the following issues in Docket No. WEVA 2009-1000: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075863; (2) the unwarrantability and gravity of the violation in Order No. 8075864; (3) the negligence in connection with the violation in Order No. 8079178; and (4) whether the violation in Order No. 8079179 was S&S and unwarrantable.

For the foregoing reasons, we also vacate and remand the following issues in Docket No. WEVA 2009-1306: (1) the unwarrantability of the violation and the negligence of the operator in connection with the violation in Order No. 8075874; (2) the negligence in connection with the violation in Order No. 8075906; and (3) the negligence in connection with the violation in Order No. 8079224.

To the extent the Judge arrives at any different conclusions with respect to the issues than he did in his initial decision, he should reassess the penalty for that violation consistent with this decision.

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

Commissioner Althen, concurring:

I join in the majority decision. I write separately only to note that, with respect to Order No. 8075874, the Judge found that “[t]here is no evidence that would show that Brody should have known that gob was restricting the airflow at face No. 4 prior to Ward’s inspection.” 33 FMSHRC at 1366.

A finding that the operator neither knew nor should have known of the lessened airflow supports a finding of no negligence. When substantial evidence supports a finding, it is our duty to affirm. Here, the Judge cited evidence to support his finding. However, in the context of the entirety of the violations resolved in this case and the Judge’s discussion of the history of prior violations, I believe it prudent to include this violation in the remand to permit the Judge to reconsider whether the operator should have known of this violation. Should the Judge continue to find no negligence based on the evidence already cited or additional evidence gleaned from the record, then, in my view the further finding of no unwarrantable failure would continue to be appropriate.

/s/ William I. Althen  
William I. Althen, Commissioner

## **COMMISSION ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, D.C. 20004-1710

August 4, 2015

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

v.

CONCRETE MOBILITY, LLC

Docket No. CENT 2013-519-M  
A.C. No. 41-04898-320563-01

Docket No. CENT 2013-520-M  
A.C. No. 41-04898-320563-02

BEFORE: Jordan, Chairman; Young, Nakamura and Althen, Commissioners<sup>1</sup>

## **ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On July 1, 2014, the Commission received from Concrete Mobility, LLC (“Concrete”) a motion seeking to reopen two penalty assessment proceedings and relieve it from the Default Orders entered against it.

On August 8, 2013, the Chief Administrative Law Judge issued Orders to Show Cause in response to Concrete’s perceived failure to answer the Secretary of Labor’s June 7, 2013 Petitions for Assessment of Civil Penalty. By its terms, the Orders to Show Cause were deemed to be Default Orders on September 9, 2013, when it appeared that the operator had not filed an answer within 30 days.

Concrete asserts that none of the individuals at the mine were aware of any MSHA procedures, and thus the operator failed to respond to the Petitions for Assessment of Civil Penalty and the Orders to Show Cause. Furthermore, the operator asserts that it could not have prevented the violations at issue. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on February 10, 2014, and the cases were referred to the U.S. Department of Treasury for collection on April 3, 2014.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge’s order here has become a final decision of the Commission.

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<sup>1</sup> Commissioner Cohen has elected not to participate in this matter.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator’s receipt of a delinquency notice and the operator’s filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the delay in responding to MSHA’s delinquency notice amounted to more than 30 days. Concrete failed to explain its delay in filing this motion to reopen after receiving the delinquency notice. This lack of explanation is grounds for denial.

Having reviewed Concrete’s request and the Secretary’s response, we conclude that Concrete has failed to establish good cause for reopening the proposed penalty assessments.

Accordingly, we deny its motion with prejudice.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, D.C. 20004-1710

August 25, 2015

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

v.

ANDRES DIAZ, employed by OIL-DRI  
CORPORATION OF GEORGIA

Docket No. SE 2014-56-M  
A.C. No. 09-00114-317230-A

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (2012) (AMine Act@). On November 25, 2013, the Commission received from Andres Diaz (ADiaz@) a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), that had become a final order of the Commission.

Under the Commission=s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. ' 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. ' 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (AJWR@). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. ' 2700.1(b) (Athe Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure@); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The parties both acknowledge that the Mine Safety and Health Administration (MSHA) agreed to administratively withdraw the 110(c) penalty against Diaz as part of the settlement of related dockets SE 2011-245, SE 2011-246, SE 2011-475, and SE 2011-520. The proposed settlement, however, was approved by Judge Jeffery Tureck on April 22, 2013, before the 110(c) case was docketed with the Commission. Diaz asserts that because the parties had agreed that the 110(c) penalty would be withdrawn, he did not believe it necessary to timely contest the proposed assessment. The Secretary acknowledges that, due to inadvertence, he failed to withdraw the 110(c) case per the terms of the settlement and thus does not oppose Diaz=s request to reopen.

Having reviewed Diaz=s request and the Secretary=s response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further appropriate proceedings pursuant to the Mine Act and the Commission=s Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan  
Mary Lu Jordan, Chairman

Michael G. Young  
Michael G. Young, Commissioner

Robert F. Cohen, Jr.  
Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

William I. Althen  
William I. Althen, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710

August 27, 2015

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

v.

RPC CONTRACTING, INC.

Docket No.: SE 2014-118-M  
A.C. No.: 31-02100-337389

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On January 13, 2014, the Commission received from RPC Contracting, Inc. (“RPC”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 5, 2013, and became a final order of the Commission on January 6, 2014. RPC asserts that its Chief Financial

Officer, who handles RPC's MSHA matters, was out of the office from November 27 through December 30, 2013 due to medical leave, and that the CFO returned to the office on December 31, 2013 and forwarded the documents to counsel. The operator further asserts that counsel was on holiday leave and had left town to attend a family funeral, and was therefore unaware of the assessment until January 13, 2013.

The Secretary does not oppose the request to reopen, however he notes that the operator should have made sure that its counsel was aware of the receipt of the contest form and the limited time to contest it. The Secretary asserts that counsel has always been aware of the time-sensitive contest rules of the Mine Act and should have had coverage at the office when counsel was unable to be there. The Secretary notes that its reason for not opposing the motion to reopen is mainly because the operator requested it before receiving a delinquency notice. The Secretary urges RPC to take steps to ensure that future penalty contests are timely filed.

Having reviewed RPC's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael G. Young  
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.  
Robert F. Cohen, Commissioner

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

/s/ William I. Althen  
William I. Althen, Commissioner

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 5, 2015

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

v.

MARYAN MINING, LLC,  
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2012-552  
A.C. No. 11-00726-284930

Mine: Shay #1 Mine

## **DECISION AND ORDER**

Appearances: Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, for the Petitioner

Christopher D. Pence, Esq., Hardy Pence, PLLC, Charleston, West  
Virginia, for the Respondent

Before: Judge Rae

### **I. STATEMENT OF THE CASE**

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (“the Mine Act”), 30 U.S.C. § 815(d). At issue are one citation and one order issued to mine operator MaRyan Mining, LLC (“MaRyan”) under section 104(d)(1)<sup>1</sup> of the Mine Act.

A hearing was held in St. Louis, Missouri on January 29, 2015, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based upon the entire record and my observations of the demeanor of the witnesses, I uphold and modify each of the violations as set forth below.

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<sup>1</sup> The issuance of a citation or order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard. 30 U.S.C. § 814(d)(1).

## II. FACTUAL BACKGROUND

The parties have stipulated to the following facts:

1. MaRyan Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. MaRyan Mining, LLC has an effect upon commerce within the meaning of section 4 of the Federal Mine Safety and Health Act of 1977.
4. MaRyan Mining, LLC operates the Shay #1 Mine, Mine Identification Number 1100726.
5. The inspector was acting in his official capacity when the citations/orders herein were issued.
6. MaRyan Mining, LLC was served with a copy of the citations/orders on the date and time indicated.
7. The total assessed penalty, if affirmed, will not impair Respondent's ability to remain in business.
8. The size of the mine and the size of the controller are accurately reflected and accounted for in the Proposed Assessment of penalty for Citation No. 8419744 and Citation No. 8419745.

Joint Exhibit 1; Tr. 7.<sup>2</sup>

MSHA Inspector Rexdon L. Boliard<sup>3</sup> visited the Shay #1 Mine on November 1, 2011 to perform a methane spot inspection on the Unit 2 production unit. Tr. 22. He arrived at the mine with his field office supervisor at 6:40 AM, a few minutes before the start of the day shift.

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<sup>2</sup> In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered S-1 through S-4 and the Respondent's exhibits are numbered R-1 and R-4.

<sup>3</sup> Boliard began working for MSHA in 2010. He underwent on-the-job training and 22 weeks of classroom training at MSHA's Mine Academy to become a certified coal mine inspector. He also holds certification as a special investigator and accident investigator. Before coming to MSHA, Boliard worked in a coal mine for almost seven and a half years as a laborer, equipment operator, repairman, and qualified electrician and served as a safety committeeman for United Mine Workers of America for approximately six years. He still holds his electrical card and maintains certification in the state of Illinois as a mine examiner and mine manager. In the fall of 2011, Boliard was the lead inspector conducting MSHA's quarterly regular inspection at the Shay #1 Mine. Tr. 13-17, 35, 54-58, 75.



Tr. 22-23. After talking to day shift mine manager Monte Jones and looking at the examination books for Unit 2, he entered the mine and performed the spot inspection. Tr. 22-25.

While in the mine, the inspection party observed four employees of General Mine Services (GMS), a contractor that provides labor at the mine, entering the 1R1LMW worked out panel (referred to as Old Unit 2). Tr. 24-25, 60; Ex. S-1. A worked out panel is an area where the mine operator has removed all the coal it can, after which the operator retrieves its equipment and moves on. Tr. 41-42, 99-100. The GMS crew had been intermittently recovering belt structure from Old Unit 2 for several weeks. Tr. 28-29, 51-52, 100, 160-63. The leadman for the crew was Jimmy Harper. Tr. 30, 100, 161. The other three GMS workers on the crew were inexperienced miners with less than a year of mining experience each. Tr. 30.

After Inspector Boliard finished the methane spot inspection and returned to the surface, he checked the examination books again to see whether a preshift exam had been performed for Old Unit 2 for the day shift. Tr. 24-25, 84-85. He saw that it had not, and notified Jones and mine superintendent Todd R. Leverton. Tr. 25. Boliard then traveled to the mine's communication and tracking office with Jones to inspect the communication and tracking records. Tr. 26-27. The records showed that GMS leadman Harper had called the surface at 8:39 AM that morning to report to the communication and tracking office that the GMS crew would be going off grid because they would be traveling into the worked out area, where the tracking system would not be able to detect their tracking devices.<sup>4</sup> Tr. 27-28, 71, 120-22; Ex. S-3 at 2. The communication and tracking system had later picked up the GMS crew's tracking devices' signals when they exited Old Unit 2 at 10:50 AM. Tr. 28; Ex. S-3 at 3.

Leadman Harper was called to the surface to discuss the crew's work in Old Unit 2 that morning. He recounted to Inspector Boliard that the day before, he had told mine examiner Robert L. Yeske that the area where the GMS crew would be working needed to be preshifted for the November 1 day shift. Tr. 28-29, 67, 87. Because no preshift exam had been performed for Old Unit 2 within three hours before the day shift had begun on November 1, Boliard issued Citation Number 8419744, which alleges a significant and substantial (S&S) section 104(d)(1) violation of the mandatory safety standard at 30 C.F.R. § 75.360(a)(1) for allowing miners to work in an area that had not been preshifted. Ex. S-1; Tr. 36-37, 43.

After issuing the citation, Inspector Boliard went back underground with Jones and Harper and traveled to the part of Old Unit 2 where the GMS crew had been working. There, he observed two loose ribs about a crosscut apart, each measuring 7½ feet tall by 5 feet long. One of them was 12 inches thick. The other was 10 inches thick and was across from a damaged roof bolt, which created a 6½-foot by 6½-foot area of unsupported top. Tr. 31; Ex. S-2. The loose ribs had gapped out from the mine wall and the roof bolt was hanging down from the roof, its plate was dislodged, and some of the roof material had fallen out from around it. Tr. 32-33, 50, 109. On the basis of the two loose ribs and the damaged roof bolt, Inspector Boliard issued Order Number 8419745, which alleges an S&S section 104(d)(1) violation of the mandatory

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<sup>4</sup> Underground coal miners are usually required to wear GPS tracking devices to comply with the emergency response plans that underground mines are required to develop pursuant to section 316(b)(2) of the Mine Act. *See* Tr. 26, 176; 30 U.S.C. § 876(b)(2)(E)(ii).

safety standard at 30 C.F.R. § 75.202(a) for failure to adequately support or otherwise control the roof and ribs so as to protect miners from the hazards of roof or rib falls. Ex. S-2; Tr. 46.

Subsequently, Inspector Boliard attempted to pull down the loose ribs with his fiberglass sounding rod but was unable to do so because the rod bent when he tried. Tr. 34, 80-81. Jones retrieved a stronger metal pry bar and was able to pull down the ribs. Tr. 34, 81. Jones also flagged off the area around the damaged roof bolt to prevent travel underneath it. Tr. 33. In all, these abatement efforts took about 20 to 25 minutes. Tr. 53, 90-91. Boliard thereafter terminated the order and exited the mine. Tr. 35.

At the hearing, MaRyan presented testimony from shift manager Jones, mine examiner Yeske, and superintendent Leverton indicating that the preshift examination violation was caused by a miscommunication between the GMS crew and mine management. MaRyan's witnesses explained that Yeske had conducted a preshift exam of Old Unit 2 between 8:00 and 11:00 PM on the evening of October 31, 2011 because the GMS crew was scheduled to work there during the following shift – the midnight shift, which ran from midnight until 7:00 AM on November 1. The mine examination report confirms that Yeske examined Old Unit 2 the night of October 31. Ex. R-1. However, the GMS crew showed up later than expected on the morning of November 1 and took it upon themselves to perform their work on Old Unit 2 during the day shift instead of the midnight shift without informing mine management. Tr. 102-06, 137-38, 142-45, 165-66.

With regard to the roof and rib control violation, MaRyan's witnesses suggested that the hazard posed by the violation was minimal because roof conditions at the mine were very good. Tr. 107-09, 131, 145-51, 155-60. Inspector Boliard agreed that roof conditions were generally good at the mine. Tr. 77-80.

### III. LEGAL PRINCIPLES

#### A. Gravity/Significant & Substantial (S&S) Designation

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

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

6 FMSHRC 1, 3-4 (Jan. 1984); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987). The inspector’s judgment is also an important element of an S&S determination. *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1959 (Aug. 2014); *Mathies*, 6 FMSHRC at 5. The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); see, e.g., *Wolf Run*, 36 FMSHRC at 1957-59.

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. This element is established only if the Secretary proves “a *reasonable likelihood* the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). Evaluation of the reasonable likelihood of injury should be made assuming “continued normal mining operations,” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made “in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989).

The S&S nature of a violation and the gravity of the violation are not synonymous. Gravity, generally expressed as the degree of seriousness of the violation, is an element that must be assessed for every violation, while an S&S finding is applicable only where the *Mathies* criteria are met. The gravity assessment and a finding of S&S are frequently based upon the same or similar factual circumstances, *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987), but the focus of the inquiries differs. The Commission has pointed out that the focus of the gravity inquiry “is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996); see also *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that notwithstanding the likelihood of injury, some violations are serious in the context of the standard violated and the Mine Act’s deterrent purposes, such as a violation of an important safety standard; a violation demonstrating recidivism or defiance on the operator’s part; or a violation that could combine with other conditions to set the stage for disaster).

#### B. Negligence/Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Mine Act, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined by the Secretary as having occurred in connection with a violation when “[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances.” *Id.* § 100.3, Table X.

More serious consequences can be imposed under the Mine Act for violations that result from the operator’s unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. §

814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *see Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2011). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries*, 23 FMSHRC at 711.

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

#### IV. FINDINGS OF FACT AND ANALYSIS

##### A. Citation Number 8419744 (Preshift Exam Violation)

###### 1. The Violation

Citation Number 8419744 was issued for a violation of the mandatory safety standard at § 75.360(a)(1). Ex. S-1. The cited regulation provides, in pertinent part:

[A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

The Shay #1 Mine has three shifts that run consecutively beginning at midnight (the midnight shift), 7:00 AM (the day shift), and 3:30 PM (the afternoon shift). Tr. 91, 96. Thus, when work is to be performed in a particular area during one of these shifts, a preshift exam must be conducted for that area at the start of the shift or during the last three hours of the preceding shift in order to comply with § 75.360(a)(1).

On November 1, 2011, four GMS contractors spent about two hours working on Old Unit 2 during the day shift even though the area had not been examined by a certified examiner during that shift or during the immediately preceding midnight shift. Accordingly, a violation of § 75.360(a)(1) occurred, as conceded by MaRyan's witnesses. See Tr. 102, 164.

## 2. Gravity and S&S Designation

### Parties' Positions

Inspector Boliard marked this violation as reasonably likely to cause an injury that would result in lost workdays or restricted duty for four miners. Ex. S-1. He also marked the violation as S&S. Ex. S-1; Tr. 38. He reasoned that sending the four GMS miners into an unexamined area was reasonably likely to expose them to any number of hazards, such as low oxygen, high methane, or the hazardous roof and rib conditions that were actually observed, and these conditions could in turn expose the miners to injuries such as strains, contusions, or broken bones from a rib or roof fall or suffocation from low oxygen or high methane. Tr. 37-39. Boliard believed that the gravity of this violation was serious because "[i]f the practice is continued to send miners in where no examination has been done ... bad things could happen." Tr. 38.

MaRyan argues that this violation is not S&S because the roof and rib conditions cited by Boliard were not reasonably likely to cause an accident or injury in this case, considering that miners rarely accessed the cited area, the roof at the mine was competent, and the loose ribs could not be pulled down with Boliard's fiberglass sounding rod. Resp.'s Post-Hr'g Br. 13-15.

### S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first element required to sustain an S&S finding under the *Mathies* test.

The second *Mathies* element, the existence of a discrete safety hazard contributed to by the violation, is also satisfied because this violation contributed to the discrete hazard that the four GMS miners would be injured when they entered and remained in an underground area where conditions were unknown and potential safety hazards had not been identified and addressed through a preshift examination.

Turning to the third *Mathies* element, I find that this hazard was reasonably likely to result in an injury-causing event with continued normal mining operations under the circumstances of this particular case. Two loose ribs and a damaged roof bolt were found in the unexamined area where the four GMS miners were working. Given the witnesses' uniform testimony that the mine roof was stable and largely composed of competent limestone, I find that

the damaged roof bolt was unlikely to lead to a roof fall. *See* Tr. 77-80, 89-90, 107-09, 131, 156-60. However, rib falls or rib rolls can occur at any time and are just as dangerous as roof falls. The coal seam is thick and the roof is high in this mine, averaging 7½ to 9 feet, which contributes to the risk of a rib fall or rib roll. Tr. 32, 158. The two loose ribs observed by Inspector Boliard had gapped out from the mine wall, meaning they had already begun to fall down, and when pulled they came down in large pieces that could have caused serious injuries. Tr. 32, 81, 90. Furthermore, miners were reasonably likely to access the cited area. Four GMS contractors had been regularly working on Old Unit 2 for the past few weeks. They would not have known to avoid the area where the loose ribs were observed on the morning of November 1 because no preshift exam had been performed. Boliard testified that he observed fresh tire tracks and footprints with no rock dust in them in the immediate vicinity of the loose ribs and that the GMS contractors had been working in that particular area several hours earlier. Tr. 33-34, 82. Under the circumstances I find that it was reasonably likely that a rib fall would occur and cause injury to a nearby miner or miners who would be struck or pinned by falling rock. Any such injury would be of a serious nature, satisfying the fourth *Mathies* element.

Because the four *Mathies* criteria are met, this violation is S&S.

### Gravity Analysis

The gravity of this violation is serious in light of both the importance of the cited safety standard, (*see Jim Walter Res., Inc.*, 28 FMSHRC 579, 598 (Aug. 2006) (recognizing “fundamental importance” of preshift examination requirement); *Birchfield Mining Co.*, 11 FMSHRC 31, 34-35 (Jan. 1989) (explaining purpose and significance of requirement)), and the circumstances surrounding the violation. Allowing miners to work in an unexamined area exposes them to the hazards of unknown conditions, and in this particular case the conditions in the unexamined area included two loose ribs and a damaged roof bolt, which exposed four miners to a concrete risk of serious injury from a rib fall or rib roll.

### 3. Negligence and Unwarrantable Failure

#### Parties’ Positions

Inspector Boliard charged the operator with high negligence and issued this violation as an unwarrantable failure under section 104(d)(1). Ex. S-1. He believed that mine management knew the GMS miners would be working on Old Unit 2 yet sent them into this off-grid area without performing any type of exam, which was an obvious and dangerous violation. *See* Tr. 39-45. The Secretary asks me to find that Inspector Boliard’s high negligence and unwarrantable failure designations are appropriate under the facts of this case. Sec’y’s Post-Hr’g Br. 10-16.

MaRyan contends that mine management was unaware of this violation and had no opportunity to avoid or abate it, and argues that the factors which would support a finding of unwarrantable failure are not present in this case. MaRyan requests that this citation be modified to a 104(a) violation involving no negligence. Resp.’s Post-Hr’g Br. 15-23.

### Operator's Knowledge of Violation; Obviousness of Violation

The operator's knowledge of a violation is both a factor affecting the unwarrantable failure analysis and a prerequisite for an MSHA inspector to make a finding of high negligence under 30 C.F.R. § 100.3. Knowledge is established where the operator knew or should have known of the violation. *See Coal River Mining, LLC*, 32 FMSHRC 82, 90-92 (Feb. 2010).

Contrary to Boliard's belief that mine management knowingly sent the GMS crew into an unexamined area, there is evidence that due to a miscommunication or mistake made by the GMS crew, the operator did not know of this violation until after it had occurred. MaRyan's witnesses testified that GMS leadman Harper brought his crew onto the Old Unit 2 worked out panel several hours later than expected on November 1. The crew was scheduled to complete their work on Old Unit 2 during the midnight to 7:00 AM shift that day, which accorded with their normal schedule. Tr. 105-06, 163. A preshift exam had been performed for that period of time. Ex. R-1; Tr. 103-04, 136-37. However, the crew did not enter the panel until approximately 8:40 AM. Tr. 27.

The GMS crew should have notified mine management that they would not be completing their work during the midnight shift as scheduled so that management could arrange for a preshift exam for the day shift. Moreover, when the crew went into Old Unit 2, they should have looked at the DTI (dates, times, and initials) board at the entrance to the panel, which would have shown that the area had not been examined for the day shift. *See* Tr. 59-60, 74, 126, 166. Yet the crew apparently ignored the DTI board and failed to communicate their plans to mine management.

Harper told Inspector Boliard that he had asked mine examiner Yeske to perform an exam for the day shift. Tr. 28-29. Yeske, however, denied having any such conversation with Harper. Tr. 142. Yeske was the examiner for the midnight shift. He said that if he had been asked to perform an exam for the day shift, he would have told Harper to speak to someone else or write it on the whiteboard in the office where the mine examiners filled out their paperwork. Tr. 142-43. This makes sense considering the mine's normal procedures for scheduling preshift exams: either the location that needs to be preshifted is identified on the whiteboard or the shift mine manager verbally instructs the mine examiner to examine it. Tr. 70, 101, 137-38, 163. Yeske followed normal procedures and examined Old Unit 2 for the midnight shift. Tr. 137, 144-45. Boliard testified that he found Yeske to be competent and to exercise good judgment. Tr. 59. Boliard did not provide any reason why Yeske would have examined Old Unit 2 for the midnight shift if the GMS crew had been scheduled for a different shift. In fact, Boliard was unaware that Yeske had conducted a preshift exam at all. Tr. 58. Boliard did not look at the whiteboard or the exam books to see what shifts were identified as working shifts for Old Unit 2 and did not speak to the mine examiners or anyone else on the scene other than Harper to determine what the GMS crew's intended shift was. Tr. 63, 68-70. Harper was not called as a witness. Although hearsay is admissible in administrative hearings, in this instance Harper's credibility is extremely important and MaRyan was not given the opportunity to confront him. Harper had reason not to admit he had been late and had never requested a preshift exam; if that were the case, GMS likely would have received the citation instead of MaRyan. Tr. 75. The only evidence that MaRyan's management should have known miners would be working on Old

Unit 2 during the day shift was Harper's self-serving hearsay assertion that he had told Yeske they would be there. I find that Harper was likely lying and Yeske was being truthful. Mine management was not aware that Old Unit 2 needed to be examined for the day shift on November 1.

I further reject the Secretary's argument that the operator should have recognized the need for a preshift exam as soon as the GMS crew arrived at the mine. The Secretary reasons that the crew had been working on Old Unit 2 for several weeks and the mine was tracking their location and directing their work, so mine management should have known an exam was needed. Sec'y's Post-Hr'g Br. 11-12, 15. In essence, the Secretary is arguing that the violation was obvious. However, the GMS crew normally worked on Old Unit 2 during the midnight shift and therefore mine management would not have expected them on the day shift. Tr. 106, 162-63. This work was intermittent and the crew lacked authority to decide when they would go onto the worked out panel without getting clearance from management ahead of time, which did not happen in this case. Tr. 100, 119-20, 162. Although the crew was wearing tracking devices, the purpose of the tracking system is unrelated to mine examinations. The workers manning the tracking warehouse had no reason to know and no means of finding out that Old Unit 2 had not been preshifted. Tr. 71, 122, 177-78. Thus, it would not have been obvious to mine management that the GMS crew was working in the unexamined area.

For all the reasons discussed above, I find that this violation was not obvious and that the operator did not have knowledge of it until after it occurred.

#### Operator's Notice that Greater Efforts at Compliance Were Necessary

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the extent the past violations and warnings placed the operator on notice prior to the issuance of the citation that greater efforts were necessary for compliance with the cited safety standard. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014).

In this case, there is no evidence that MaRyan received past similar violations or specific warnings from MSHA that greater efforts were needed to comply with the cited preshift exam regulation. *See* Tr. 75, 88; Ex. S-4.

#### Operator's Abatement Efforts

The abatement effort factor measures an operator's response to violative conditions that it knew or should have known about before the citation was issued. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Also relevant is the level of priority the operator has placed on abating conditions for which it received prior notice that greater compliance efforts were necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Abatement efforts undertaken after the issuance of the citation are not relevant. *Id.*

The operator made no effort to abate this violation before the citation was issued. However, as discussed above, mine management had no knowledge of the violative condition and the operator had not previously been placed on notice that greater efforts at compliance with



the cited standard were necessary. I find that the lack of abatement efforts does not weigh against MaRyan under these circumstances.

#### Extensiveness; Duration; Degree of Danger Posed

The extensiveness of a violation can be assessed in terms of the extent of the affected area, the number of people affected, or the measures required to abate the violation. Here, the affected area was the portion of the No. 4 entry between SS25+95 and SS27+45 on the Old Unit 2 worked out panel. Ex. S-1; *see* Tr. 133-36; Ex. R-4. This a relatively small area. Because the violation occurred in a worked out panel where miners do not normally work and travel, it affected only the four miners in the GMS crew who were recovering belt structure there. The only measure required to abate the violation was the performance of a preshift exam. Ex. S-1. I conclude that this violation was not extensive.

With regard to the duration of the violation, this violation lasted for less than one shift. Ex. S-1. Miners were in the unexamined area for approximately two hours, from about 8:40 to 10:50 AM. Tr. 27-28; Ex. S-3 at 2-3.

Although this violation was serious and posed a concrete risk of injury, the degree of danger was not unusually high considering all the circumstances, including the relatively short duration of the violation and the fact that only one hazardous condition was actually discovered and cited in the unexamined area.

#### Conclusions

After considering the seven factors discussed above and all the factual circumstances surrounding this violation, I find no evidence of aggravated conduct on the operator's part. This violation occurred because four GMS contractors entered Old Unit 2 at an unexpected time without notifying mine management. The operator was unaware of the violation until the citation was issued. Afterward, the operator promptly terminated GMS from performing this type of work. Tr. 166-67. The operator's conduct did not constitute an unwarrantable failure to comply with the cited safety standard. Accordingly, the criteria for me to uphold the citation under section 104(d)(1) are not met. The type of action is hereby modified to a 104(a) citation.

The negligence associated with this violation is low because there was no reason for the operator to know the GMS crew would be working on Old Unit 2 during the day shift instead of the midnight shift.

#### B. Order Number 8419745 (Roof & Rib Control Violation)

##### 1. The Violation

Order Number 8419745 alleges a violation of the mandatory safety standard at 30 C.F.R. § 75.202(a). Ex. S-2. The cited regulation states: "The roof, face and ribs of areas where persons work and travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

The violative conditions observed by Inspector Boliard included a damaged roof bolt and two loose ribs. The roof bolt was hanging down, its plate was dislodged, and cap rock had fallen out from around it. Tr. 31-33, 109. The two loose ribs were gapped out from the wall and one of them was across from the damaged roof bolt, which created a 6½-foot by 6½-foot area of unsupported top. Tr. 31-32; Ex. S-2. These conditions establish that a violation of § 75.202(a) occurred, which MaRyan does not dispute.

## 2. Gravity and S&S Designation

### Parties' Positions

Inspector Boliard marked this violation as S&S and reasonably likely to cause an injury that would result in lost workdays or restricted duty for four miners. Ex. S-2. He explained that a rib or roof fall would be expected to cause injuries such as contusions, strains, broken bones, and crushing injuries, and he felt that all four miners on the GMS crew would be affected because he observed tire tracks and footprints where the miners had been standing between the rib and the belt structure they were recovering. Tr. 47-49.

As argued with respect to the preshift exam violation, MaRyan contends that this violation is not S&S because the roof and rib conditions were not reasonably likely to lead to an accident or injury under the circumstances of this case. Resp.'s Post-Hr'g Br. 13-15.

### S&S Analysis

A violation of a mandatory safety standard occurred, satisfying the first *Mathies* element.

The violation contributed to the discrete hazard that the four GMS miners would be injured by a roof fall, rib fall, or rib roll caused by the operator's failure to support or otherwise control the roof and ribs. Thus, the second *Mathies* element is satisfied.

This hazard was reasonably likely to result in an injury-causing event with continued normal mining operations under the circumstances of this case, satisfying the third *Mathies* element. As explained above in my discussion of the third *Mathies* element for the preshift exam violation, I find that the damaged roof bolt was unlikely to cause a roof fall considering the composition of the roof at this mine, but the two loose ribs were reasonably likely to lead to an injury-causing rib fall or rib roll. The 7½-foot-tall ribs had already begun to fall and came down in dangerously large pieces when pulled, according to Inspector Boliard. Tr. 32, 81, 90. Although MaRyan argues that the cited area was not frequently accessed, four GMS miners were in fact working in the vicinity of the loose ribs at the time the violation occurred, leaving fresh tire tracks and footprints nearby. Tr. 33-34, 47, 49, 82. Under these circumstances, I find that the loose ribs were reasonably likely to lead to a rib fall or rib roll that would cause injury to the GMS miners who were recovering belt structure in the area.

A rib fall or rib roll would be expected to cause injuries such as broken bones and crushing injuries. These types of injuries are serious in nature. Thus, the fourth *Mathies* element is satisfied.

Because the four *Mathies* criteria are met, this violation is S&S.

### Gravity Analysis

The gravity of this violation is serious in that the violation exposed four miners to a risk of serious injury from a rib fall or rib roll.

### 3. Negligence and Unwarrantable Failure Designation

#### Parties' Positions

Inspector Boliard charged the operator with high negligence and characterized this violation as an unwarrantable failure under section 104(d)(1). Ex. S-2. He believed that the violation was obvious and that the operator had failed to discover it only due to the operator's failure to conduct a preshift examination for Old Unit 2. See Tr. 49-53. The Secretary asks me to find high negligence and unwarrantable failure based on the obviousness of the violation, the high degree of danger presented due to the GMS miners' lack of experience and the off-grid location where the violation occurred, the history of rib and roof falls at the mine, and the operator's failure to conduct an on-shift or supplemental exam. Sec'y's Post-Hr'g Br. 17-19.

MaRyan contends it had no knowledge of this violation and no opportunity to abate it. MaRyan argues that the unwarrantable failure designation is not supported by the evidence and requests that the order be modified to a section 104(a) citation involving no negligence. Resp.'s Post-Hr'g Br. 15-23.

#### Duration of Violation

Inspector Boliard testified that the ribs and roof bolt cited in this order had probably been loose for one shift. Tr. 51. He explained these conditions can arise very quickly. Tr. 53, 81. Yeske, who testified he would have flagged the loose ribs and damaged roof bolt if he had seen them, had examined the area two shifts earlier without reporting the violative conditions. Tr. 138-41. I find that this violation lasted for approximately one shift.

#### Operator's Knowledge of Violation; Obviousness of Violation

The operator had no knowledge of the violative conditions because no preshift exam had been conducted for the cited area. The Secretary faults the operator for failing to conduct an examination of the area and concludes that the operator should have known of the violative conditions because they would have been obvious to a mine examiner. For the reasons discussed above, however, I find that the operator had no reason to know of the need to conduct a preshift exam on Old Unit 2 for the November 1 day shift.

Old Unit 2 was not an active production unit. It would not have been traveled frequently by anyone. Accordingly, I find that the violative conditions were not obvious to MaRyan because none of its supervisors or agents were in the area to notice them.

### Notice that Greater Efforts at Compliance Were Necessary; Abatement Efforts

The safety standard at issue here, § 75.202(a), was cited to MaRyan 33 times in the two years preceding the issuance of Order Number 8419745. Ex. S-2; Tr. 172; *see also* Ex. S-4. The Secretary argues that these prior violations placed the operator on notice that it needed to check for roof and rib control problems. Sec'y's Post-Hr'g Br. 19. However, even the inspector agreed that the mine's roof conditions were generally good. Tr. 77-78. Moreover, there are two reasons that the operator likely was not on notice that greater compliance efforts were necessary under the particular circumstances of this case. First, the mine's past roof control problems were related to phenomena such as kettlebottoms and slickensides, which were not a concern in the instant case. Tr. 79-80, 159, 174-75. Second, the operator would not have known to check the roof and rib conditions on Old Unit 2 on the morning of November 1 because the operator lacked knowledge that miners would be working and traveling in the area.

Similarly, although the operator made no effort to abate this violation before the inspector cited it, the lack of abatement efforts is of minimal relevance because the operator lacked knowledge of the violation.

### Extensiveness; Degree of Danger Posed

This violation was not extensive. The cited conditions affected a relatively small portion of the Old Unit 2 worked out panel that was traveled by just four miners. The violation was abated without extensive efforts by flagging off the area under the damaged roof bolt, retrieving a metal pry bar, and pulling down the two loose ribs, all of which took less than 30 minutes. Tr. 33-34, 80-81, 90-91.

Although this violation posed a discrete risk of injury to the four GMS miners, I find that the degree of danger was not unusually high given the short amount of time the violation existed and the fact that a metal pry bar was needed to pull down the ribs instead of the inspector's fiberglass sounding rod, which indicates the ribs were not so loose that they would have fallen without the application of a significant force.

### Conclusions

For all the reasons discussed above, I find that the operator did not engage in aggravated conduct with respect to this violation. The violation was not extensive or unusually dangerous and the operator had no reason to know of it until after Inspector Boliard cited it. The factors which would support an unwarrantable failure finding are not present. Because this violation is not an unwarrantable failure, the type of action is hereby modified from a section 104(d)(1) order to a section 104(a) citation.

The negligence associated with this violation is low because, as discussed above, the operator had no knowledge or reason to know of the violation.

## V. PENALTIES

### A. Legal Principles

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

### B. Parties' Positions

The Secretary proposes "specially assessed"<sup>5</sup> penalties of \$15,200.00 for Citation Number 8419744 and \$24,600.00 for Citation Number 8419745. The Secretary has offered no testimony or argument explaining how he arrived at these penalty amounts.

MaRyan argues that the Secretary's proposed penalties should not be imposed because the negligence and gravity of the violations were overstated and because the Secretary has failed to offer any evidence as to why a special assessment is warranted. Resp.'s Post-Hr'g Br., 23-26.

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<sup>5</sup> Although the Commission holds the authority to assess all penalties under the Mine Act, the Secretary ordinarily proposes penalties using a points formula set forth in 30 C.F.R. § 100.3 and referred to as the "regular assessment" process. Section 100.5 provides that MSHA may waive the regular assessment process "if it determines that conditions warrant a special assessment," which must be based on the six statutory penalty criteria. 30 C.F.R. § 100.5(a), (b).

### C. Assessment of Penalties

#### Violation History

The Secretary has submitted an MSHA document showing the operator's violation history for the 15 months preceding the occurrence of the two violations at issue here. MaRyan received 252 violations that became final during that period. Ex. S-4. MaRyan argues that this document does not demonstrate poor compliance or any other basis for the special assessment. Resp.'s Post-Hr'g Br. 25. I agree. In fact, the violation history provides no qualitative analysis at all and no basis for me to determine whether the number of violations shown is high or low.

The Secretary's penalty petition assigns 8 out of 25 possible penalty points for the operator's overall history of violations per inspection day. See 30 C.F.R. § 100.3, Table VI. This corresponds to a moderate violation history. I find that the operator's moderate violation history is not a mitigating factor or a significant aggravating factor in the penalty calculation.

#### Size of Operator; Ability to Continue in Business

The parties have stipulated that the penalties proposed by MSHA will not impair MaRyan's ability to remain in business. Joint Exhibit 1. The parties have not stipulated to the size of the operator's business, but the penalty petition reflects that the mine's tonnage is over 1 million and the controller's tonnage is over 8 million, indicating a large business. I have taken into account the appropriateness of the penalties to the size of the operator's business, as well as the desired deterrent effect of the civil penalties in comparison to the size of the operator and its overall resources. See *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

#### Good Faith

The Special Assessment Narrative Forms submitted with the Secretary's penalty petition reflect that the operator was credited with good faith in abating Citation Number 8419744 but not Citation Number 8419745. However, the testimony presented by both parties indicates these violations were timely abated in good faith, and I have taken this factor into account.

#### Negligence and Gravity

The factors that have weighed most heavily in my penalty assessment are the gravity and degree of negligence associated with each violation, which are discussed at length within the body of the decision above.

## Conclusion

After considering the six statutory penalty criteria, I assess a penalty of \$500.00 for each of these violations.

## **ORDER**

MaRyan Mining, LLC is hereby **ORDERED** to pay the sum of \$1,000.00 within thirty (30) days of the date of this Decision and Order.<sup>6</sup>

/s/ Priscilla M. Rae

Priscilla M. Rae

Administrative Law Judge

## Distribution:

Paige I. Bernick, Esq., U.S. Department of Labor, Office of the Solicitor, 211 Seventh Avenue North, Suite 420, Nashville, TN 37219

Christopher D. Pence, Esq., Hardy Pence, PLLC, P.O. Box 2548, Charleston, WV 25329

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<sup>6</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

August 10, 2015

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

v.

EMPIRE IRON MINING PARTNERSHIP,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2008-505-M  
A.C. No. 20-01012-153165-01

Mine: Empire Mine

## **DECISION APPROVING SETTLEMENT** **AND** **ORDER VACATING CITATION**

Before: Judge Feldman

The captioned civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d). The captioned docket contains 19 citations, for which the Secretary proposes a total civil penalty of \$19,031.00.<sup>1</sup>

On August 18, 2011, the captioned docket was stayed pending resolution of *Tilden Mining Co., LLC*, 33 FMHSRC 876 (Apr. 2011) (ALJ), which was, at that time, pending before the Commission. Section 56.12028 of the Secretary’s mandatory safety standards requires periodic resistance testing of all grounding systems. 30 C.F.R. § 56.12028. *Tilden Mining* addressed the question of whether extension cords on power cables constitute grounding systems as contemplated by section 56.12028. Citation No. 6199725, included in the captioned docket, for which the Secretary proposes a civil penalty of \$176.00, alleges a similar violation of section 56.12028 designated as non-significant and substantial (S&S) in nature. On August 20, 2014, on appeal, the Commission concluded that extension cords and power cables require continuity testing under section 56.12028. *Tilden Mining Co., LLC*, 36 FMHSRC 1965 (Aug. 2014). *Tilden Mining* was thereafter appealed to the U.S. Court of Appeals for the D.C. Circuit on September 8, 2014. As of the date of this Order, *Tilden Mining* is still pending before the D.C. Circuit.

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<sup>1</sup> Docket No. LAKE 2008-505-M originally contained 20 citations, for which a total civil penalty of \$19,274.00 was proposed. On March 28, 2012, Citation No. 6199742 was severed from the captioned docket and placed in Docket No. LAKE 2008-505-M-A. Docket No. LAKE 2008-505-M-A was disposed of via settlement on October 16, 2012. As such, 19 citations remain at issue in the captioned docket.



Pending before me is a motion to approve settlement of 18 of the 19 citations at issue in the captioned docket, for which the parties have agreed on a total civil penalty of \$14,456.00. The parties have not agreed on a settlement of the proposed \$176.00 civil penalty for Citation No. 6199725 concerning continuity testing, asserting that the settlement of this citation is dependent upon the resolution of *Tilden Mining* before the D.C. Circuit. Citation No. 6199725 was issued on March 19, 2008. The citation was contemporaneously abated on March 19, 2008, after the subject power supply cord was tested for resistance. Citation No. 6199725 has been held in abeyance, out of necessity, pending the ultimate disposition of the identical issue in *Tilden Mining*.

The subject violation in Citation No. 6199725, which has been designated as non-S&S in nature, and for which the Secretary seeks a nominal penalty of \$176.00 was timely abated and has been pending for over seven years, during which time memories likely have faded and/or witnesses likely have become unavailable. I see no need to further delay final resolution of this docket and payment of the \$14,456.00 civil penalty agreed upon by the parties for the remaining 18 of 19 citations at issue in this proceeding. Frankly, to do so because of the outstanding \$176.00 civil penalty proposed by the Secretary for remaining Citation No. 6199725, that allegedly occurred over seven years ago and was timely abated, would elevate form over substance.

Accordingly, in the interest of administrative efficiency, Citation No. 6199725 shall be vacated without prejudice, with leave for the Secretary, if he so elects, to reissue a citation for the subject alleged continuity testing violation if the Secretary prevails before the D.C. Circuit in *Tilden Mining*.

With respect to the remaining 18 citations, the parties have agreed on a reduction of the proposed civil penalty from \$18,855.00 to \$14,456.00. The parties' agreed-upon settlement terms for Citation Nos. 6199720, 6199455, 6199729, and 6199746, include deleting the S&S designations and modifying the likelihood of injury findings from "reasonably likely" to "unlikely," with corresponding penalty reductions. Regarding Citation Nos. 6199953 and 6199955, the parties agree to modify the degree of negligence attributable to the cited violative conditions from "moderate" to "low," with corresponding penalty reductions.

Regarding Citation Nos. 6199714, 6199457, 6199745, 6199748, and 6199749, the parties agree to penalty reductions for each citation from \$1,412.00 to \$988.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the gravity of the cited violation. Specifically, the Respondent represents that the cited presence of "mud, slippery material, stones, and/or pellets" in workplaces and passageways did not cause slip and trip hazards and therefore not reasonably likely to cause reasonably serious injuries.

In addition, regarding Citation No. 6199719, the parties agree to a penalty reduction from \$3,689.00 to \$3,136.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited severely rusted grating was not easily recognizable due to dust and mud build-up. Regarding Citation Nos. 6199731 and 6199734, the parties agree to penalty reductions for each citation from \$162.00 to \$146.00 based on the

vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing lamp covers and lightbulbs were not easily recognizable.

Additionally, regarding Citation No. 6199738, the parties agree to a penalty reduction from \$162.00 to \$146.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing guarding on a rotating taper lock bushing shaft was not easily recognizable. Furthermore, regarding Citation No. 6199744, the parties agree to a penalty reduction from \$162.00 to \$130.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing knockout was at one time present and the condition was not easily recognizable. Regarding Citation No. 6199956, the parties agree to a penalty reduction from \$1,111.00 to \$889.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing hinges on a conveyor belt access door were not easily recognizable. Finally, the Respondent has agreed to pay the Secretary's proposed penalty in full in Citation No. 6199730.

In sum, the total agreed-upon reduction in civil penalty for these citations is not of significant magnitude relative to the entire agreement to render it unreasonable in view of the uncertainties of litigation. While the Secretary does not necessarily agree with the exculpatory representations made by the Respondent, apparently there are sufficient vagaries of litigation to justify the parties' settlement proposal.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

## **ORDER**

In view of the above, it **IS ORDERED** that Citation No. 6199725 **IS VACATED** without prejudice.

It **IS FURTHER ORDERED** that the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Empire Iron Mining Partnership, **IS ORDERED** to pay the \$14,456.00 civil penalty within 30 days of this Order in satisfaction of the 18 remaining citations at issue.<sup>2</sup> Upon receipt of timely payment, the captioned matter **IS DISMISSED**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

Distribution: (Regular and Certified Mail)

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3516

Patrick Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

/acp

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<sup>2</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

August 10, 2015

U.S. SILICA COMPANY,  
Contestant,

v.

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

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

v.

U.S. SILICA COMPANY,  
Respondent.

## CONTEST PROCEEDINGS

Docket No. WEVA 2014-802-RM  
Citation No. 8715732; 04/08/2014

Docket No. WEVA 2014-803-RM  
Citation No. 8416877; 04/02/2014

Mine: Berkeley Plant  
Mine ID: 46-02805

## CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2014-970-M  
A.C. No. 46-02805-351338

Docket No. WEVA 2014-1120-M  
A.C. No. 46-02805-354304

Mine: Berkeley Plant

## DECISION

Appearances: Daniel McIntyre, United States Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner;

Justin Winter, Law Office of Adele Abrams, P.C., Beltsville, Maryland for Respondent.

Before: Judge Miller

These cases are before me on notices of contest filed by U.S. Silica Company and petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). These dockets involve one 104(d)(1) citation and twelve 104(a) citations with a total proposed penalty of \$26,814.00. Prior to the hearing, the parties reached a settlement of eleven of the 104(a) citations. On June 10, 2015 the court issued an order approving partial settlement addressing those eleven 104(a) citations. The two remaining citations, one a 104(d)(1) and the other a 104(a), remained for hearing. The parties presented testimony and evidence regarding the two remaining citations at a hearing held on June 24, 2015 in Washington, D.C. The parties have stipulated to the jurisdiction of MSHA and the Commission and have entered into other stipulations regarding the penalty criteria that are discussed below.

## **I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

U.S. Silica Company's Berkeley Plant is a surface silica mine in Morgan County, West Virginia. The mine produces ground silica using open-pit mining methods. The mine typically blasts an area, then loads the material onto haul trucks and transports it to a stockpile area. The material is then crushed and processed on-site. The pit uses a loader and two to three haul trucks during mining activity. The mining activity has left a limestone highwall, the upper portion of which is covered by soil and vegetation.

Both of the citations at issue in this proceeding involve the maintenance and stability of a highwall and, more specifically, the soil and slope of the highwall. The stability of a highwall depends on a number of variables, including its height, geology, and the angle of the wall. The stability of soil also depends on the angle, soil composition, slope, and the raveling and erosion of material. In addition to blasting, mines normally use benching and scaling to control highwalls. Generally, benches are placed above the working area to "catch" and help control rock and material that rolls or falls from the highwall. Scaling is used to remove loose or hanging rock and material before it falls. All mines, no matter which method or methods are used to control the highwall, must be vigilant in watching the movement and the changes of the highwall.

On Sunday, March 16, 2014 a slope failure occurred on the western wall in the northern pit of the Berkeley Plant. The western wall is separated into an upper and lower section by an old haul road which, in this instance, acted as a catch bench. The upper section of the limestone highwall was approximately 200 feet high and sloped at a 45 degree angle. In most places the limestone was not visible and was covered by soil and vegetation, some of which had been in place for many years. The highwall failure resulted in soil and other material near the top of the wall falling down into the pit.

The old haul road, which was acting as a bench, was no longer in use as a road and had been bermed on both ends to prevent access. The mine did not consider the road a catch bench, nor did it maintain it as a catch bench. The bench varied from 25 to 50 feet wide, and the soil and material that slid down from above on March 16th covered a good portion of the length of the bench up to ten feet deep. In addition, soil and material that were not caught by the bench traveled all the way to the bottom of the pit and covered the access road below, which was the only means of entry into the bottom of the pit. The north portion of the mine was not in operation at the time of the failure on Sunday, March 16th. Following the failure, the mine, over the course of roughly four days, cleaned up the material that covered the access road to the bottom of the pit. The mine did not clean the bench or remove any material from the highwall.

On April 2, 2014 MSHA Inspector James Slick traveled to the mine to conduct a regular inspection. Slick, who has 11 years' experience as a mine inspector and 32 years' experience as a miner, was not aware of the slide and was not told of the slide by any management person. Rather, one of the miners mentioned the slide to him after he arrived at the mine. Slick traveled to the pit area and, upon seeing the area of the slide, said that the "hair stood up [on] the back of [his] neck." (Tr. 60). He observed the stain on the highwall from the slide, and could see its path over the old haul road that was acting as a bench and across the access road leading to the

pit. Miners were working in the pit below the slide area at the time, and the bench above had not been cleared, nor had any steps been taken to maintain the highwall in a condition that would prevent further sliding. Slick immediately told the miners who were working in the pit to move out and barricade the area. Based on his observation, he issued a 104(d)(1) citation for failing to maintain the highwall.

Sec'y Ex. 4 p. 2 is a photograph of the access road into the pit, and shows the area where miners were working when Slick arrived. Sec'y Ex. 4 p. 3 shows the active area of mining, including loose rock on the left portion of the picture. The brown material on the right hand side of the road in the photograph is the area of the fall. The old haul road that acted as a catch bench can be seen on the right hand side of the picture and was covered nearly in its entirety by the slide debris.

Slick explained that the active access road into the pit is directly below the highwall and is used by both pickups and haul trucks, as well as other mobile equipment, to enter and exit the pit. Slick questioned the mine about the cleanup of the fallen material that covered this active road. He was told that it took four days for the mine to clean up the material at the bottom of the pit so that it could re-enter the pit to work. In Slick's view, if the failure had happened at a time when a miner was traveling the pit haul road, the slide would have engulfed them and there would have been no chance of getting out alive. Slick testified that a haul truck driver, a front end loader operator, or any other miner in the area, "wouldn't stand a chance."

At hearing, the mine explained that its cleanup efforts were undertaken in order to resume operations, but there was no credible testimony regarding the mine's plans for preventing further slides during the time between when the slide occurred and when Slick issued the citation. In addition, the mine presented no evidence or efforts it had made to maintain the highwall prior to the slide described by Slick. Slick questioned the mine about the old haul road that acted as a catch bench and learned that the mine did not designate the road as a catch bench and therefore did not see the need to maintain it, before or after the slide. Instead, the road had been closed off because it was no longer useful. Although the mine cleaned the active access road into the pit after the slide so that work could resume, it did not clean off the bench above, or take any other measures to scale down the loose debris that was seen on the highwall. Slick explained that the old haul road, operating as a bench, was not maintained, nor was it adequate prior to the slide of material. According to Slick, there was a definite potential for another slide and the old haul road was less likely to be able to function as a catch bench since it was full of material.

Slick explained that he cited the mine under 30 C.F.R. § 56.3130 because the standard addresses mining methods and safety benches. Here, the bench was not maintained prior to or after the slide, nor did the mine employ any methods to ascertain that the highwall was safe. As a result, Slick opined that a serious hazard was present both prior to and after the slide. According to Slick, the highwall had the same potential to slide on April 2nd as it did on March 16th, but on April 2nd the bench was mostly full and would not have been able to catch a large portion of any sliding material. The miners were working in a pit where they could not evaluate the highwall, could not scale, and could not control any slide of loose material.

The mine explained that it used spotters to watch the highwall during the removal of the slide material from the access road. However, because spotters were not necessary after the access road was reopened, none were in place when Slick arrived. Slick addressed the mine's use of spotters and indicated that, while spotters may have some use in watching the highwall, they are not a substitute for maintaining the highwall in a safe condition. Rather, spotters are simply in place to warn miners working in the pit in the event they see rock or other material begin to slide. In Slick's opinion, any warning would be too late and would do little to protect the miners.

Slick explained that highwalls change minute by minute and operators are expected to be constantly aware of the conditions. Slick observed material on the catch bench that had accumulated prior to the March slide but had not been removed. After seeing the aftermath of this slide, Slick inspected the entire highwall and observed one other area that he considered a hazard. That area, however, had been barricaded with cones. Slick observed loose trees, stones and dirt along the highwall and understood that the mine had taken no purposeful steps in the weeks following the slide to improve the highwall or to mitigate against a future slide. Given the lack of any meaningful steps to mitigate against a failure both before and after the March 16<sup>th</sup> slide, he assessed the negligence as high.

A team from the MSHA Technical Support Division investigated the highwall failure on April 8, 2014. The MSHA team observed areas that indicated previous movement and instability of the soil and observed raveling of material just south of the slide area when conducting the investigation. The team determined that, at the time of the slope failure, the falling material mounded along the upper section of the highwall, covered the bench below, and then slid into the active pit area. The team observed that overburden material, soil and vegetation were present above the pit and had not been cleared away or benched back from the edge of the highwall.

According to the team's report, the lower section of the pit was being actively mined for sandstone along the eastern side, resulting in a 150 foot highwall sloped at 45 degrees. Some of the fallen material from the upper section of the highwall was visible on this lower section. The failure area was estimated to be 150 feet wide, narrowing to 50 feet at the lower section of the pit. According to the MSHA investigation team, it took four days to clear the fallen material from the pit. Moreover, material had not been cleared from the bench at the time of the inspection, nor had any other action been taken to scale or maintain the highwall.

Jarrod Durig, a MSHA mining engineer and supervisor who regularly assesses highwalls and slope stability, was one of two engineers from MSHA's Technical Support Division to visit the slide area at the Berkeley pit. Based on his observations, he and another MSHA engineer generated a report and assisted the mine in finding ways to bring the highwall into compliance. Durig opined that the mine used no method whatsoever to control the highwall. He noted that the only bench in place was inadvertently created by the mine when it abandoned its old haul road.

Durig's review found that the Berkeley pit contains a sandstone layer and a lighter colored strata of limestone, as shown in the photographs, Sec'y Ex. 4. The darker material seen in the photographs is the soil, which is prominent in the area. The sandstone is on top of

limestone and, as the sandstone was mined down over time, loose material slid and got hung up on the highwall or on the irregularities in the limestone strata. Loose soil was present on April 8th when Durig visited the mine and he observed a new slide near the barricade of the pit. In addition, Durig observed water and active raveling both of which are signs of slope instability. He also observed that the upper portion of the wall, not a part of the current slide, held a large accumulation of soil. Further, there were other locations on the highwall that had dormant vegetation and large accumulations of soil, including trees near the top of the wall that had fallen over or were leaning. I find Durig to be a knowledgeable, experienced witness. His analysis of the highwall, its condition, and the necessary steps to bring the highwall into compliance are well thought out and based upon, not only the evidence but his first hand observations.

Durig explained that there were two aspects to this highwall, the hard rock area and the soil area also referred to as the slope. Here, the hazard was not necessarily the rock formation, but was more the loose soil slope on the highwall. Soil or slope is weaker than highwall, and a 45 degree incline is the upper boundary of an acceptable slope. Because soil is not nearly as stable as rock, it must be addressed and brought down to maintain the integrity of the highwall in general. Most mines create benches to control soil and falling material, but, here, the old haul road had not been maintained and only accidentally acted as a bench to control a portion of the slide. Durig saw nothing that indicated the mine had made any effort to deal with the soil, the slope, or the bench, nor had it taken steps to mitigate the hazard created by the loose material on the wall both before and after the slide in March.

Although no slide occurred while Durig was at the mine, the raveling and the state of the soils and vegetation indicated impending failure. On cross examination, Durig again explained that there is no way to predict an imminent ground failure, but the geometry of the slope, the loose material, the dead vegetation and trees, and erosion all demonstrated that the stability of the slope he observed was marginal at best. Durig saw no indication that any mitigation was done prior to the slide or in the period of time after the slide but prior to the issuance of the citation. He agreed with Slick that spotters are not a substitute or control of a highwall.

Following the issuance of the citation, MSHA, the mine, and contractors hired by the mine, engaged in discussions regarding a plan to bring the highwall into compliance. The contractors started work in October and finished around November 21<sup>st</sup>. One contractor came in to scale the highwall, remove loose rock, and take down the loose soil. Another contractor addressed the top of the highwall by removing material in order to give the top a better slope, and creating berms and a new road at the top. The same contractor cleaned the old haul road, established it as a catch bench, and put berms on it to increase its storage capacity. Durig opined that the mine could have done this work over time and well before the slide.

The mine operator called John Head, a mining engineer, as an expert. Head has been involved in a variety of activities in the mining industry. He has a mining engineering degree and a master's degree in management. Head became involved in this matter on April 10, 2014, just over one week after Slick issued the 104(d)(1) citation, when he was contacted by someone from the office of the attorney representing the mine in this proceeding. Head, like Durig, prepared an expert report and testified at hearing.



Head reviewed the citation and visited the mine on April 14th. He observed the slide area, with no slide material left in pit, and could see the slide had filled the old haul road. It was his opinion that there was no large scale instability at the time. He noted that, with the highwall at an angle of 45 degrees, raveling could result in loose material rolling down. He observed some small areas where there was raveling but, generally, the highwall was stable. According to Head, his duty was to address both the stability and the safety of the highwall, and those two things are not always comparable. There was no evidence of instability in his view, but there were issues involving safety that needed to be addressed. Specifically, he expressed concern regarding areas of the brow, areas where trees had leaned over indicating that material had moved, and isolated areas with loose rocks that needed to be addressed because the catch bench was full. While he believed that a bench was desirable, he did not think it was absolutely necessary. He did not see conditions that would cause a failure in the next few days, or serious conditions like water or a bulge at the toe, but he did see conditions that needed to be addressed in the long term.

Head's report included a list of steps the mine took after the slide, and he discussed those steps during his testimony. Head explained that, among other things, the mine took steps to remind miners about being diligent and staying away from highwall, conducted examinations of the highwall to look for signs of additional movement, decided to cease work in the pit if rainfall made the soil unstable, and used spotters to inspect the highwall during cleanup. Head agreed that the use of spotters is not the answer to instability and, instead, in his view, only adds a measure of safety by possibly providing an early warning of a slide or fall. He noted that spotters were not used after the cleanup because the mine did not observe any movement of the soil or highwall and thought the spotters were no longer necessary. Head offered little testimony regarding the conditions prior to the slide, or during the time after the cleanup of the access road but prior to the inspection by MSHA. Instead Head's testimony focused on the means used by the mine to mitigate against the potential for an accident during the week the mine was cleaning up the fallen material. Head stated that the actions of the mine reasonably provided for mitigation, but they did not eliminate the hazard. The hazard was removed when the mine brought in a contractor to take back the brow and rake across the highwall to take down loose material. After the highwall was addressed, some accumulation of material remained. The contractor also cleaned off the catch bench so it was available for use, adding to the safety of the area. He agreed that the mine could have taken steps and remedied the unsafe condition of the area prior to the fall in March.

The two experts in this case offered substantially similar testimony. However, I give greater weight to the testimony of Durig who has more experience specifically with highwalls and the geology of highwalls. Further, Durig's education is more directly related to the issue at hand and he addressed the condition of the highwall and the length of time that the highwall was left to deteriorate without any work being done by the mine. Head, on the other hand, discussed what was done to clean up the fall in the one area, and what was done to abate the violation. He did little to shed light on the violation itself and the conditions that existed at the mine before the slide.

## Citation No. 8716877

### The Violation

On April 2, 2014 MSHA Inspector James Slick observed the bench and the slide area of the Berkeley Plant as described above. He observed that the large ground failure caused material and debris to fill the bench from end to end and to cover the haul road into the pit below. Because Slick believed that the condition of the wall and the bench continued to pose a hazard, the equipment was removed from the pit and the area was barricaded and posted immediately. During the course of the inspection, Slick learned about the highwall failure on March 16, 2014, approximately two weeks prior to his arrival and given his observations issued Citation No. 8716877 on April 2, 2014 pursuant to section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 56.3130. The standard requires mines to use methods that will maintain the wall, bank and slope stability in places where persons work or travel, and, when benching is necessary, to maintain the benches. The requirements that the quarry wall be sloped back, as found in 30 C.F.R. § 56.3131, and that hazardous ground conditions be corrected, as found in 30 C.F.R. § 56.3200, are also applicable in this circumstance. The citation alleges that the mine failed to maintain a safety bench on a highwall. Slick determined that the condition was reasonably likely to result in a fatal injury, was S&S, affected one person, and was a result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$5,503.00 for this alleged violation.

The Secretary argues that the mine failed to maintain the highwall and that the only catch bench was in place by accident. Specifically, the Secretary argues that the mine did not use any method to maintain the wall, bank or slope above the area where persons were working, nor did it maintain the bench.

U.S. Silica argues that, because it did not incorporate benching into its mining method in the area, it was not required to maintain the old haul road as a bench. Moreover, because there was no evidence of large scale instability on the wall, the mine complied with the standard. The mine presented no evidence of the condition of the highwall prior to the failure, or any actions taken to maintain the highwall prior to or after the slide and therefore I agree that the violation occurred as cited.

The Commission has explained that section 56.3130 is a "clear," *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), "performance-oriented" standard intended to require mining methods that maintain ground stability. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993). The standard requires that benches, when used as a method of control, must function as catch benches and must be maintained in order to prevent falls of ground to the area below. The plain language of the standard, when read in conjunction with sections 56.3131 and 56.3200, requires operators to "maintain highwall stability and correct hazardous conditions before work or travel takes place." *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The evaluation of whether a violation occurred is measured against the standard of whether reasonably prudent person familiar with the factual circumstances would recognize that a hazard, as contemplated by the standard, existed. *Id.* (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)). In this case, the mine failed to maintain the highwall at all, offering no

information about the stability of the wall or the slope, or about steps that had been taken to bring down loose material or to provide or maintain an adequate bench to catch any sliding material.

MSHA's Program Policy Manual provides additional guidance regarding the standard and requires that "a bench located immediately above the area where miners work or travel be maintained in a condition adequate to retain material that may slide, ravel, or slough onto the bench from the wall, bank, or slope." IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56, at 10 (2010) ("PPM"). The MSHA guideline also indicates that if it is too hazardous to maintain a bench, other measures, including ceasing mining in the area or placing a berm at the base of the wall which prevents material from entering areas where miners work or travel, may be utilized. *Id.* at 10-11.

In *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 374 (Mar. 1993), the Commission upheld a judge's finding that a violation of section 56.3130 existed where material had accumulated on catch benches such that the benches could no longer catch material and protect persons working below. There, the Commission stated that "evidence regarding the state of the benches . . . and [the mine's] failure to clean them is probative of the stability of the walls, banks, and slopes[.]" *Id.* The Commission, in affirming the judge's decision, confirmed that the judge properly found that a reasonably prudent person would have recognized that the standard was violated. *Id.* at 375. Like in *Cyprus*, U.S. Silica allowed the bench to accumulate material to such a degree that it was rendered ineffective.

In *Connolly-Pacific Co.*, 36 FMSHRC 1549 (June 2014), the Commission upheld this court's finding that a violation of section 56.3130 existed where the mine failed to maintain the stability of a highwall. There, the court relied upon photographs and expert testimony to find that the mining method employed by the mine, which did not involve the use of scaling or benching a 300 foot highwall, and instead involved allowing rock to slide down the highwall before being removed by a loader operator at the base, did not maintain the highwall in conformity with the standard.

Here, I find that the mine offered no explanation about the general condition of the highwall prior to the failure, or how they considered and controlled the highwall and slope. Instead the mine essentially agreed that, while the old haul road may have acted as a bench in this instance and caught some material, it was purely by accident and the mine had no intent of making it a catch bench. As a result, the mine did not maintain it as a bench. Given that the mine did not scale the highwall, have any record of the wall's movement or stability, use any means to clean up the loose material at the top, or maintain a bench, it violated the standard in every respect. While benching may not be a requirement under the standard, the mine failed to employ *any* mining method to maintain ground stability and prevent the type of failure which had already occurred. I reject the mine's argument that it complied with the standard because there was no evidence of large scale instability at the time the citation was issued or when its expert viewed the area. There is no dispute that the mine had just experienced a large ground failure. The mine had failed to detect or control that failure, took no subsequent steps to prevent a similar failure in the future, and the witnesses for the Secretary offered credible testimony that the conditions were right for another failure.

While the mine, in its brief, argues in passing that it employed berms at the base of the highwall along the road and in the pit as an alternative means of control, the evidence is not persuasive. No one from the mine testified to the existence of these berms prior to the ground failure, or in the time between when the failure occurred and when the citation was issued. Moreover, even if the court were to accept the mine's argument that a berm was in place, it clearly would not have controlled the March 16<sup>th</sup> ground failure, which resulted in material 12 feet deep covering the entire width of the access road, or any subsequent similar failure.

I find that a reasonably prudent person, familiar with the mining industry, would know that this highwall presented a clear hazard, that it should have been scaled or otherwise cleaned up, and that benches above the working area, or some alternative method of control, were necessary to control falls and protect the miners below. Accordingly, I find that a violation of the cited standard occurred as alleged.

### S&S and Gravity

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but that the

hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed a S&S designation of a violation of section 56.3130 where loose and cracked rocks were observed on a near vertical highwall above miners working on foot and in equipment on the pit floor. The court found that, because it was impossible to predict when material would fall, it was “at least reasonably likely” that, assuming continued mining operations, material would fall and strike a miner or equipment operator, and that even small pieces of rock could be dangerous if they fell from great height.

In this case the Secretary has demonstrated that the violation was S&S. First, there was a failure of the wall that resulted in a mass of material sliding off the wall, covering the bench and then covering the haul road below. Slick and Durig agreed that the conditions were right for another failure of the wall. In addition, Inspector Slick explained that, had any miner been in the area when the fall occurred, he would have been buried by debris or had no way out of the pit. The mine does not dispute Slick’s description of the fall and the hazard it created. The mine was fortunate that no one was driving a truck or loader on the pit road on the day of the slide. Slick and Durig agreed that the slide was large enough to engulf equipment or push it up against the opposite wall. In addition, there was enough material to completely block the only way out of the pit and it took the mine four days to clean up just that area of the pit in order to reestablish the road and any route into the pit area. Durig testified that the photographs, Sec’y Ex. 4 pp. 4 and 5, clearly show how large the slide was and that the bench was full of material. Looking at the current active road into the pit and the scope of the slide into that area, Durig expected that a front end loader, a haul truck, or other piece of equipment, would have been engulfed or pushed against the opposite wall by the slide. The slide would have trapped others, as there was no other way out of the pit.

I have found that there is a violation of the mandatory standard, and that the violation of not maintaining the highwall did, and would in the future, result in a fall or slide of material. The fall or slide of material is a serious hazard which will lead to the covering up of equipment and the miners operating the equipment, or, in the very least, push the heavy equipment with the operator into the opposite side of the pit wall. When the drivers of the equipment are covered up or engulfed by soil, trees and other sliding material, it will result in a serious injury or death. Hence, I find the violation to be S&S.

#### Unwarrantable Failure and Negligence

Inspector Slick testified that he believed the violation to be the result of high negligence and an unwarrantable failure for a number of reasons, including the fact that the mine was aware of the condition of the highwall, both before and, more importantly, after the slide, yet failed to take any remedial measures. The mine had done nothing to prevent this slide or any subsequent slide even though the condition of the highwall was obvious. The mine took no steps after the slide to clear the catch bench or scale the loose material. All management members were aware of the slide but, instead of focusing on preventing another similar slide, they cleared the pit road and continued working under a bench that was now filled with debris. I find that the violation

was a result of the mine's high negligence and the unwarrantable failure to comply with the mandatory standard.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“R&P”); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (approving Commission’s unwarrantable failure test). The Commission has explained that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator’s efforts in abating the violative condition; 5) whether the violation was obvious; 6) whether the condition posed a high degree of danger; and 7) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353

***Length of time that the violation has existed.*** In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition exists is a “necessary element” of the unwarrantable failure analysis. The Commission, in remanding the case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission explained that, even where the record of a case does not allow a judge to make a determinative finding with regard to how long a violative condition existed, the judge must analyze the element and “[e]ven imperfect evidence of duration in the record should be taken into account[.]” While the Commission has found that a duration of a “matter of seconds” may weigh against an unwarrantable failure finding, it has also held that a duration of a few minutes may support an unwarrantable failure finding. *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

Durig testified that he viewed aerial and satellite images of the mine dating back to approximately 2000 and, in those images, he saw vegetation and soil deposits similar to what could still be seen in other areas of the mine that had not yet failed, and what would have been seen in the area of the slide prior to the failure. The dangerous condition of the highwall at the time of the failure certainly didn’t develop instantaneously. Rather, the condition developed over an extended period of time, during which the mine took no steps to maintain the stability of the highwall or slope. I find that this factor weighs heavily in favor of an unwarrantable failure finding.

***Extent of the violative condition.*** In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the “extent of the violative condition is an important element in the unwarrantable failure analysis.” The Commission has explained that the purpose of this element is to “account for the magnitude or scope of the violation[,]” and the judge may analyze it by looking at, among other things, the “extent of the affected area as it existed at the time the citation was issued[,]” the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). In *Dawes* the Commission found that, because only one miner endangered himself by walking under the suspended boom, the violation was not extensive. *Id.*

The top of the wall in this pit was over 300 feet high, with approximately 200 feet above the old haul road, which was functioning as a bench, and approximately 150 feet below the old haul road down to the access road. Further, the wall was between 1600 to 1800 feet wide. The entire wall was left unmaintained. The Secretary’s witnesses and the mine’s expert witness testified that there were areas at the brow that needed to be addressed, as well as loose material all over the highwall. While it may have only taken the mine a few days to clear the material from the access road following the failure, it took months to formulate a plan to terminate the citation, and required approximately a month for contractors to complete their work to bring the mine into compliance before the citation was terminated. I find that the violative condition was very extensive.

***Whether the operator has been placed on notice that greater efforts were necessary for compliance.*** The Commission has explained that repeated, similar violations, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). The prior violations relied upon to establish notice need not have been a result of an unwarrantable failure, nor do those violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013).

The testimony elicited at hearing did not address whether MSHA had ever placed this operator on notice that greater compliance efforts were necessary. It is not clear whether other inspectors had viewed the highwall, or even mentioned it, prior to the Slick’s inspection on April 2, 2014. As a result, this factor was not relied upon in reaching my unwarrantable failure finding.

***Operator’s efforts in abating the violative condition.*** In evaluating the operator’s efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge’s finding that management did not take steps to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

I find that the mine made no efforts to abate the violative condition prior to the issuance of the citation. There is no evidence that the mine took steps to abate the violative condition prior to or after the slide. Even after the slide when it was clear that the bench was full in areas, the mine took no steps to clean it, nor did it attempt to scale the highwall or even consult with someone who could provide advice on how to remove the hazards. The only action taken by the mine in response to the failure was to clear the access road to the pit, and provide spotters, neither of which abated the violative condition. I find that this factor weighs heavily in favor of a finding that the violation was result of the mine's unwarrantable failure to comply with the mandatory standard.

***Whether the violation posed a high degree of danger.*** The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Moreover, it has noted that a violation may be aggravated and unwarrantable where the hazardous nature of a violative condition is common knowledge. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009) (citing *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be an unwarrantable failure based on "common knowledge" that power lines are hazardous and precautions must be taken around them)). Further, when a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). Furthermore, a high degree of danger may be evidenced where a fatal accident occurred as a result of the cited condition or practice. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997).

The violation posed a high degree of danger. Loose material was observed in multiple places on the highwall and the brow, or slope, of the wall, which consisted of soil and vegetation, had not been addressed by the mining methods of this operator. Just as the Commission in *Cyprus Tonopah* found that a mine's failure to maintain benches was probative of the stability of the walls, banks, and slopes, here, the mine's failure to employ *any* mining method to address the hazardous conditions on this highwall and slope is probative of the stability. 15 FMSHRC at 374. Further, the undisputed fact that a major failure of the wall occurred, combined with the obvious conclusion that the failure, or any similar failure, would almost certainly kill anyone in the path of the slide, makes it clear that the violation posed a very high degree of danger.

***Whether the violation was obvious.*** The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).



Both Durig and Slick testified that the violation was obvious and I agree. The pictures entered into evidence show loose soil and other material, including rocks and dead vegetation, spread across the highwall. Sec’y Ex. 4 pp. 1, 2, 4, 5, 6. The mine had taken no steps to maintain the wall and slope by removing or protecting against the loose material. The bench, which the mine admittedly was not maintaining, was clearly full in areas and could not protect against the future fall of material in those areas.

***Operator’s knowledge of the existence of the violation.*** In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator’s knowledge of the existence of a violation may be established where the operator “reasonably should have known of the violative condition.” 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator “reasonably should have known of the violative condition” by showing that the “operator’s knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]” *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1199-1200 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010)).

I find that, even if the operator did not have actual knowledge of the existence of this violation, it certainly should have known of the violative condition. In spite of the fact that the mine was not cited for the highwall conditions prior to the slide, the condition was extremely obvious and, as discussed above, a reasonably prudent person should have known that the highwall needed constant attention in order for the mine to maintain it in a safe condition. Even if the failing condition of the highwall was not obvious before the March 16<sup>th</sup> failure, it certainly was so after the failure. Nevertheless, the mine allowed the condition to persist until the inspector issued the citation. The mine’s witnesses testified that, following the failure, the managers met to discuss how to deal with the situation. The managers knowingly chose to take no steps to abate the obvious, hazardous condition. I find that they were on notice of the existence of the condition and the potential for a similar future failure given that they took no steps to prevent one from occurring.

The mine argues that the steps it took after the March 16<sup>th</sup> failure to insure that the highwall was stable were taken in a reasonable good faith belief as to what was required to achieve compliance. However, the mine did not employ any mining method to maintain the stability of the wall and slope prior to or after the failure, I find that this argument is without merit. The steps taken by the mine between the times when the fall occurred and when the citation was issued did not address the stability of the wall. Rather, they addressed the need to resume operations and, at the very most, an attempt to avoid, not address, the hazard.

While the operator argues that the presence of spotters mitigates against the high negligence and unwarrantable failure findings, I disagree. In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed the Secretary’s designation of moderate negligence where the mine had established protective berms in at least some portions of a quarry, had conducted routine inspections of the highwall, and had employed spotters when material was removed from the base of the wall. Here, I find that the mine did far less. The mine did not offer credible evidence of someone being aware of the changing conditions of the wall or monitoring its movements. Further, there were no examinations or remediation even after the

serious fall of ground. In *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014), the Commission found that the use of spotters did nothing to maintain a highwall's stability, nor did it constitute a correction of fall-of-materials hazards. Moreover, in finding that substantial evidence supported the judge's finding that an inspector did not abuse his discretion when issuing a 107(a) imminent danger order, the Commission cited the inspector's testimony that the use of spotters "'does not stop or mitigate the likelihood of material coming off the wall. It just lets the guy watch it happen.'" *Id.* at 1555. In other words, spotters are just witnesses to falls of material, and the use of them should not be considered a mitigating factor. Here, it is undisputed that spotters were only used during the cleanup of the access road, and were not present prior to the failure, or after the cleanup was complete. Accordingly, I find that the violation was a result of the mine's high negligence and unwarrantable failure to comply with the mandatory standard.

### **Citation No. 8715732**

On April 8, 2014 Inspector Michael Smith traveled to U.S. Silica's Berkeley Plant to conduct an inspection. Smith observed fresh tire tracks at the toe of a 175 foot perimeter highwall in the southwest corner of the Berkeley mine. He explained that no safety bench was present in the area and loose material extended all the way to the brow of the wall. In addition, he observed two foot diameter rocks approximately 75 feet above the work area. The brow of the highwall had not been stripped back and it appeared that trees were at the edge. Further, he observed loose material at the toe, which appeared to have been moved by a front end loader. Smith opined that a fall of material would cause crushing injuries to a miner working below. Based on his observations, Smith issued Citation No. 8715732 for a violation of section 56.3131 of the Secretary's regulations. Smith determined that the condition was highly likely to result in a fatal injury, was S&S, affected one person, and was a result of the operator's high negligence. The Secretary has proposed a civil penalty in the amount of \$12,248.00 for this alleged violation.

### The Violation

Inspector Smith, has been with MSHA since 2008 and received the regular MSHA training as well as accident investigation training. He has an extensive background in highwalls dating back to 1972 when he started operating heavy equipment in pits similar to the one here. and he is aware of the importance of maintaining highwalls in safe condition.

Inspector Smith traveled to the Berkeley pit on April 8, 2015, about a week after Slick issued the citation associated with the fall of ground. Smith reviewed the mine file and met the engineers from MSHA's Technical Support Division at the mine to review the highwall and the fall area. While walking to the area of the slide, Smith observed a separate area, shown in two photographs, Sec'y Ex. 4 pp. 8, 9, where tire tracks were under a 175 foot highwall. As a result he issued a citation because the area where persons worked or traveled had loose unconsolidated material created a fall of material hazard.

Smith explained that Sec'y Ex. 4 p. 9 is a photograph of the area he cited and shows the material at the bottom of the wall that had fallen from above to the pit below. The photo shows material higher up the wall that appears ready to fall into the pit area. Smith testified that the rock and material he observed would roll or fall from the wall and hit a haul truck, loader or

other equipment, as well as any miner on foot. It has been his experience that, when heavy equipment is being operated under and around highwalls, drivers frequently step out of the equipment and are on foot in the areas. It appeared that the mine had been removing rock at the bottom of the wall, causing the area above to shift or move. Smith said that the operator of a front end loader would only have been able to see directly in front of, and a little bit above, the equipment, and would not be able to see rock or material falling from higher up. Smith observed fresh tracks up to the area where material was being removed at the base of the highwall but he did not want to travel any closer to view the tracks as he believed the area was dangerous. He is positive that, given the conditions he observed, the rocks would come down from the highwall and hit those working below.

Smith noted that there is no way to predict exactly when a fall of rock or material will happen, but, generally, it happens fast and occurs before anyone below the wall can see it and get out of the way. It is his belief that the mine had been digging in the area, loading material and hauling it away. According to Smith, the weight of a 2 foot diameter rock coming off the highwall during this process, would hit the glass in the front of the cab and go through the windshield injuring the driver. Smith envisioned rocks falling or rolling onto the loaded bucket of the loader, traveling down the boom and into the cab, injuring, if not killing the driver. There were no safety benches in place, or any other measures to control the highwall.

While the mine asserts that Slick had observed this area six days earlier without an issue, Smith explained that highwall conditions change on a daily basis and he saw it as a clear danger on the day he was at the mine. This portion of the highwall was not affected by the barricade put in place after Slick's citation, and mining was ongoing at the quarry. Miners were traveling in the area and, while Smith did not see the loader when he passed by, he did see raveling of rock and the fresh tire tracks near the fallen rock, which indicated that work had recently been done under the highwall. Further, he observed a truck a couple hundred feet up the haul road, but when he attempted to question the driver, the driver refusal to answer. According to Smith, he could tell the work in the area was new from the conditions he observed.

Doug Andrews, an hourly employee at the Berkley pit, testified on behalf of the mine operator. According to Andrews, he was aware of the slide of material in March. Andrews testified that, at the time of Slick's inspection on April 2<sup>nd</sup>, he was spotting for the area identified in Smith's citation and shown in Sec'y Ex. 4 p. 9. There were two trucks and a loader operating in the area, and Andrews' believes that, Slick observed them working in the area, and saw no problem with the highwall. According to Andrews, they continued to mine in the area the remainder of the day and the following day. Then, as they always do when leaving an area, they bermed it off, and it remained bermed off until Smith arrived a few days later and cited the mine for working under the highwall.

The Secretary argues that this is an area where persons work and travel and that there was a fall of material hazard, thereby demonstrating a violation.

U.S. Silica argues that the Secretary cannot meet his burden of showing that there was a fall of material hazard when miners were working in the area, and that the area in question was not being mined or traveled and had been bermed to prevent unauthorized travel in the area. The

operator further argues that Inspector Slick had observed mining in the area just a few days prior to this citation and did not see a hazard.

Section 56.3131 requires that “[i]n places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.” 30 C.F.R. § 56.3131.

The Commission has explained that the language of section 56.3131 is “clear.” *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The plain language of the standard, when read in conjunction with sections 56.3130 and 56.3200, requires operators to “maintain highwall stability and correct hazardous conditions before work or travel takes place.” *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1553 (June 2014). The evaluation of whether a violation occurred is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances would recognize that a hazard, as contemplated by the standard, existed. *Id.* (citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed a violation of section 56.3131 where large overhanging rock formations, and loose cracked material, were present on the perimeter of a quarry wall. There, the material had not been sloped or stripped back to the angle of repose. The court cited the Secretary’s evidence that a loader operator had worked and traveled under the highwall. Moreover, tire tracks at the base of the highwall, as well as the lack of protective catch benches, warning signs, or berms in the area, evidenced that this was an active area of the quarry.

In *Duke’s Sand & Gravel*, 37 FMSHRC 63 (Jan. 2015) (ALJ), Judge Moran upheld a violation of section 56.3131 where loader tracks and bucket dig marks could be seen beneath a protruding overhang in a pit. Similarly in *Allied Stone, LLC*, 35 FMSHRC 31 (Jan. 2013) (ALJ), Judge Zielinski upheld a violation of section 56.3131 where loose, unconsolidated material on a 30 foot highwall, as well as an overhanging rock protrusion, were observed above an area where miners worked. There, the court, in finding a violation, cited evidence that tire tracks could be seen within two feet of the base of the highwall, the lack of an angle of repose, and no barrier to keep miners away from the base of the wall.

I find that the Secretary has shown a violation and, in doing so, I credit Inspector Smith’s testimony. While Smith did not see a truck or loader actively engaged in work under the highwall as he passed by on April 8th, it was clear to him that work had recently been done in the area. He observed loose material both on the highwall, and on the ground. Tire tracks could be seen close to the highwall, which indicated to him that the mine had very recently loaded material in the area. The loader operator and truck driver would not speak with the inspector, but Andrews indicated that they were working in the area just days before the citation was issued. There was nothing to indicate that the mine would not return to remove material from this part of the pit, and it was accessible to miners working. While it is not entirely clear whether a berm existed at the time of the Smith’s inspection, Andrew’s testimony that the mine routinely bermed work areas at the end of each day lends itself to a finding that the mine would, and in this case

did, continue to mine the area below the loose material in the time leading up to Smith's issuance of the citation. Accordingly, I find that the Secretary has established a violation.

### S&S and Gravity

Inspector Smith indicated that, given the condition he observed, the material on the wall would have fallen, or rolled and, when it did, it would hit the loader, go through the windshield and seriously injure the driver. Therefore, he designated the violation as S&S.

In *Connolly-Pacific Co.*, 33 FMSHRC 2270 (Sept. 2011) (ALJ), this court affirmed an S&S designation of a violation of section 56.3131 where loose, overhanging material was observed on a highwall above where miners worked. The court found that the mine's failure to strip back, slope, or perform controlled blasting to remove the loose material significantly increased the likelihood of rock falling and injuring a miner. In *Three Way Portable Crushing, Inc.*, 32 FMSHRC 1486 (Oct. 2010) (ALJ) Judge Barbour upheld the S&S designation of a violation of section 56.3131 where he found that material falling from a highwall could hit bench-like protrusions and get projected away from the wall at speeds which could cause a fatality. The presence of an inadequate berm at the base of the highwall contributed to the hazard.

I have found a violation of the mandatory standard and that the violation created a hazard in the form of a fall of material from either directly above a loader or truck, or from far above near the brow. Sec'y Ex 4 p. 9 shows loose material in the area that would have been immediately above equipment working in the area. Additional loose material can be seen higher up on the wall. In both areas material was poised to either fall or roll down into the bottom of the pit where miners had very recently been working and, given my above findings, would continue to work. As Smith explained, even a 2 foot rock rolling off the wall would go right through the windshield of the loader and lead to a serious injury or a fatality. I find the violation to be S&S.

### Negligence

Smith determined that the violation was a result of high negligence given that, just a few days prior, Slick had issued the citation discussed above, which also involved a failure to maintain the highwall in the pit. In *Martin Marietta Aggregates*, 26 FMSHRC 847 (Nov. 2004), Judge Melick upheld the high negligence designation for a violation of section 56.3131 where a pit foreman was aware of fissures and cracks in a highwall prior to a wall failure, but did not take steps to protect miners working in the area below the highwall.

I find that the mine exhibited high negligence. The mine was clearly aware of issues with the stability of highwall and the presence of loose material above where miners were working. Nevertheless, the mine continued to work beneath those conditions. While the mine argues that mitigating circumstances exist because Slick did not find a hazard in the area during his earlier inspection and the mine had not worked in the area for several days, I credit Inspector Smith's testimony and find that a hazard did exist when he observed the area on April 8<sup>th</sup> and that miners

had very recently been in the area.<sup>1</sup> Moreover, even if minimal mitigating circumstances did exist, the court is not bound by the Secretary's regulatory definition of high negligence, *Hidden Splendor Resources*, 36 FMSHRC 3099 (Dec. 2014), and the evidence in this case clearly demonstrates that the mine was highly negligent in allowing its miners to work beneath a highwall which not only had loose material all over it, but had very recently experienced a substantial failure and the mine had taken no steps to prevent a reoccurrence.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider "six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 114 7 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[ s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The parties have stipulated that the penalties as proposed will not affect its ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity and negligence are discussed above. Given the total lack of any mining method employed by this operator to maintain the highwall both before and after the March 16<sup>th</sup> wall failure at this facility, I find that an increased penalty of \$10,000.00 is appropriate for Citation No. 8716877. I assess the originally proposed penalty of \$12,248.00 for Citation No. 8715732.

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<sup>1</sup> U.S. Silica, by way of an attachment to its brief, attempted to introduce Inspector Slick's field notes into the record. The field notes were referenced at hearing, but were never formally introduced into evidence. The record was closed at the end of the hearing. As a result, the court has not considered the field notes in reaching its conclusions in this matter and strikes them from the record.

### III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a total penalty of \$10,000.00 for Citation No. 8716877 and a penalty of \$12,248.00 for Citation No. 8715732. Accordingly, U.S. Silica Company is **ORDERED** to pay the Secretary of Labor a total penalty of \$22,248.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller  
Margaret A. Miller  
Administrative Law Judge

Distribution:

Daniel McIntyre, U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216,  
Denver, CO 80204

Justin Winter, Law Office of Adele Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD  
20705

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

August 14, 2015

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

Petitioner

v.

CONSOLIDATION COAL CO. AND  
MCELROY COAL CO.,

Respondents

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2011-1314, et al.<sup>1</sup>  
A.C. No. 46-01318-249156

Mine: Robinson Run No. 95  
Mine ID: 46-01318

Mine: Blacksville No. 2  
Mine ID: 46-01968

Mine: Shoemaker  
Mine ID: 46-01436

Mine: Loveridge No. 22  
Mine ID: 46-01433

Mine: McElroy  
Mine ID: 46-01437

**ORDER OF CONSOLIDATION**  
**AMENDED DECISION APPROVING GLOBAL SETTLEMENT<sup>2</sup>**  
**ORDER TO DISMISS**  
**ORDER TO PAY**

Before: Judge Harner

These cases concern proposals for assessment of civil penalties filed pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d) (“Act”), seeking civil penalty assessments for alleged violations of mandatory safety and health standards. This decision concerns 132 civil penalty dockets, including 1753 citations and orders, with proposed penalties totaling \$5,097,611.00. The parties have negotiated and submitted a proposed settlement that seeks to resolve all affected citations and orders contained in these 132 dockets. It is **ORDERED** that these cases are **CONSOLIDATED** for purposes of settlement.

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<sup>1</sup> All Docket Numbers contained in this settlement are listed in Appendix A, attached hereto.

<sup>2</sup> This Decision is being amended solely to correct the A.C. No. for the lead docket, Docket No. WEVA 2011-1314; and the footnote number regarding payment information, now correctly reflected as footnote number 4.



On December 6, 2013, Murray Energy Company (“Murray”) acquired five northern West Virginia underground mines from CONSOL Energy, Inc. (“CONSOL”). The five mines that were acquired are Blacksville No. 2 (Mine ID: 46-01968), Loveridge (Mine ID: 46-01433), McElroy (Mine ID: 46-01437), Robinson Run (Mine ID: 46-01318), and Shoemaker (Mine ID: 46-01436) (collectively referred to as the “CONSOL Mines”). The Secretary issued citations/orders to the CONSOL Mines on or before December 6, 2013 and this global settlement resolves those citations/orders (“affected citations/orders”).

The Secretary attached three exhibits to his Motion to Approve Global Settlement. Exhibit 1 contains a summary of the 132 dockets included in this global settlement. Exhibit 2 contains a listing of all citations/orders in 110 fully resolved dockets. Exhibit 3 contains 22 dockets and the citations/orders in them that were issued on or before December 6, 2013. These 22 dockets also contain additional citations/orders issued after that date.<sup>3</sup>

The parties have agreed that the affected citations/orders shall be affirmed as set forth herein and that a civil penalty shall be assessed for each affected citation/order as set forth in Exhibit 2 and Exhibit 3. The facts surrounding each violation are set forth in the body of each affected citation/order, copies of which were attached as part of Exhibit A to the Secretary’s Petitions. The Secretary has considered the deterrent effect of such penalties taking into account that the CONSOL Mines were not owned or controlled by Murray when the affected citations/orders were issued. The violations were abated in good faith. The operator’s history of previous violations and size are contained in Exhibit A which was attached to the Petition for each case when filed by the Secretary. The Respondent agrees that final assessment of the agreed upon penalties will not adversely affect the operator’s ability to continue in business. The gravity of each violation and the operator’s negligence are set forth in the body of each citation/order. In reaching this agreement on the total penalty amount, the parties reviewed and considered the allegations contained in the 1753 affected citations/orders which are contained in the 132 dockets at issue here and present the following in support of this Motion:

### **Negligence:**

The parties have reviewed the affected citations/orders in the 132 Dockets affected by this global settlement. The affected citations/orders generally encompass violations that are often issued by MSHA in underground coal mines, including violations issued for the following standards: 30 C.F.R. §75.400 - combustible accumulations, 30 C.F.R. §75.202 - roof and rib control, 30 C.F.R. §75.370 and 30 C.F.R. §75.220 - ventilation plan and roof control plan, 30 C.F.R. §75.517 – electrical, 30 C.F.R. §75.360 –pre-shift examinations and 30 C.F.R. §75.1403 – safeguard notices, for example. The parties agree that the respondent will accept all affected citations/orders as issued, despite the existence of good faith factual and legal disputes. The parties agree however, that the Respondent shall pay civil penalties which, while lower than proposed, are commensurate with the respondent’s assertions in each of the dockets. Specifically, Respondent has raised issues concerning the designated level of negligence and the evidence the Secretary relied on to support high and moderate negligence designations for certain conditions. For certain citations/orders, Respondent asserts, for example, that

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<sup>3</sup> All of the citations/orders issued after December 6, 2013, have been fully resolved by Respondent and were the subject of Decisions Approving Partial Settlements.

management could not be in a position to know, nor could they have known, of conditions that existed for a short period of time, were in remote areas of the mine, had just occurred, or were not noted on examinations. The Secretary reviewed the evidence in light of Respondents' assertions. The parties agree that all affected citations/orders shall be affirmed as issued, regarding the negligence findings alleged, and that in some instances a modest reduction in penalty is appropriate.

### **Gravity:**

Gravity findings include the likelihood of injury or illness, the type of injury or illness, whether the gravity is significant and substantial and the number of persons affected. The parties reviewed the gravity findings in the 1753 affected citations/orders. As would be expected given the volume, Respondent raised factual issues in whole or in part with regard to the gravity findings alleged in many of the affected citations/orders. The Respondent raised factual and evidentiary concerns surrounding whether some of the conditions alleged would be reasonably likely or highly likely to lead to a permanently disabling or fatal injury and whether the number of persons identified would be affected by the hazard cited. Additionally, Respondent contends that there are several instances where the evidence does not fully support the likelihood of injury identified on the face of the citation or order. Those questions arise, for example, when evaluating the likelihood of miners to be permanently or fatally injured for minor or technical violations of the ventilation plan or roof control plan or whether an inadequate pre-shift examination would result in a fatal injury to one or more miners. Finally, based on many of the same factors, the Respondent raised concerns regarding the significant and substantial designation for certain hazards including whether the limited exposure of miners would contribute to a serious injury or death should normal mining operations continue. After reviewing the evidence presented by the Secretary and the Respondent, the parties agree that the affected citations/orders should be affirmed as issued. The Secretary has agreed to a reduction in penalty for some of the affected citations/orders in recognition of the defenses raised by the Respondent should the violations proceed to a hearing on the merits.

Finally, Order No. 8038342 contained in Docket No. WEVA 2012-995 and Order No. 7114564 contained in Docket No. WEVA 2013-800 were designated as flagrant violations for assessment purposes pursuant to § 110(a)(2) of the Mine Act. The Secretary agrees to remove that designation for the purposes of this settlement and to resolve those Orders at the maximum penalty of \$70,000.00 each.

I have considered the representations and documentation submitted, find that the settlement is reasonable as set forth in the motion to approve settlement, and conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. In deciding to approve this settlement agreement, I note the following: the violations of the Act set forth in the affected citations/orders were not committed while the mines were under Murray's control; the settlement will allow the parties to move forward and concentrate on future safety, health, and compliance in order to benefit the miners who work at these five mines; and the settlement will avoid protracted litigation that would occur if the cases were not resolved. While the Respondent is paying less than the amounts originally assessed by the Secretary, I deem that the amounts are reasonable under all of the circumstances herein.

The motion to approve settlement is **GRANTED**, all representations are accepted as set forth in the motion, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of **\$3,313,477.00** according to the following payment schedule:

Within 30 days of this decision, Respondent will pay \$1,000,000.00. Respondent will make a second payment of \$1,000,000.00 within 120 days of the date of this decision. Respondent will make a third payment of \$1,000,000.00 within 240 days of this decision. Respondent will make a fourth and final payment of \$313,477.00 on or before 360 days from the date of this decision.<sup>4</sup> The parties further agree that if Respondent fails to make any payment in accordance with the terms herein, any remaining penalty due becomes payable in full immediately upon default. Upon the completion of the payment schedule, these cases are **DISMISSED**.

/s/ Janet G. Harner  
Janet G. Harner  
Administrative Law Judge

Distribution:

Dana L. Ferguson, Esq., U.S. Dept. of Labor, Office of the Solicitor, MSH Division, 201 12<sup>th</sup> St. South, Suite 500, Arlington, VA 22202

Eric Silkwood, Esq., Hardy Pence, 500 Lee St. East, Suite 701, Charleston, WV 25301

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<sup>4</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Docket No.	Mine	Full / Partial	Number of Citations in Docket	Number of Citations Settling
WEVA 2011-1314	Harrison/Robinson	F	19	19
WEVA 2011-2248	Marion/Loveridge	F	14	14
WEVA 2011-900	Harrison/Robinson	F	11	11
WEVA 2012-1052	Marshall/McElroy	F	53	53
WEVA 2012-1115	Ohio/Shoemaker	F	3	3
WEVA 2012-1143	Marion/Loveridge	F	2	2
WEVA 2012-1193	Marshall/McElroy	F	1	1
WEVA 2012-1194	Marshall/McElroy	F	70	70
WEVA 2012-1256	Harrison/Robinson	F	2	2
WEVA 2012-1257	Harrison/Robinson	F	9	9
WEVA 2012-1258	Ohio/Shoemaker	F	3	3
WEVA 2012-1460	Marshall/McElroy	F	1	1
WEVA 2012-1489	Marshall/McElroy	F	1	1
WEVA 2012-1642	Harrison/Robinson	F	19	19
WEVA 2012-213	Harrison/Robinson	F	10	10
WEVA 2012-322	Marshall/McElroy	F	18	18
WEVA 2012-471	Marshall/McElroy	F	41	41
WEVA 2012-512	Marion/Loveridge	F	1	1
WEVA 2012-634	Marshall/McElroy	F	15	15
WEVA 2012-706	Harrison/Robinson	F	11	11
WEVA 2012-772	Marshall/McElroy	F	1	1
WEVA 2012-773	Marshall/McElroy	F	14	14
WEVA 2012-827	Harrison/Robinson	F	18	18
WEVA 2012-873	Marshall/McElroy	F	1	1
WEVA 2012-874	Marshall/McElroy	F	22	22
WEVA 2012-97	Marshall/McElroy	F	1	1
WEVA 2012-973	Marion/Loveridge	F	1	1
WEVA 2012-974	Marion/Loveridge	F	5	5
WEVA 2012-975	Marshall/McElroy	F	13	13
WEVA 2012-98	Marshall/McElroy	F	36	36
WEVA 2012-995	Marion/Loveridge	F	1	1
WEVA 2013-50	Harrison/Robinson	F	22	22
WEVA 2013-51	Marion/Loveridge	F	1	1
WEVA 2013-52	Marion/Loveridge	F	26	26
WEVA 2013-1008	Marion/Loveridge	F	1	1
WEVA 2013-1028	Marshall/McElroy	F	1	1
WEVA 2013-1029	Marshall/McElroy	F	40	40

WEVA 2013-1060	Mon/blacksville	F	10	10
WEVA 2013-1079	Marion/Loveridge	F	3	3
WEVA 2013-1080	Marion/Loveridge	F	3	3
WEVA 2013-1087	Harrison/Robinson	F	13	13
WEVA 2013-1088	Ohio/Shoemaker	F	17	17
WEVA 2013-1132	Marshall/McElroy	F	3	3
WEVA 2013-1133	Marshall/McElroy	F	53	53
WEVA 2013-1134	Harrison/Robinson	F	1	1
WEVA 2013-1156	Ohio/Shoemaker	F	12	12
WEVA 2013-1167	Harrison/Robinson	F	16	16
WEVA 2013-1201	Mon/blacksville	F	31	31
WEVA 2013-1213	Marion/Loveridge	F	39	39
WEVA 2013-1226	Marshall/McElroy	F	23	23
WEVA 2013-1251	Ohio/Shoemaker	F	5	5
WEVA 2013-1286	Harrison/Robinson	F	7	7
WEVA 2013-1287	Marion/Loveridge	F	2	2
WEVA 2013-1288	Marion/Loveridge	F	23	23
WEVA 2013-1291	Mon/blacksville	F	27	27
WEVA 2013-1340	Marshall/McElroy	F	16	16
WEVA 2013-397	Harrison/Robinson	F	2	2
WEVA 2013-451	Harrison/Robinson	F	1	1
WEVA 2013-501	Mon/blacksville	F	30	30
WEVA 2013-571	Marshall/McElroy	F	1	1
WEVA 2013-572	Marshall/McElroy	F	22	22
WEVA 2013-573	Ohio/Shoemaker	F	2	2
WEVA 2013-574	Ohio/Shoemaker	F	8	8
WEVA 2013-584	Harrison/Robinson	F	9	9
WEVA 2013-636	Marshall/McElroy	F	29	29
WEVA 2013-672	Marshall/McElroy	F	11	11
WEVA 2013-695	Ohio/Shoemaker	F	1	1
WEVA 2013-696	Ohio/Shoemaker	F	20	20
WEVA 2013-698	Ohio/Shoemaker	F	1	1
WEVA 2013-707	Harrison/Robinson	F	2	2
WEVA 2013-708	Harrison/Robinson	F	27	27
WEVA 2013-790	Marshall/McElroy	F	1	1
WEVA 2013-791	Marshall/McElroy	F	26	26
WEVA 2013-800	Ohio/Shoemaker	F	1	1
WEVA 2013-838	Mon/blacksville	F	61	61
WEVA 2013-883	Harrison/Robinson	F	16	16
WEVA 2013-929	Marshall/McElroy	F	27	27

WEVA 2013-936	Marion/Loveridge	F	3	3
WEVA 2013-956	Harrison/Robinson	F	14	14
WEVA 2013-960	Ohio/Shoemaker	F	8	8
WEVA 2014-9	Ohio/Shoemaker	F	3	3
WEVA 2014-25	Harrison/Robinson	F	17	17
WEVA 2014-29	Marion/Loveridge	F	1	1
WEVA 2014-38	Marion/Loveridge	F	24	24
WEVA 2014-73	Mon/blacksville	F	33	33
WEVA 2014-189	Harrison/Robinson	F	53	53
WEVA 2014-199	Harrison/Robinson	F	29	29
WEVA 2014-217	Ohio/Shoemaker	F	16	16
WEVA 2014-231	Marion/Loveridge	F	36	36
WEVA 2014-298	Mon/blacksville	F	10	10
WEVA 2014-352	Marshall/McElroy	F	2	2
WEVA 2014-353	Marshall/McElroy	F	32	32
WEVA 2014-540	Harrison/Robinson	F	10	10
WEVA 2014-542	Marion/Loveridge	F	2	2
WEVA 2014-566	Marshall/McElroy	F	2	2
WEVA 2014-623	Harrison/Robinson	F	2	2
WEVA 2014-698	Mon/blacksville	F	2	2
WEVA 2014-741	Marshall/McElroy	F	2	2
WEVA 2014-771	Mon/blacksville	F	1	1
WEVA 2014-799	Marion/Loveridge	F	5	5
WEVA 2014-800	Marion/Loveridge	F	1	1
WEVA 2014-801	Marshall/McElroy	F	1	1
WEVA 2014-895	Marion/Loveridge	F	2	2
WEVA 2014-912	Harrison/Robinson	F	2	2
WEVA 2014-1032	Marshall/McElroy	F	1	1
WEVA 2014-2041	Mon/blacksville	F	1	1
WEVA 2014-2042	Mon/blacksville	F	2	2
WEVA 2014-2040	Mon/blacksville	F	5	5
WEVA 2014-1044	Mon/blacksville	F	30	30
WEVA 2014-786	Mon/blacksville	F	30	30
WEVA 2012-1118	Mon/blacksville	F	17	17
WEVA 2012-937	Mon/blacksville	P	19	4
WEVA 2014-541	Marion/Loveridge	P	51	50
WEVA 2014-543	Ohio/Shoemaker	P	15	14
WEVA 2014-567	Marshall/McElroy	P	31	22
WEVA 2014-624	Harrison/Robinson	P	8	2
WEVA 2014-625	Ohio/Shoemaker	P	25	12

WEVA 2014-653	Marion/Loveridge	P	20	8
WEVA 2014-740	Marshall/McElroy	P	14	5
WEVA 2014-770	Harrison/Robinson	P	11	2
WEVA 2014-772	Mon/blacksville	P	25	14
WEVA 2014-784	Marion/Loveridge	P	46	24
WEVA 2014-808	Mon/blacksville	P	8	5
WEVA 2014-835	Marshall/McElroy	P	39	4
WEVA 2014-872	Ohio/Shoemaker	P	73	42
WEVA 2014-913	Harrison/Robinson	P	26	2
WEVA 2014-943	Mon/blacksville	P	61	24
WEVA 2014-1017	Harrison/Robinson	P	15	1
WEVA 2014-1033	Marshall/McElroy	P	31	4
WEVA 2014-1110	Mon/blacksville	P	19	2
WEVA 2014-1124	Harrison/Robinson	P	13	1
WEVA 2011-2408	Marion/Loveridge	P	5	2

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August 21, 2015

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

v.

NALLY & HAMILTON ENTERPRISES,  
INC.,  
Respondent.

## CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2012-749  
A.C. No. 15-19611-281692

Mine: Tinsley Branch

Docket No. KENT 2012-904  
A.C. No. 15-19301-284689

Docket No. KENT 2012-1085  
A.C. No. 15-19301-287868

Mine: Bear Branch

## **AMENDED DECISION AND ORDER<sup>1</sup>**

Appearances: Anthony M. Berry, Esq., U.S Department of Labor, Office of the Solicitor,  
Nashville, TN for the Secretary

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC,  
Lexington, KY & Thomas Hamilton, Esq., Saltsman & Willett, PSC,  
Bardstown, KY for Respondent

Before: Judge Lewis

## STATEMENT OF THE CASE

This proceeding is before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Nally & Hamilton Enterprises, Inc. (“Respondent” or “Nally & Hamilton”) pursuant to Section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d).

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<sup>1</sup> The heading on page 30 of this decision was amended to reflect the cited standard of 30 CFR § 77.1001 rather than 30 CFR §75.1001. Further, the heading on page 40 of this decision was amended to reflect the violation at issue was found to be “Reasonably Likely To Result In A Fatal Injury And Was Significant And Substantial In Nature.”



## PROCEDURAL HISTORY

On November 1, 2011, MSHA Inspector Larry Wayne Stubblefield went to Respondent's Bear Branch Mine to terminate an earlier citation unrelated to the instant proceeding. While there, he issued Citation No. 8366644 and Order No. 8366645 under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). Respondent later contested these citations and they were placed in Docket No. KENT 2012-1085. On November 19, 2011, he returned to Bear Branch Mine as a result of an anonymous complaint filed under Section 103(g) of the Mine Act. While at the mine, Stubblefield issued three citations: Nos. 8366655, 8366656, and 8366657, under Section 104(d)(2) of the Act. Respondent also contested these citations and they were placed in Docket No. KENT 2012-904. This docket also included Citation No. 8344920, which was issued on June 13, 2011 by MSHA Inspector Elmer Hall Jr. under Section 104(d)(1) of the Mine Act.

On May 18, 2013, these matters were set for hearing and consolidated with Docket Nos. KENT 2012-749 and KENT 2014-98. The parties agreed to settle KENT 2014-98 and a Decision and Order Approving Settlement in that matter was issued on May 4, 2015. A hearing was held in Lexington, KY on February 10, 2015 at which the parties submitted testimony and documentary evidence. The parties announced at the outset of the hearing that the two citations contained in Docket No. KENT 2012-749 had been settled<sup>2</sup> and that Citation No. 8344920 in KENT 2012-904 had likewise settled.<sup>3</sup> The hearing was held on the remaining five citations with a total assessed penalty of \$136,926.00. After the hearing, each party submitted a post-hearing brief and a reply brief.

## STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.<sup>4</sup> Those stipulations include the following:

1. Nally & Hamilton Enterprises, Inc. was an "operator" as defined in the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), 30 U.S.C. § 802(d), at Bear Branch (Mine Identification No. 15-19301).

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<sup>2</sup> Under the terms of the settlement, Citation No. 8369000 and Order No. 8369001 were modified to change the type of action from 104(d)(1) issuances to 104(a) citations. Further, the penalty for each was reduced from \$19,300.00 to \$2,500.00. Therefore, the entire settled amount was \$5,000.00.

<sup>3</sup> Under the terms of the settlement, Citation No. 8344920 was modified from 104(d)(1) Citation marked as "Highly Likely," "Fatal," "S&S," and "High Negligence" to a 104(a) Citation marked as "Unlikely," "Permanently Disabling," "Non-S&S," and "Moderate Negligence. Further, the penalty was reduced from \$52,500 to \$1,000.00.

<sup>4</sup> Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred to as "GX" and Respondent's Exhibits will be referred to as "RX."

2. Bear Branch (Mine Identification No. 15-19301) was a “coal or other mine” within the meaning of the Mine Act, 30 U.S.C. § 802(h).
3. At all relevant times, the products of Bear Branch (Mine Identification No. 15-19301) entered commerce, or the miner operations or products affected commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
4. Nally & Hamilton Enterprises, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to 30 U.S.C. §§ 815 and 823.
5. 30 C.F.R. §§ 77.1001, 77.1713(a), and 77.1005(a) are each mandatory health and safety standards as the term is defined in Section 3(l) of the Mine Act.
6. Payment by Respondent of the proposed penalty of \$80,700.00 in KENT 2012-1085 will not affect Respondent’s ability to remain in business.
7. Payment by Respondent of the proposed penalty of \$56,226.00 for the remaining violations in KENT 2012-904 will not affect Respondent’s ability to remain in business.
8. The citations and/or orders contained in the Exhibits A attached to the Secretary’s petitions in KENT 2012-1085 and KENT 2012-904 are authentic copies of the citations and orders at issue in this proceedings with all appropriate modifications and abatements, if any.
9. Citation No. 8366644 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 1, 2011.
10. Order No. 8366645 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 1, 2011.
11. Order No. 8366655 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.
12. Order No. 8366656 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.

13. Order No. 8366657 was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent on November 19, 2011.

14. Respondent produced 383,754 tons of coal at Bear Branch Mine in 2010.

(JX-1, Tr. 8).<sup>5</sup>

## **DOCKET NO. KENT 2012-1085**

### **I. Summary of Testimony**

On November 1, 2011 Inspector Larry Wayne Stubblefield<sup>6</sup> went to Bear Branch Mine to review ground control revisions submitted in response to a citation (unrelated to the instant matter) issued on the safety benches.<sup>7</sup> (Tr. 19-20, 46-47). He was conducting an E-16 spot inspection to terminate that citation.<sup>8</sup> (Tr. 21). Upon arrival, he reviewed the mine file. (Tr. 21-22).

Stubblefield arrived at Bear Branch at around 1 p.m. and traveled to the Cow Head area. (Tr. 22). At around 1:30-1:40 p.m. he went to the Beatty Branch area and measured the highwall at the Leatherwood Seam 5A pit. (Tr. 22-23). He used a TruPulse 200 Laser Rangefinder and inclinometer and determined that the area was 265 feet long and 89 feet tall. (Tr. 25, 27, 32).

Developing such a highwall involved finding a coal seam and measuring with a rock level to determine where the highwall should be established. (Tr. 103). A dozer then installed a road to the top bench (where the drilling occurs). (Tr. 103, 126). Once the location was determined the operator removed trees and brush to create a blasting pad for the drill and set up a blasting plan (or series of holes on a grid). (Tr. 48-49, 103-104, 126-127, 138, 219). The drill could not run while vegetation was in place. (Tr. 49). Removing loose material aids in keeping the holes open. (Tr. 219-220). Holes are then drilled down to the coal level. (Tr. 126). The last hole was placed two or three feet from where the highwall should be established. (Tr. 49, 138). However, blasting is not an exact science, and the distance the wall will form behind the last hole

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<sup>5</sup> Hereinafter the transcript will be cited as “Tr.” followed by the page number.

<sup>6</sup> Larry Wayne Stubblefield was present at the hearing and testified. (Tr. 14). At the time of the hearing, Stubblefield was a surface coal mine inspector specialist. (Tr. 14). In that capacity, he inspected surface coal mines, prep plants, and facilities, investigated accidents, and reviewed plans. (Tr. 15). He had extensive experience, training, and certifications. (Tr. 15-16). He had conducted highwall examinations for 10-12 years. (Tr. 16).

<sup>7</sup> The highwall inspections here were unrelated to an earlier accidents or fatalities, though MSHA may have discussed those accidents in meetings. (Tr. 203-204). Stubblefield did not know if highwall violations in his district increased at this time. (Tr. 204).

<sup>8</sup> A spot inspection is not an inspection of the entire mine, but instead an inspection a specific area, a specific item, a complaint, or some other particular thing. (Tr. 21).

depends on the strata of rock. (Tr. 49-50, 77-78). The break can be farther back than expected. (Tr. 77-78). As a result, vegetation must be removed some distance behind where the wall is planned, though Stubblefield did not know the exact distance. (Tr. 28-29, 49-50, 138-139). A powder crew then loads and shoots. (Tr. 127). If more of the wall is blasted away than intended, excavators can be used to remove vegetation close to the edge. (Tr. 78-79).

A dozer or excavator could be used to check if material on the side of the wall was solid. (Tr. 51, 116-117). This first occurs when there is 10 feet of exposed wall then again as each 10 to 20-foot step of material is removed. (Tr. 118-119). Equipment can be used to reach up and check areas and, if the rock is loose, the equipment will take it down. (Tr. 117, 128-129). Soft slate can be smoothed down while rocks are pulled out. (Tr. 129). If a rock is stuck or does not fall, it is presumably stable and the operator will not pry it loose. (Tr. 117, 129-130). Eventually the wall would be over 60 feet tall and too high to reach with equipment, but the higher materials should already be cleaned on earlier steps. (Tr. 119, 134). The highwall cleaning process was part of an explicit policy in place that was discussed with dozer operators. (Tr. 133).

At hearing, Stubblefield reviewed Respondent's ground control plan in place on the day at issue (RX-1) and the revised ground control plan that was put submitted on November 22, 2011 (RX-2). (Tr. 55-56). That earlier plan contained nothing about removing trees or root balls from the crest of the highwall. (Tr. 57). The earlier plan also did not define a "safe distance" for a buffer zone. (Tr. 57-58, 104). Respondent would just remove any material it believed could fall in and would leave anything that it believed was stable, regardless of distance. (Tr. 105). The revised plan developed by MSHA and Tracy Creech defined that distance as ten feet from the edge of the high wall.<sup>9</sup> (Tr. 59, 80, 104). However, no citations were issued November 1 for violation of the ground control plan; the citations were issued for violations of mandatory standards. (Tr. 57, 81). Since the revision, failure to remove material within 10 feet of the wall would be a violation of the ground control plan and the standard, but the standard predated the revision. (Tr. 81). At some point Creech likely talked to employees about the new ground control plan. (Tr. 136-137).

Stubblefield found that the instant highwall had loose tree roots, trees standing on the edge of the wall and dirt, root balls, and large rocks hanging over the crest.<sup>10</sup> (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p.1-6). The rocks appeared brown and consisted of shale. (Tr. 27). Stubblefield and Charles Baker could not tell the exact distance the trees were from the edge and

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<sup>9</sup> Tracy Creech was present at hearing and testified. (Tr. 120). At the time of the hearing he was employed as safety coordinator for all of Respondent's mines. (Tr. 120-121, 130-131). In that capacity he would travel with inspectors, check equipment, conduct training, deal with citizen complaints, and attend hearings. (Tr. 121). He had extensive experience, training, and certifications. (Tr. 121-122). He went to Bear Branch once a week, though he could not recall the last time he was there before November 1, 2011. (Tr. 131-132). Creech was not present when the citations were issued, he arrived later. (Tr. 132-133).

<sup>10</sup> A root ball occurs when timber is removed and the roots, medium-sized rocks and dirt, remain and hang. (Tr. 24, 53). Root balls range in size from 5 to 100 pounds. (Tr. 54, 88-89).

did not go to the top of the highwall to find out.<sup>11</sup> (Tr. 51-52, 58, 107). Stubblefield believed they were right up to the edge. (Tr. 52, 91). Baker believed they were 15-20 feet from the edge. (Tr. 107). No trees were hanging over the crest, which would make the trees more likely to fall. (Tr. 52).

Inspector Ratliff, who had issued the previous citation, told Stubblefield he had informed Respondent's mine foreman Charles Baker that the top of highwalls needed to be cleaned. (Tr. 19-21, 72). Stubblefield did not know if Ratliff mentioned root balls or trees. (Tr. 47, 72). Baker did not recall this meeting and did not recall being told there was a problem with vegetation on the crest or hanging over the highwall. (Tr. 106).

Stubblefield believed Respondent should have scaled back loose material during the initial development of the wall to ensure it was away from the edge. (Tr. 28, 30, 76). The buffer zone should have been 10-12 feet farther back than the anticipated wall location to ensure nothing was on the edge of the highwall. (Tr. 76-78). Based on the conditions present, this buffer zone was not created. (Tr. 78). It was possible the blast removed material farther back than Respondent anticipated. (Tr. 78, 134-135). Creech believed this is what happened. (Tr. 139-141). However, he conceded that even if this occurred, Respondent was responsible for ensuring the material was back a safe distance. (Tr. 141). He posited Respondent could have used a chainsaw to prune back material. (Tr. 142). He believed it was also possible a dozer had removed a rock from under the roots. (Tr. 140).

At hearing, Baker testified that he saw only little, fine roots and grass hanging over the edge and that they were not dangerous. (Tr. 106, 113). He also recalled that dozers and excavators were always at the wall checking for loose material, though he could not recall the last date this was done before the inspection. (Tr. 118). Creech also did not believe that anything present was dangerous; the roots were fine, barely hung off the edge, and none weighed 100 pounds. (Tr. 123-124, 130). He had never seen root balls fall from a highwall. (Tr. 124). The trees appeared stable. (Tr. 124). The presence of this material did not mean miners were not cleaning the wall. (Tr. 134). He did not know if the dozer operators had followed the cleaning policy, but they always did so when he was present. (Tr. 133). Blue marks on the brown rock showed places where the dozer blade had attempted to clean material. (Tr. 135-136). Creech saw other places that looked like material had been torn out. (Tr. 135-136). Creech believed Respondent had done a good job of removing hazardous material and that the foreman did not believe the remaining roots were a danger. (Tr. 137).

As a result of this condition, Stubblefield issued a 104(d)(1) citation, No. 8366644 (GX-1), under Section 77.1001. (Tr. 17, 22-23, 28, 58). That standard required loose, hazardous material be stripped back a safe distance from the top of the highwall. (Tr. 28). If that cannot be done, barriers must be put in place to prevent material from falling into the pit. (Tr. 28-29).

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<sup>11</sup> Charles Baker was present at hearing and testified. (Tr. 98). He had worked for Respondent from 1997-2013 as a dozer operator and foreman. (Tr. 99, 238-239). In that capacity he conducted pre-shift and on-shift examinations of highwalls, berms, and dumping areas. (Tr. 101). Dangers included loose materials and hill seams. (Tr. 101). He had extensive experience, training, and certifications. (Tr. 99-100, 241). There was no special certification for highwall examiner, but regular training included instruction on highwalls. (Tr. 241-242).

The citation was marked as permanently disabling because root balls, rocks, or trees falling 89 feet into the pit and striking a miner or the cab of a piece of equipment was highly likely to result in such an injury. (Tr. 31-32).

The citation was marked as highly likely because in Stubblefield's experience, the root balls and material were highly likely to fall under normal continued mining activities. (Tr. 33, 68-69, 93-94). Stubblefield could not say how large that material would be. (Tr. 70). But he had seen material, including root balls, fall from walls and strike equipment, and even a miner, during his career. (Tr. 33, 53-54, 64). He had seen trees fall from highwalls and root balls can fall even if the trees do not. (Tr. 33, 53). However, no material was falling and neither the trees nor the root balls appeared unstable when the citation was issued. (Tr. 54, 58, 63-64, 68). But, Stubblefield was not present in the morning and did not know what was cleaned up before he arrived and he did not ask. (Tr. 64). It had taken a week or two to develop the wall to that point. (Tr. 70, 108, 114). Stubblefield believed it was possible that nothing had fallen in that time. (Tr. 70). Baker testified that at no time since the development of the highwall had any trees or root balls fallen into the pit. (Tr. 107-108). Stubblefield did not know if Respondent had previous citations for this type of condition. (Tr. 80). Baker and Creech could not recall any citations for root ball material or fine roots hanging over the wall. (Tr. 111-112, 125). However, Creech believed more citations were issued later at other mines. (Tr. 125-126).

The miners in the area were in loaders that ranged from right under the highwall to 10-50 feet away. (Tr. 23). The loaders stayed perpendicular to the wall, so the closest the cabs could get was approximately 12-20 feet. (Tr. 60-61, 109). The loaders had rollover protection that prevented the cab from being crushed. (Tr. 61, 67-68, 109, 125). The equipment weighed more than a root ball or a tree. (Tr. 61). However, the machines also had sloped windshields that could be smashed in the event of a fall. (Tr. 66-67). The equipment did have falling object protection consisting of a thick piece of metal sticking out over the cab. (Tr. 67-68, 109, 125). This fall protection prevented material from crushing the cab or going through the windshield. (Tr. 110). The windshield was made of MSHA-approved safety glass and was not cracked or broken. (Tr. 110-111). Baker did not know what the weight limit was for the fall protection on the equipment. (Tr. 114). Creech was uncertain which equipment was in the pit. (Tr. 125).

Stubblefield believed only one person would be affected if something fell and marked the citation to reflect that belief. (Tr. 34, 76). However, there were two loaders (each with one miner) exposed while cleaning a pit under the highwall. (Tr. 23, 34, 59-60, 76).

The citation was marked as high negligence and an unwarrantable failure because it was extensive, had existed for more than one shift, and was obvious to anyone entering the area. (Tr. 34-36, 71). Baker was in the area and should have known that the area needed to be cleaned. (Tr. 35-36). It would have taken several shifts to remove the overburden over a 265-foot area. (Tr. 30). The record book also showed that the condition existed for several shifts. (Tr. 36). Stubblefield believed there were no mitigating factors. (Tr. 71). Stubblefield did not believe the fact that the ground control plan did not define "safe distance" was a mitigating factor. (Tr. 71). The unwarrantable failure designation was also supported because Ratliff had discussed the issue on October 12, 2011, with Baker, though it was mostly based on the conditions observed. (Tr. 71-74, 85-87).

Stubblefield testified that there was no safe way to correct this condition. (Tr. 61-62). Respondent could not place someone back on top of the wall to clean the material and the top of the wall was too high for equipment to reach. (Tr. 29-30, 62). Instead, Stubblefield testified that Respondent asked if they could use an excavator to scoop the coal out without exposing anyone directly underneath and Stubblefield allowed it.<sup>12</sup> (Tr. 29-30). Baker recalled that Stubblefield suggested using the excavator. (Tr. 112). Using an excavator gave an additional 18 feet of distance between the cab and the wall as compared to the loader. (Tr. 62-63). Stubblefield did not know if miners would be exposed in the excavator, but it was the safest way given the equipment present to allow Respondent to recover the coal and to remedy the problem. (Tr. 29-31, 37, 63). He had seen this technique used other times. (Tr. 37, 63).

Once the coal was removed, the citation was terminated by placing a berm 30-40 feet from the wall to prevent entry and reclaiming the wall with backfill from the next pit. (Tr. 30, 41, 64-65, 111, 127-128). Baker believed the berm was 15-20 feet away. (Tr. 111). The area was bypassed to limit exposure. (Tr. 41). Backfilling and reclaiming were done with dozers and trucks and were a normal part of the mining process. (Tr. 65, 70, 92-93, 111). Dozers would push the shot and rock trucks would backfill close to the top of the wall. (Tr. 93, 111, 127-128). During that process, miners were necessarily within 12 feet of the wall. (Tr. 65, 70). It was not possible to keep miners 30 feet from the wall during reclamation. (Tr. 65, 70). However, it may have been possible to do some reclaiming without exposing miners. (Tr. 92).

Stubblefield reviewed the on-shift record book back to October 17, 2011, and found that no hazardous conditions were reported through the day at issue. (Tr. 38-39). None of the conditions would have occurred within the most recent shift. (Tr. 40). The condition would have existed whenever Respondent made the first cut. (Tr. 40). Baker conducted the examinations, but did not list hazards in the book. (Tr. 74, 108). There may have been as many as 100 inspections in the one to two week period the wall was in development. (Tr. 114). Baker testified he did not list any condition because there were no hazards. (Tr. 109, 115).

As a result of this condition, Stubblefield issued a 104(d)(1) Order, No. 8366645 under Section 77.1713(a). (GX-2, Tr. 18, 38). That standard required someone designated by the operator to conduct an examination of all the working areas at surface mines or facilities during each working shift. (Tr. 38). The goal of the standard was to ensure that working conditions were safe and all hazardous conditions were corrected, recorded, and reported. (Tr. 38, 247). The foreman should have seen the material hanging over the crest and the trees on the edge and prevented miners from working under the highwall. (Tr. 38-39).

The citation was marked as highly likely to result in a permanently disabling injury because failure to conduct an adequate exam exposed miners to hazards that were highly likely to cause injury. (Tr. 42). The history of mining has shown that inadequate exams can lead to serious injuries. (Tr. 42). Under continued normal mining conditions, the underlying citation would have caused an injury. (Tr. 42-43).

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<sup>12</sup> An excavator is a track backhoe, a mast, and a bucket. (Tr. 37). Stubblefield believed the instant backhoe was a 335 Cat or something larger. (Tr. 37). It could have reached out 30-35 feet with the bucket and rake back with the mast. (Tr. 31, 37).

The citation was marked as affecting two people because there were two people in the area where the inadequate examination was conducted. (Tr. 43, 76).

The citation was also marked for high negligence because there was a failure to comply with a mandatory standard, and the violation was obvious, extensive, existed for a long time, and Respondent's agent was present. (Tr. 43-44). There was no record of a condition or corrective action and the foreman allowed miners to work in the area. (Tr. 44). The foreman was an agent and should have been aware that the wall was not in compliance. (Tr. 44). Further, foremen received in-depth and annual 6-hour refresher training to recognize hazards on highwalls, working areas, pits, roads, berms, weather conditions, and areas where miners work or travel. (Tr. 44-45). The condition was obvious and it would be impossible for the foreman not to see it. (Tr. 39).

This Order was terminated when the trees and root balls were reported in the record book. (Tr. 41, 74-75). Further, a berm was placed 30-40 feet from the wall and the area bypassed to prevent exposure. (Tr. 41, 74-75).

## **II. Contentions of the Parties Regarding Citation No. 8366644**

With respect to Citation No. 8366644, the Secretary asserts that Respondent violated 30 C.F.R. §77.1001, that this violation was Highly Likely to result in Permanently Disabling injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-1)(*Secretary's Post-Hearing Brief* at 14-22). The Secretary believes that the proposed penalty of \$35,700.00 is appropriate. (*Id.* at 23-24).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 9-10). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S or an unwarrantable failure to comply. (*Id.* at 13-15). (*Id.* at 12-15). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the citation is found valid, reduced pursuant to its proffered gravity and negligence determinations.

## **III. Findings of Fact and Conclusions of Law Regarding Citation No. 8366644**

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the ALJ's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8<sup>th</sup> Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).



a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1001.

On November 1, 2011, Inspector Stubblefield issued a 104(d)(1) Citation, No. 8366644, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Mine Operator has failed to strip loose hazardous material a safe distance from the top of the highwall in the Leatherwood Seam (5A) Pit of the Beatty Branch area of the mine, for a distance of at least Two Hundred and Sixty-Five Feet (265'), as measured with an MSHA issued TruPulse 200 Laser Rangerfinder and Inclinometer, Serial #014278. Loose material in the form of tree roots and dirt are hanging over the edge of the wall for the entire distance, and loose rocks are present in some areas, extending back through the pit from where the drill bench begins, in advance of where the mining sequence stopped. Numerous trees are also standing on or, very near the crest of the wall. This condition was discussed with the Mine Foreman during a mine visit on 10/12/11 for Investigation and Recommendation of Ground Control Plan Revision submitted by the Operator. The condition is obvious to anyone entering the pit, and should have been corrected prior to mining. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of Mine Management. Order #8366643, is issued today to the Mine Operator for failure to comply with his acknowledged Ground Control Plan in the same area. Order #8366645 is issued today for an inadequate on-shift examination of this area.

(GX-1). The document also discussed termination, stating:

The Mine Operator is allowed to, and has used an excavator, placed adjacent the highwall, at mast length, to remove the coal from the affected area, so as to not expose any miners underneath the highwall in the affected area. The area is then barricaded/bermed off to prevent entry.

(GX-1).

The cited standard, 30 C.F.R. §77.1001 ("Stripping; loose material."), provides the following:

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

30 C.F.R. §77.1001.

At hearing, inspector Stubblefield testified the instant highwall had loose tree roots, trees standing on the edge of the wall and dirt, root balls, and large, brown, shale rocks hanging over

the crest. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p.1-6). The presence of this material indicated that it was not stripped in accordance with the standard. The Secretary cited several cases in his brief where Commission ALJ upheld violations under the cited standard for loose rocks, dirt, trees, and roots. *Sunny Ridge Mining Co., Inc.*, 17 FMSHRC 648 (Apr. 1995)(ALJ Fauver) *aff'd in rel. part* 19 FMSHRC 254 (Feb. 1997); *Gatliff Coal Company, Inc.*, 13 FMSHRC 368, 378-379 (Mar. 1991)(ALJ Melick); and *Marty Corp.*, 7 FMSHRC 150, 150-152 (Jan. 1985)(ALJ Melick)(citation upheld for exposed roots and trees attached to loose material even though earlier attempts to remove the trees were unsuccessful). Therefore, I find Respondent violated 30 C.F.R. §77.1001 with respect to Citation No. 8366644.

In its brief, Respondent contended that this citation should be vacated and raised several arguments to support that position. However, none of those arguments were persuasive. Specifically, Respondent argued that Stubblefield had conceded at hearing that he did not see any instability in the highwall or anything that appeared ready to fall into the pit. (*Respondent's Post-Hearing Brief* at 10). Further, Stubblefield found no instability in the root balls. (*Id.*). Finally, while Stubblefield testified the trees were on the edge, he further stated that they did not appear unstable and that he could not tell how far the trees were from the edge. (*Id.*). In short, Respondent argued that the material was not loose and therefore the citation should be vacated.

Respondent correctly recounts the Inspector's testimony but draws legal conclusions unsupported by that testimony. Stubblefield testified that he did not see any material fall into the pit. (Tr. 54, 58, 63-64, 68). He likewise testified that he did not believe any of the material was ready to fall into the pit. (Tr. 54, 58, 63-64, 68). However, as noted above Stubblefield credibly testified the cited material was loose. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, GX-4 p. 16). Nothing presented at hearing undermines that testimony. A plain reading of the standard shows that the inquiry at hand is not whether the material has fallen or if a fall is imminent, but instead, whether the material is loose. 30 C.F.R. §77.1001. Respondent presented no authority for the proposition that "loose" means material has fallen or is about to fall. Material can be loose but not fall. Similarly, material can be loose and be in no danger of an imminent fall. Therefore, Respondent's argument does not undermine the finding that the cited material was loose and therefore violated 30 C.F.R. §77.1001.

b. The Violation Was Unlikely to Result in Lost Workday/Restricted Duty Injuries To One Miner And Was Not Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Citation No. 8366644 as being "Highly Likely" to result in a "Permanently Disabling" injuries to a miner and that the condition was S&S. (GX-1). With the exception of the number of persons affected, these determinations were not supported by a preponderance of the evidence.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury

or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §77.1001.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Material hanging from the highwall was likely to fall under continued normal mining operations. (Tr. 33, 68-69, 93-94). Material falling from the highwall would contribute to the danger of a miner being struck by material. Stubblefield testified that he had seen miners struck by material falling from highwalls in the past. (Tr. 33, 53).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was not met. The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Id.* at 1281. Importantly, it stated that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996). The likelihood of the hazard being realized must be considered assuming normal continued mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (Jun. 1986).

Analysis under the third prong of *Mathies* hinges on whether a miner would be injured, assuming that the hazard is realized. In this instance, the hazard contributed to was the hanging material falling into the pit. However, even if material were certain to fall, an injury would not necessarily be likely. At hearing, Inspector Stubblefield was unable to say how large the material would be in the event it would fall. (Tr. 70). Stubblefield testified that the root balls, which were actually hanging over the edge of the wall, weighed between 5-100 pounds. (Tr. 54, 88-89). Baker and Creech credibly testified that the roots were “fine,” weighed less than 100 pounds, and posed no danger in the event of a fall. (Tr. 106, 113, 123-124, 130). Perhaps more importantly, Stubblefield agreed with Respondent’s witnesses that the cited equipment had roll protection to prevent the cabs from being crushed. (Tr. 61, 67-68, 109, 125). The equipment weighed more

than a root ball or a tree. (Tr. 61). There was also falling object protection protecting the windshield. (Tr. 67-68, 109-110). Further, the windshield was made with MSHA-approved safety glass that was in good condition. (Tr. 110-111).

As discussed *intra*, I specifically find that the Secretary failed to carry his burden of proof that the trees in the cited area – which would have been the heaviest objects testified to—actually stood to near to the edge of the highwall that they would be considered part of the “loose hazardous material” that should have been stripped for a safe distance from the top of the highwall. The inspector did not go to the top of the highwall, where perhaps more accurate measurements could have been made of the actual distance(s) from the edge of the highwall to where the tree line/trees were located. Given the angle from which the photographs presented by the Secretary were taken and the contradictory assertions by the Respondent to the actual distances at issue, I was left to conjecture such.

In short, the Secretary failed to establish that if material fell from the highwall it would be anything more than small, fine pieces of root and small rocks. If this small material fell from the highwall and happened to strike one of the pieces of equipment, the safety measures built into the equipment would protect the cab and prevent injury. Therefore, I find that an injury was not reasonably likely to occur in the event of material falling from the highwall. As a result, the third prong of *Mathies* is not met.

In his brief, the Secretary correctly noted that it need not prove that material was likely to fall, but rather that a fall would be reasonably likely to result in a reasonably serious injury. (*Secretary's Post-Hearing Brief* at 17). In fact, the Secretary argued that an injury was highly likely to occur. (*Id.* at 15-16). He noted that if a tree or root ball struck the cab of a miner, the injury would be at least permanently disabling. (*Id.* at 16). The Secretary contended that Stubblefield had taken the size of the root balls and the protections afforded by the vehicle into account in making his assessment. (*Id.*). Finally, the Secretary noted that cabs do not offer perfect protection and that even seemingly small amounts of material can be a fatal weight. (*Id.* at 17).

As noted *supra*, the Secretary failed to establish the size and weight of the objects that were near the edge of the highwall. Further, even if the material weighed 100 pounds, the Secretary failed to establish that the cab of the equipment would be damaged and miners inside would be injured in the event of a fall. Respondent presented compelling evidence regarding the safety of the equipment. (Tr. 61, 67-68, 109-111, 125). Nothing the Secretary presented, including Stubblefield's undocumented assertion that he considered those safety measures, undermines that evidence. In light of the Secretary's burden in this proceeding, these failures are fatal to its claim that the citation was S&S.

In addition, to support its argument, the Secretary pointed to two previous fatal injuries resulting from material falling from a highwall. (*Id.* at 16-17). However, those previous accidents were substantially different from the situation here. In one accident, “[T]he rock which struck the operator's cab of the highwall drill measured approximately seven and one-half feet long, seven feet wide, and four feet thick.” “MSHA-Coal Mine Fatal Accident Investigation Report, Fall of Rick, October 5, 1998,” <http://www.msha.gov/FATALS/1998/FTL98C23.htm> (last visited July

17, 2015). The Secretary provided no evidence that any of the material cited here approached the massive size of rock that fell in that incident. A piece of rock measuring 7.5' by 7' by 4' would weigh considerably more than one hundred pounds. Similarly, the second accident involved a miner being struck when outside of his equipment. MSHA – Coal Mine Fatal Accident Investigation Report: Fatality #23 – October 07, 2002 Falling, Rolling or Sliding Rock/Material – Surface – Alabama – Tuscaloosa Resources, Inc. – Carter Mine,” <http://www.msha.gov/FATALS/2002/FTL02c23.htm> (last visited July 17, 2015). The Secretary presented no evidence to show that miners in the instant matter were on foot. Therefore, the fatal injuries described in those fatal reports provide little support for the Secretary’s position.

Having determined that this situation does not meet the third prong of the *Mathies* test and is therefore not S&S, it is not necessary to consider the fourth prong. However, for the purpose of determining the gravity of this violation, it is still necessary to consider the severity of the injury that would result if a miner were affected.

In the unlikely event that a large piece of material was to fall on the cab of the equipment, a miner could suffer scrapes, bruises, and other similar injuries from being jostled. As a result, a finding of “Lost Workday/Restricted Duty” would be appropriate. Therefore, this citation was non-S&S and unlikely to occur, but if an incident did occur it would result in lost workday/restricted duty injuries.

c. Respondent’s Conduct Is Best Characterized As “Low” Negligence rather than “High” Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Stubblefield found that the operator’s conduct was highly negligent in character and the result of an unwarrantable failure. (GX-1).

Standard 30 C.F.R. §100.3(d) provides the following:

(d) Negligence. Negligence is 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. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required 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. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: “The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances.” Conversely, moderate negligence is shown when “[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating

circumstances.” Low negligence is reserved for situations where there are “considerable” mitigating circumstances.

I find that Respondent should have known about the violation but that there were considerable mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator’s agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, with responsibilities that are crucial to the mine’s operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000). Further, “in carrying out... required examination duties for an operator, an examiner... may appropriately be viewed as being ‘charged with responsibility for the operation of . . . part of a mine,’ and, therefore, the examiner constitutes the operator's agent for that purpose.” *Rochester and Pittsburg Coal Co.*, 13 FMSHRC at 194 quoting 30 U.S.C. §802(e).

In the instant matter, both Creech and Baker were members of management. (Tr. 99,120-121, 130-131, 238-239). Both had seen the material on the highwall. (Tr. 106, 113). Further, Baker conducted the pre-shift examinations of the cited area. (Tr. 74, 108). Both Baker and Creech seemed aware that there was material near the edge of the wall (though they characterized it as fine). (Tr. 106, 113, 123-124, 130). As discussed *supra*, this material was a violation of the cited standard. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

I find that the record demonstrates there were considerable mitigating circumstances. While both Baker and Creech saw the material hanging, they both credibly testified that they had seen similar material on walls throughout their careers without incident. (Tr. 111-112, 125). Respondent’s witnesses testified that they genuinely believed that the material present posed no hazard because of its small size and the other safety measures in the area. (Tr. 106, 113, 123-124, 130). Respondent’s witnesses testified that while the material was present, it did not appear to be unstable. (Tr. 124). Inspector Stubblefield largely corroborated that testimony. (Tr. 54, 58, 63-64, 68).

In addition, Baker and Creech credibly testified that Respondent took measures to ensure that material was back away from the edge of the wall after blasting. (Tr. 118, 133-137). These efforts were simply less effective than anticipated. Relatedly, the Secretary failed to establish that the material was as close to the edge as originally alleged. Baker testified that the trees were 15-20 feet back from the edge of the highwall. (Tr. 107). Stubblefield testified that he believed that the material was right near the edge. (Tr. 52, 91). However, he could not say for certain that the material was at that location. (Tr. 51-52, 58). Further, he took no action to confirm the location of the trees. The photographs were inconclusive. Therefore, I find that the Secretary failed to meet his burden with respect to the location of the trees.

The Secretary provided several arguments to support his contention that the “High” negligence designation was appropriate. However, none of those arguments were compelling.

For instance, the Secretary argued Stubblefield noted that the trees on the edge, the roots, and the other loose material were obvious to anyone entering the area. (*Secretary's Post-Hearing Brief* at 18). The Secretary stated that Baker, by his own admission, conducted over 100 examinations in the area but failed to mark the condition as a hazard, but argues that the failure to recognize a hazard does not excuse Respondent from obligation to correct the hazard. (*Id.*).

As noted *supra*, the Secretary failed to establish that the trees at issue were close to the edge of the highwall. Beyond that, Respondent does not maintain that it was unaware of the existence of the hanging roots. In fact, its witnesses testified that they saw the material at issue. Instead, the evidence suggests that Respondent was not aware that the roots constituted a hazard. The roots were small, appeared fine, and showed no obvious signs of an imminent fall. Though the roots were obvious, the hazard they posed was not. While the Secretary is correct that a hazard existed and that Respondent was not excused from its obligation to correct the hazard simply because it was not obvious, I find that a reduction in the assessed negligence is appropriate.

Further, the Secretary argued that Baker had conceded that a hypothetical stable tree three feet from the edge of the highwall should have been removed. (*Secretary's Post-Hearing Brief* at 18). The record supports this assertion: Baker did testify to that effect. (Tr. 105). However, as noted *supra*, the Secretary failed to establish that the trees were within three feet of the edge of the highwall. It was at least as likely that the trees were 15-20 feet away from the edge. (Tr. 107). Therefore, Baker's comment regarding the hypothetical tree three feet from the edge was irrelevant.

The Secretary also argued that while the condition likely existed because more material had been blasted than intended, Respondent should have then cleaned the material after the blast. (*Secretary's Post-Hearing Brief* at 18-19). In support, the Secretary notes that Creech agreed that Respondent did not do a good job of cleaning the, "little clumps of roots that Mr. Stubblefield considers dangerous." (*Id.* at 19). Baker and Creech credibly testified that Respondent made efforts to ensure the area was clean. (Tr. 118, 133-137). Creech simply conceded that the fine roots, which Respondent failed to recognize as a hazard, were not cleaned. For the reasons stated *supra*, Respondent's failure to recognize this hazard was negligent, but somewhat reasonable because that hazard was not obvious.

While nothing excuses Respondent's failure to remove the loose, hanging material, a finding of "High" negligence would be inappropriate given the circumstances. Instead, I find Respondent's actions are better characterized as displaying "Low" negligence.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995).

The Commission formulated a six-factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

**1. Extent Of The Violative Condition**

Stubblefield determined that the condition was spread across the 265-foot crest of the highwall. (GX-1). There was a large amount of roots and loose material dangling over the highwall. (Tr. 22-24, 26-27, 58, 64, 88-89, 91, 106, 1112, 123-124, 130). Nothing presented by Respondent refutes this testimony. Therefore, the instant violation was extensive.

**2. The Length of Time The Violation Existed**

At hearing, Inspector Stubblefield credibly testified that this condition likely existed from the time the area was first developed. (Tr. 40). The loose material likely occurred when more material than intended was removed during the initial blasting of the highwall. (Tr. 78, 134-135, 139-141). Baker testified that it had taken 1-2 weeks to develop to that point. (Tr. 114). The book indicated that development started on October 17, 2011. (Tr. 38-39). Therefore, the condition had existed for several shifts.

**3. Whether the violation is obvious or poses a high degree of danger**

The violation at issue was not particularly obvious and did not pose a considerable danger. As discussed with respect to the negligence designation, *supra*, the roots were obvious but the hazards those roots posed were not. Further, whatever hazards the trees may have presented were not obvious because the trees were not as close to the edge as originally cited. Further, as discussed with respect to gravity, *supra*, the condition was unlikely to occur and was not S&S. The roots were small and the equipment was provided with fall protection. (Tr. 67-68, 106, 109-113, 123-125, 130). Further, the material appeared stable. (Tr. 124).

**4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.**

The evidence does not show any meaningful notice regarding the cited condition. Respondent had received no previous citations for material on top of the highwall. No one had told Respondent that it was on notice that additional efforts were needed. Further, Baker and Creech credibly testified that they had seen highwalls in the cited condition their entire careers without receiving any citations. (Tr. 111-112, 125).

The Secretary alleged that Respondent received notice regarding the cited condition in three ways. I will address each argument in turn. First, Respondent had previously received citations on its safety benches. (*Secretary's Post-Hearing Brief* at 19-21). Respondent argued that safety benches are part of the highwall and therefore these citations provided notice



regarding other issues on the highwall. (*Secretary's Post-Hearing Brief* at 21 citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1263-1264 (Aug. 1992).

The Secretary is correct 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 a standard.” *San Juan Coal Co.*, 29 FMSHRC 125, 131 (2007). Further, the Commission “has rejected the argument that only past violations involving the same regulation and occurring in the same area within a continuing time frame may properly be considered when determining whether a violation is unwarrantable.” *Id.*; see also *Black Beauty Coal Co. v. Federal Mine Safety and Health Review Com’n*, 703 F. 3d. 553, 561 (D.C. Cir. 2012). However, that case law is not so broad as to stand for the proposition that any violation on a highwall provides notice of any other violation on a highwall, however tenuously related. The Secretary presented little to no evidence regarding the circumstances surrounding the previous citations on a safety bench. I have no way to determine what caused the issuance of these citations and what relationship, if any, they bear to the instant matter. While it is possible that these citations provided some notice, I cannot make that determination on the bare record present here. In light of the Secretary’s burden, I find he failed to establish that the previous citations provided notice regarding the instant condition.

Second, the Secretary argued that Ratliff told Stubblefield he had discussed the issue in the past with Respondent. (*Secretary's Post-Hearing Brief* at 21). The Secretary noted that past discussions with MSHA regarding violative conduct place an operator on “heightened scrutiny that it must increase its efforts to comply with the standard.” (*Id.* at 14 *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (Jun. 2001) and *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007)). Inspector Ratliff was not present at hearing and all evidence suggesting that he discussed the cited condition with Baker comes from Stubblefield’s hearsay conversation. (Tr. 19-21, 73). Stubblefield did not know if Ratliff mentioned root balls or trees. (Tr. 47, 72). While hearsay is admissible under Commission rules, hearsay evidence is accorded only the weight warranted by the circumstance. *REB Enterprises, Inc.*, 20FMSHRC 203, 206 (1998)( the Commission held that hearsay evidence is admissible but that the judge has discretion to “determine whether it was reliable and entitled to any probative weight.”)(citations omitted). Here, one party to the alleged conversation, Baker, was present at the hearing and testified. He credibly stated that he did not remember this conversation or any warning regarding the cited issue from Ratliff. (Tr. 106). In light of the Secretary’s burden, I find he failed to establish that Ratliff provided previous notice regarding the instant condition.

Finally, the Secretary argued that Stubblefield had discussed the issue with Respondent on October 12, 2011. (*Secretary's Post-Hearing Brief* at 21). The Secretary is correct that Stubblefield initially testified that MSHA had discussed this issue with Baker during an earlier inspection. (Tr. 19-21, 72). However, he later stated that he had no specific recollection of the content of that conversation and was not present for it. (Tr. 42, 72). On the other hand, Baker recalled the conversation and credibly testified that he and Stubblefield never discussed material on top of the highwall. (Tr. 106). In light of the Secretary’s burden, I find he failed to establish that Stubblefield provided previous notice regarding the instant condition.

## **5. The operator's efforts in abating the violative condition**

Creech and Baker credibly testified that Respondent took actions to ensure that material was not hanging over the edge of the wall. (Tr. 118, 133-137). However, it is undisputed that Respondent failed to remove the small root balls and other materials that were hanging over the edge. Therefore, Respondent took some action to abate the violative condition, but those efforts were insufficient.

## **6. Operator's knowledge of the existence of the violation**

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing (REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co., supra*; *Rochester & Pittsburgh Coal Co., supra*; and *Southern Ohio Coal Co., supra*. As discussed *supra*, the preponderance of the evidence shows that Baker and Creech knew or should have known about the violative condition. However, Baker and Creech were not aware of the degree of the hazard present and that hazard was not obvious.

In light of the lack of notice, the fact that the cited condition was not highly dangerous, Respondent's efforts at abatement, the fact that the hazard was not obvious, and the fact that Respondent's actions were best characterized as "low" negligence, I find that this violation was not an unwarrantable failure on the part of the operator.

### **d. Penalty**

In this matter, the Secretary proposed a penalty of \$35,700.00 for Citation No. 8366644. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed earlier, Respondent had no significant history of violating the cited standard or any substantially similar standards.

(2) The appropriateness of the penalty compared to the size of the Operator's business - The parties stipulated that at Bear Branch mine, Respondent produced 383,754 tons of coal in 2010. (JX-1). Further, Respondent produced 3,892,526 tons of coal at all of its operations.

According to MSHA's penalty assessment guidelines this gives Bear Branch, 11 "mine size points" out of a possible 15 and 9 "controller size points" out of a possible 10. *See* 30 CFR §100.3(b). Thus, Respondent is an above-average sized operator with a relatively large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited low negligence.

(4) The effect on the Operator's ability to remain in business – The parties stipulated that the penalty would not affect Respondent's ability to remain in business. (JX-1).

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in lost workday/restricted duty injuries to a miner and it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – All evidence suggests that Respondent abated the condition quickly following the issuance of the violation.

In light of the decision to modify the negligence of the citation from "High" and "Unwarrantable Failure" to "Low" and to remove the Unwarrantable Failure designation and to modify the gravity from "Highly Likely" and "S&S" to "Unlikely" and "Non-S&S," a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$4,000.00.

#### **IV. Contentions of the Parties Regarding Order No. 8366645**

With respect to Order No. 8366645, the Secretary asserts that Respondent violated 30 C.F.R. §77.1713(a), that this violation was Highly Likely to result in Permanently Disabling injuries to two miners, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-2)(*Secretary's Post-Hearing Brief* at 24-28). The Secretary believes that the proposed penalty of \$45,000.00 is appropriate. (*Id.* at 28-29).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 9-10). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 13-15). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 12-13). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

**V. Findings of Fact and Conclusions of Law Regarding Order No. 8366645**

a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1713(a).

On November 1, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366645, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Mine Foreman failed to conduct an adequate examination for hazardous conditions, in the Leatherwood Seam (5A) pit of the Beatty Branch area of the mine. Citation #8366644 is issued today for failure to strip/remove loose hazardous materials a safe distance from the top of the wall, for a distance of Two Hundred and Sixty-Five Feet (265') in this area. The On-shift Examination Record Book for this mine, indicates no hazardous conditions reported beginning on 10/17/2011 and continuing through today, 11/01/2011, for this area. The loose materials are obvious to anyone entering the pit area. This condition should have been found, recorded in the examination record, and corrected before the mining sequence was allowed to continue. Failure to conduct adequate examinations exposes miners to hazards that can reasonably be expected to result in an accident causing serious injuries to miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management. Order #7366643 is issued today to the Mine Operator for failure to comply with his Acknowledged Ground Control Plan in the same area.

(GX-2).

The cited standard, 30 C.F.R. §77.1713(a) ("Daily inspection of surface coal mine; certified person; reports of inspection."), provides the following:

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 operators." *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979). Whether a certified person has conducted an adequate examination can be determined by using the "reasonably prudent miner" test. *Tuscaloosa Resources*, 36 FMSHRC 1615, 1636 (Jun. 2014)(ALJ Simonton). The Commission has summarized this test as "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.” *Id.* at 1618.

In the instant matter, it is undisputed that the required examination was conducted by Baker in the Highwall area. (Tr. 74, 108). Baker was properly certified and qualified for the purposes of conducting examinations. The highwall was an active area in the mine. It is further undisputed that root balls and other loose material were placed near the edge of the highwall. (Tr. 22-24, 26-27, 58, 68, 88-89, 91, 106, 113, 123-124, 130). Finally, it is also undisputed that the loose material was not noted in the reported or corrected. (Tr. 38-39).

In light of this evidence and my previous findings, I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the act would have recognized that the cited material was not permitted. As I found with respect to Citation No. 8366644, the underlying condition constituted a hazard and the existence of the roots and material was obvious, though the hazard was less so. The underlying standard specifically required loose, hazardous material to be stripped a safe distance from the top of the highwall. 30 C.F.R. §77.1001. Having seen the material, Baker should have recorded it in the examination record and taken steps to correct the condition. The failure to do so constituted a violation of §77.1713(a)

In its brief, Respondent argued that the order should be vacated because there was no loose, hazardous material on the highwall. (*Respondent’s Post-Hearing Brief* at 9-10). It argued that this means the examination was adequate. (*Id.*). For the reasons discussed with respect to Citation No. 8366644 *supra*, the roots balls and other material on the highwall constituted a hazard. Therefore, Respondent’s argument is not supported by the record.

b. The Violation Was Unlikely to Result in a Permanently Disabling Injury And Was Not Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366645 as being “Highly Likely” to result in a “Permanently Disabling” injuries to two miner and that the condition was S&S. (GX-2). With the exception of the number of persons affected, these determinations were not supported by a preponderance of the evidence.

Respondent’s failure to conduct an adequate examination of the cited highwall exposed miners in the area to the hazards discussed in Citation No. 8366644. Furthermore, the Secretary’s arguments in support of this designation were identical with respect to these citations. (*Secretary’s Post-Hearing Brief* at 25-26). As a result, the reasoning provided *supra* with respect to the gravity of Citation No. 8366644 is incorporated here by reference. Therefore, I find that Order No. 8366645 was “Unlikely” to result in “Lost Workday/Restricted Duty” injuries and was not S&S because the cited conduct failed to meet the third prong of *Mathies*. A finding that two miners were affected is appropriate because at least two miners were operating equipment below the highwall. (Tr. 23, 34, 59-60, 76).

c. Respondent's Conduct Is Best Characterized As "Low" Negligence rather than "High" Negligence and an Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-2). I find that Respondent should have known about the violation and that there were considerable mitigating factors.

With respect to knowledge, Baker was a member of management, he conducted the pre-shift examination in the area, and he was aware that there was material near the edge of the wall. (Tr. 74, 99, 106, 108, 113, 123-124, 130, 238-239). As discussed *supra*, this material was a violation of the underlying standard. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

I find that the record demonstrates there were considerable mitigating circumstances. Examiner Baker credibly testified that he had seen similar material on highwalls throughout his career without incident. (Tr. 111-112). I believe it is significant that no other conditions were found with respect to this highwall to indicate that the examination was otherwise inadequate. Clearly, Respondent should have recognized the instant hazard, but apparently the operator was doing an adequate job of preventing or correcting other hazards in the area. As with the underlying condition, Respondent's witnesses seemed to have genuinely believed the cited material presented no hazard because of its small size, stability and the other safety measures in the area. (Tr. 106, 113). Further, I again note that Respondent took measures to ensure that material was not close to the edge of the wall and that the Secretary failed to establish that trees were located near the edge of the highwall. (Tr. 118, 133-137).

The Secretary provided the same arguments in support of this examination citation as he raised with respect to the underlying citation. (*Secretary's Post-Hearing Brief* at 26). As a result, my discussion of the Secretary's argument and my finding that those arguments were not compelling with respect to Citation No. 8366644 are incorporated here by reference. A finding of "High" negligence would be inappropriate given the circumstances. Instead, I find Respondent's actions are better characterized as displaying "Low" negligence.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

**1. Extent Of The Violative Condition**

Baker testified that he may have conducted as many as 100 examinations in the area during development. (Tr. 114). He failed to record or correct the cited condition during each of those examinations. Therefore, the instant violation was extensive.

**2. The Length of Time of the Violation Existed**

At hearing, Inspector Stubblefield credibly testified that underlying condition likely existed from the time the area was first developed 1-2 weeks before the citation. (Tr. 40, 114).

The book indicated that development started on October 17, 2011. (Tr. 38-39). Examinations were conducted during that time and the condition was not recorded or corrected. Therefore, the condition had existed for several shifts.

**3. Whether the violation is obvious or poses a high degree of danger**

As discussed with respect to the underlying citation, the loose material that was missed during the examination was not particularly obvious and did not pose a considerable danger. While the roots were obvious, the hazards those roots posed were not. Further, whatever hazards the trees may have presented were not obvious because the trees were not as close to the edge as originally cited. Also, as discussed with respect to gravity, *supra*, the condition was unlikely to occur and was not S&S. The roots were small and the equipment was provided with fall protection. (Tr. 67-68, 106, 109-113, 123-135, 130). Further, the material appeared stable. (Tr. 124).

The Secretary argued that Baker was aware of the hazard but was not writing it in the book, thereby placing two miners in danger. (*Secretary's Post-Hearing Brief* at 28). I believe this overstates the situation. Baker was aware that the roots were present on the edge, but he was not aware that this condition posed a danger.

**4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.**

The evidence does not show any meaningful notice regarding the cited condition. Respondent had received no previous citations for failure to conduct adequate examinations of the highwall. No one had told Respondent that it was on notice that additional efforts were needed. Further, Baker and Creech credibly testified that they had seen highwalls in the cited condition their entire careers without receiving any citations. (Tr. 111-112, 125).

The Secretary alleged that Respondent received notice regarding the cited condition because it had received previous citations regarding the maintenance of highwalls and therefore was on notice that examinations were required to detect those hazards. (*Secretary's Post-Hearing Brief* at 27). Once again, the Secretary has taken the case law regarding past violations too broadly. The Secretary essentially argues that any citation issued on a highwall provides notice to find all other possible hazards on a highwall during future examinations. Because the Secretary presented no evidence to show how previous citations in the area provided notice in the instant matter, the Secretary essentially argues that any citation issued on a highwall necessarily provides notice for all hazards possible on subsequent examinations on the highwall. Apparently, this is true regardless of whether the previous citation addressed the specific issue missed during that subsequent examination. I believe this is far too tenuous to constitute notice. Without a showing that the previous citations bear some actual relationship to the instant matter, I cannot find that they provide notice.

## **5. The operator's efforts in abating the violative condition**

Baker conducted examinations of the area and actually saw the underlying condition. (Tr. 74, 108-109, 115). He failed to recognize the condition as a hazard. There is no evidence of any abatement conducted before the order was issued because of this failure to recognize the hazard.

## **6. Operator's knowledge of the existence of the violation**

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition. However, Baker was not aware of the degree of the hazard present and that hazard was not obvious.

In light of the lack of notice, the fact that the cited condition was not highly dangerous, the fact that the hazard was not obvious, and the fact that Respondent's actions were best characterized as "low" negligence, I find that this violation was not an unwarrantable failure on the part of the operator.

### **d. Penalty**

In this matter, the Secretary proposed a penalty of \$45,000.00 for Order No. 8366645. I find that a deviation from the Secretary's proposed assessment is warranted herein and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed earlier, Respondent had no significant history of violating the cited standard or any substantially similar standards.

(2) The appropriateness of the penalty compared to the size of the Operator's business - The parties stipulated that at Bear Branch mine, Respondent produced 383,754 tons of coal in 2010. (JX-1). Further, Respondent produced 3,892,526 tons of coal at all of its operations. According to MSHA's penalty assessment guidelines this gives Bear Branch, 11 "mine size points" out of a possible 15 and 9 "controller size points" out of a possible 10. *See* 30 CFR §100.3(b). Thus, Respondent is an above-average sized operator with a relatively large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited low negligence.

(4) The effect on the Operator's ability to remain in business – The parties stipulated that the penalty would not affect Respondent's ability to remain in business. (JX-1).

(5) The gravity of the violation – As previously shown, this violation was unlikely to result in lost workday/restricted duty injuries to a miners and it was not S&S.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – All evidence suggests that Respondent abated the condition quickly following the issuance of the violation.



In light of the decision to modify the negligence of the order from “High” and “Unwarrantable Failure” to “Low” and to remove the Unwarrantable failure designation and to modify the gravity from “Highly Likely” and “S&S” to “Unlikely” and “Non-S&S,” a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$4,000.00.

## **DOCKET NO. KENT 2012-904**

### **I. Summary of Testimony**

At 9:15 p.m. on November 18, 2011, Stubblefield received a call from Supervisor Marvin Hoskins explaining MSHA had received an anonymous verbal complaint. (Tr. 146, 204). The complaint stated Respondent was not installing safety benches and was not stripping materials a safe distance from the top of the highwalls.<sup>13</sup> (Tr. 146). Hoskins assigned Stubblefield to conduct an E-16 inspection in the area. (Tr. 146-147). Upon arrival, Stubblefield reviewed the mine file. (Tr. 147).

At 9:50 a.m. on November 19, 2011, Stubblefield arrived at the mine.<sup>14</sup> (Tr. 146-147). Upon arrival he went to Beatty Branch and then traveled to Center Ridge. (Tr. 147). At 12:10-12:15 he arrived at the Cow Head Branch, a mountain hollow that ran into Cut Shin Creek. (Tr. 147-149). At 12:40 he arrived on the right side of the Cow Head and found Respondent was drilling for a blast. (Tr. 148-150, 160-161). Two miners, a blaster and blaster helper, were preparing shot on foot below the wall. (Tr. 148-150, 160-161). The blasters were 10-12 feet from the wall. (Tr. 161). The coal in the area was still being developed and it was probably 10-15 feet shorter than the one at Beatty Branch, 55-60 feet. (Tr. 163, 189-190). Respondent had probably already drilled and shot two or three times to develop to the highwall to that point. (Tr. 158). The blaster, Ronald Sante Smith, recalled that when Stubblefield first arrived, he was not at the wall but instead loading his truck to prepare for a shot.<sup>15</sup> (Tr. 220).

On the right side of the Cow Head, Stubblefield found that Respondent had failed to strip loose, hazardous material a safe distance from the top of the highwall. (Tr. 149, 222). There was loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). There was also loose, unconsolidated rock in several areas and there were numerous trees right near the edge of the wall. (Tr. 149). There was shale located underneath all of the tree roots. (Tr. 152-152, GX-10, p. 6). There was no evidence of trees hanging over the edge or material falling at that time, though it was hard to tell

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<sup>13</sup> No issues were discovered with the safety benches. (Tr. 204).

<sup>14</sup> Stubblefield was not sure if he went to the mine between November 1 and November 19 and was not aware of any other inspectors doing so. (Tr. 211).

<sup>15</sup> Ronald Sante Smith was present at hearing and testified. (Tr. 216). At the hearing Smith was employed as a blaster by Virginia Drilling. (Tr. 216-217). He had worked for Respondent for four years and had extensive experience, training, and certifications. (Tr. 217-218). This training included instruction on recognizing highwall danger. (Tr. 229-230). Smith was trained as a foreman. (Tr. 230).

what may have fallen because of the shot material. (Tr. 192, 205). Stubblefield could not tell how far from the edge the trees were located. (Tr. 192). These conditions were largely the same as previous citations. (Tr. 192-193). This condition was caused by failing to properly scale as the wall developed. (Tr. 153-154). In this situation, Respondent should have been cleaning the top from the beginning, especially in light of the earlier citations and the new ground control plan. (Tr. 157-158). However, Stubblefield later realized he had misspoken; the new ground control plan was not yet in effect. (Tr. 182).

Smith had seen the wall before Stubblefield arrived and did not see any problems in the area. (Tr. 223). Baker saw roots and vines over the edge but agreed that there was no hazard. (Tr. 235, 244, 246). There were roots and vegetation on top of the wall but they did not believe these would fall into the pit and hit anyone. (Tr. 224, 235-236, 248-249). The roots were not attached to anything. (Tr. 244-245). The trees did not look unstable. (Tr. 224).

As a result of this condition, Stubblefield issued a 104(d)(1) Order, No. 8366655 (GX-7) under Section 77.1001. (Tr. 143-145, 149, 161).

The citation was marked as “Fatal.” (Tr. 162). Unlike the previous citation, miners were on foot with no protection, so a “Permanently Disabling” designation was not appropriate. (Tr. 162). Something small falling from the highwall and striking a miner in the head or in the back of the neck was highly likely to be fatal. (Tr. 163).

The citation was marked as “Highly Likely” because it was highly likely that miners on foot underneath the highwall without protection would be struck by something falling and fatally injured. (Tr. 163-164). In Stubblefield’s experience, under normal mining condition, unconsolidated material and material at the top of the highwall was going to fall. (Tr. 164). Stubblefield could not say how much the root balls weighed. (Tr. 192-193).

The citation was marked as affecting one person because if something fell from the wall, it was likely only one person would be struck. (Tr. 164).

The citation was marked as “High” negligence and an unwarrantable failure because it was more than ordinary negligence, it was a violation of a mandatory standard, it was obvious to anyone entering the area such that no one could accidentally overlook it, it had existed for more than one shift, it was extensive across the whole crest of the hill, it posed a hazard to miners, and an examination was conducted by Respondent’s agent (Baker) but no hazards were recorded and no corrective action was taken. (Tr. 164-167, 177-178).

The condition had to exist at the time when the wall first began developing. (Tr. 174). Stubblefield believed the first steps in the blasting process started November 4 because that was the first day noted in the examination record. (Tr. 176, 190-191). Baker agreed with this reasoning, though he did not know the exact date development began. (Tr. 240, 244). Stubblefield did not know if vegetation was removed prior to November 1, but if it was it should have been listed in an examination record. (Tr. 191-192, 211-212). An examination record would exist even if no hazards were found. (Tr. 243). No work should be performed in an area without a pre-shift examination. (Tr. 212, 243). Baker insisted that Respondent would never work in an

area that was not examined. (Tr. 243). Stubblefield did not recall seeing a record from any earlier date, though earlier dates could have been in a prior book. (Tr. 213-214).

Stubblefield believed this condition was similar to that in Citation No. 8366644 and therefore Respondent had notice with respect to the negligence and UWF designations. (Tr. 167-168). Baker did not recall receiving any earlier citations or notice from MSHA that conditions like this were a hazard. (Tr. 245). Baker did not agree with Citation No. 8366644. (Tr. 245-246). However, he conceded that the conditions were similar in the instant matter and Citation No. 8366644. (Tr. 246). He did not intend to say that he was not required to consider something a hazard when MSHA cited it in the past. (Tr. 246).

Respondent terminated the citation by barricading the area 30 feet from the wall and bypassing the area. (Tr. 161). The barricade applied only to miners on foot, not equipment. (Tr. 206). The area was later reclaimed and there was no way to do that without allowing equipment within 30 feet of the wall. (Tr. 161, 206-207). Respondent had to reclaim the wall under state law. (Tr. 207). Miners in equipment were afforded regular protection. (Tr. 206). Stubblefield did not believe this contradicted the finding of “highly likely” and “fatal” because the miners in the citation were on foot and there was no other way to reclaim the wall. (Tr. 207). It took until February 7 to terminate the condition. (Tr. 162). Stubblefield was not present for the reclamation and did not know if anyone was placed in danger during that process. (Tr. 209-210). There was no indication Respondent was taking any steps before Stubblefield arrived. (Tr. 162).

In addition to the material on top of the wall, there were also seams or cracks in unconsolidated rock in the wall with the potential for failure. (Tr. 152-153, 168, 197, GX-10, p. 4-6). There were many different laminated layers or strata of stone in the area and these become destabilized and cracked when vibrations occur during blasting. (Tr. 154-156, GX-10, p. 4). Stubblefield was positive he saw cracks, not shadows. (Tr. 194). Baker believed that the places that Stubblefield believed were cracked were likely just hill seams.<sup>16</sup> (Tr. 238). Stubblefield agreed the layers were natural hill seams, but argued blasting could weaken them. (Tr. 156-157). The seams could open up and something that was originally solid could become unconsolidated. (Tr. 208). This condition was also caused by a failure to properly scale the wall. (Tr. 153, 169).

Smith did not see any loose, cracking or unconsolidated material that might cause injury to those in the area. (Tr. 224-225). He would not have worked in an area that would put his crew in danger. (Tr. 226). Baker believed this was a “good slick wall.” (Tr. 236, 248). Material did not fall off the wall during development. (Tr. 248). If material was falling, it would be a sign of instability and the area would be barricaded immediately. (Tr. 248). The wall was no different than others he worked on during his career. (Tr. 249).

To correct this problem, the Respondent needed to adjust the drill bit size or pattern when encountering new strata to ensure the wall was stable. (Tr. 155). Respondent should have recognized the different laminated layers of stone and taken extra care. (Tr. 156-157). It was also

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<sup>16</sup> Hill seams are natural fissure joints bedding plane in the rock that over a period of time water seeps through. (Tr. 157). These seams can be full of mud unconsolidated material. (Tr. 157). Hill seams cannot be removed, but loose rock in the seams can be. (Tr. 169-170).

important to take extra care using equipment to clean and scale the wall during development. (Tr. 155, 168-169).

The only way to determine if a rock was loose was to knock it down with an excavator. (Tr. 194, 237). If something looked unconsolidated but could not be pulled down, it was not loose. (Tr. 194, 237-238). Smith claimed that Respondent used excavators and dozers to do this cleaning all of the time in this area. (Tr. 225). According to Baker, Respondent prioritized working on the wall with the dozer or excavator after a shot so that it was safe. (Tr. 239).

Stubblefield knew the marks in the wall were cracks rather than indications of previous attempts to scale the area because he did not see any dozer blade, loader bucket, or excavator teeth imprints from those machines. (Tr. 154, 195-196). If Respondent had scaled with equipment, the highwall would have been smoother. (Tr. 169). The seams would have still been visible but unconsolidated rock would not be present. (Tr. 169). He believed the cracks in the wall indicated that the rocks were loose and unconnected (however he could not say for sure if the areas were connected). (Tr. 195, 197-198). Stubblefield saw places where rocks had popped out during blasting. (Tr. 196). Stubblefield and Smith testified it was possible for a wall to look good and scaled during development but for it to get worse after additional blasting and weather changes. (Tr. 201, 227). Stubblefield did not know if the cracks had been there the whole time. (Tr. 201). Smith believed that if there were, a dozer or excavator would again be used to scale. (Tr. 227). Stubblefield could not tell if the lines were caused by core drilling. (Tr. 196-197).

As a result of this condition, Stubblefield issued a 104(d)(2) Order, No. 8366656 (GX-8). (Tr. 143-145, 168).

The citation was marked as “Highly Likely” and “Fatal” because there were miners working on foot beside the wall loading holes for blasting and they were not afforded any protection. (Tr. 171). Stubblefield believed were hundreds, perhaps thousands of pounds of material that might topple over and strike someone. (Tr. 171-172). However, he conceded he could not tell the exact weight of the loose material. (Tr. 208). Under continued normal mining, and considering the nature of the condition, blasting in the area, and the weather, Stubblefield believed this material was going to fall from the seams. (Tr. 172-173, 208-209). However, he could not say when it was going to fall. (Tr. 209). If the highwall was in place for a year or two something would fall, but highwalls were no longer opened for that length of time. (Tr. 209). This condition was probably more dangerous than Citation No. 8366655 because of the amount of the material present. (Tr. 172).

Stubblefield believed that if the material fell it would strike one person. (Tr. 173).

The citation was marked as “High” negligence and an unwarrantable failure because it was a violation of mandatory standard, it was obvious to anyone entering the area such that no one could accidentally overlook it, the wall was extensive, had existed for some time, it posed a hazard to miners, an agent of the operator was present, and examination was conducted but no corrective actions were taken. (Tr. 173, 176-178). The condition had to exist for several shifts because it would take that amount of time to reach that point in the mining process. (Tr. 175). It was not possible that it arose after the most recent examination. (Tr. 175-176).

Respondent terminated this condition the same way as with Citation No. 8366655: by barricading 30 feet away, bypassing the area, and reclaiming the area. (Tr. 170-171).

Stubblefield also found that these conditions were present back to November 4, but that nothing was recorded in the record books and no corrective action was taken. (Tr. 173-174, 179, 199). Therefore, he found the examination was inadequate. (Tr. 179, 199-200). Smith was acting foreman at the time the citation was issued and he was an agent of Respondent.<sup>17</sup> (Tr. 185, 229). Baker arrived shortly thereafter and Stubblefield explained the situation. (Tr. 185, 188). Baker had conducted the examination that day, though Smith also looked at the wall because he was working underneath of it. (Tr. 228-229). Baker testified that if an examiner does not believe something to be a hazard, he does not write it down. (Tr. 236). Baker did not see any dangers to place in the book during his examination. (Tr. 198, 243). If he had seen a danger he would have barricaded it until it could be made safe. (Tr. 241). However, Stubblefield believed Baker should have seen and recorded these issues because the previous citations placed him on notice. (Tr. 198-199). Baker was investigated to see if he would be personally cited for these conditions. (Tr. 239). He never received the outcome of that investigation. (Tr. 239-240). Stubblefield was not aware of this investigation. (Tr. 200).

As a result of this condition, Stubblefield issued a 104(d)(2) Order, No. 8366657 (GX-9). (Tr. 143-145, 179).

This citation was marked as “Highly Likely” and “Fatal” because examinations were an important part of the examiner’s job and here the examiner did not do an adequate exam and miners worked underneath the unsafe conditions. (Tr. 182-183).

The citation was marked as affecting one person, but it should have been marked for two because the blaster, the blaster helper, and the drill operator were all in the area. (Tr. 183-184). The drill operator was drilling underneath the wall when Stubblefield arrived. (Tr. 184).

The citation was marked for “high” negligence and an unwarrantable failure because Respondent violated a mandatory standard, it was more than ordinary negligence, it was obvious, existed for some time, exposed miners to a hazard, the mine foreman was there, and an examination was conducted but it was inadequate and no corrective action was taken. (Tr. 184, 188-189). The foreman is the one charged with making the area safe and the conditions should have been obvious. (Tr. 184).

To terminate the cited condition, Respondent developed an action plan that addressed the underlying conditions. (Tr. 179-180). Respondent conducted training on the first and second shifts regarding stripping loose materials a safe distance back from the top, removing loose materials, and conducting adequate examinations. (Tr. 180). The training also discussed the ground control plan and pre-operational examinations of equipment. (Tr. 180).

When Stubblefield was in the area, he asked Smith if the holes were loaded. (Tr. 159, 210). Stubblefield testified that Smith said that they were. (Tr. 159, 202, 210). When Stubblefield

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<sup>17</sup> Acting foremen, like regular foreman, needed mine foreman certification. (Tr. 185-186). The actual foreman would still need to sign the exam records. (Tr. 186).

issued the order, the explosives would have to remain in the ground. (Tr. 159). Instead, Stubblefield gave Respondent permission to detonate the explosives. (Tr. 159, 161, 201-203). Stubblefield considered the fact that Respondent could not reclaim the area safely with the explosives in place. (Tr. 159). They could have “washed out” the holes with water instead, but it would have exposed miners with hoses for a longer time than detonation. (Tr. 160). It was not possible to remove the detonator, primer with ammonia nitrate, and the whole stem once loaded. (Tr. 202). He did not ask Smith to remove anything from the holes. (Tr. 210).

Smith recalled that when Stubblefield arrived, he was still loading his truck to prepare for a shot and that none of the holes had been loaded. (Tr. 220). Smith spoke with Stubblefield and sent his two helpers to prime the holes.<sup>18</sup> (Tr. 221). Stubblefield said to get the primers and caps out of the holes in the area and the blasters did so with their hands. (Tr. 222, 228, 240-241). No ANFO was in the hole so there was no danger in removing them. (Tr. 223). After removing the material, they put everything in boxes and headed to the magazine. (Tr. 225). Respondent then explained there was going to be a bad rain that evening and asked if they could load and shoot. (Tr. 24). Stubblefield gave them permission and they did so. (Tr. 226, 231, 240-241). Stubblefield did not order any additional precautions before setting off the shot. (Tr. 227, 241).

## **II. Contentions of the Parties Regarding Order No. 8366655**

With respect to Order No. 8366655, the Secretary asserts that Respondent violated 30 C.F.R. §77.1001, that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-7)(*Secretary's Post-Hearing Brief* at 29-35). The Secretary believes that the proposed penalty of \$18,742.00 is appropriate. (*Id.* at 36-37).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 19). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S and did not display an unwarrantable failure to comply. (*Id.* at 21-23). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

## **III. Findings of Fact and Conclusions of Law Regarding Order No. 8366655**

### **a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1001.**

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366655, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The mine operator has failed to strip loose hazardous materials a safe distance from the top of the highwall in the Leatherwood Seam (5A) Pit, in the right side of the Cow Head. This area begins at the point where the active pit turns the point

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<sup>18</sup> Hole are primed by placing primers and caps together and dropping them in the holes. (Tr. 221-222). Then the bulk truck is used to load ammonia nitrate (“ANFO”) into the bore holes up the level the blaster determines. (Tr. 222).

out of the Cow Head Hollow and extends along the contour cut to where the drill bench begins, for a distance of at least Three Hundred Feet (300') by visual observation. Loose materials in the form of trees and roots are hanging along and over the crest/edge of the wall for the entire distance, and loose, unconsolidated rock is also present at several locations along this area. Numerous trees are also standing on or, very near the crest of the highwall. This condition or practice has been cited at this mine Two (2) times previously in the last Two (2) years. This condition was discussed with the Mine Foreman on 10/12/2011, and 11/03/2011, during mine visits. The condition is obvious to anyone entering the pit. The history of the mining industry has shown that highwall failures can, and do occur, such as occurred recently on 10/28/2011 which claimed the life of Two (2) miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of Mine Management. Citation #8366656 is issued today for failure to adequately scale loose rocks and materials from the highwall in this area.

(GX-7). The document also contained a modification, stating:

This order is modified to allow the Mine Operator to resume mining operations at this mine. He has developed an action plan to address stripping loose material a safe distance back from the top of the highwall. His plan states that loose material will be stripped a minimum of Ten Feet (10') back from the top of the wall in all locations, by use of dozers and excavators. The plan also states that the area affected by the Order will be barricaded a minimum distance of Thirty Feet (30') away from the wall. No miners will be allowed in this area on foot. This barricaded area will be bypassed by the mining sequence. The area will be reclaimed by using dozers and rock trucks to dump and push materials against the wall until it is reclaimed.

(GX-7). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-7). Finally, the Order was terminated with Stubblefield noting:

The affected area has been bypassed by the mining sequence and is being reclaimed by using dozers and rock trucks to dump and push materials against the wall.

(GX-7).

Stubblefield credibly testified that Respondent had failed to strip loose, hazardous material from the edge of the instant highwall. (Tr. 149, 222). Specifically, he found loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). These roots contained shale. (Tr. 152-153, GX-10, p. 6). He also saw loose, unconsolidated rock in several areas and there were numerous trees right near the edge of the wall. (Tr. 149). No barrier was constructed until after the violations were terminated. (Tr. 160-161). Stubblefield testified that these conditions were largely the same

in Citation No. 8366644. (Tr. 192-193). Therefore, I find Respondent violated 30 C.F.R. §77.1001 with respect to Order No. 8366655.

In its brief, Respondent argued that there was no loose, hazardous material in the area on November 19, 2011, and that Stubblefield conceded that he did not see instability in the trees or root balls that would indicate any material would fall into the pit. (*Respondent's Post-Hearing Brief* at 19). As with Citation No. 8366644, the issue here is not whether material is about to fall into the pit, but instead whether that material is loose. 30 C.F.R. §77.1001. Stubblefield credibly testified that he saw loose material. (Tr. 149-152, 160-161, 222). The fact that there was no imminent danger of a fall did not change the fact that this material was loose. In Stubblefield's experience, under normal mining condition, unconsolidated material and material at the top of the highwall was going to fall. (Tr. 164). Therefore, Respondent's argument does not undermine the finding that the cited material was loose and therefore violated 30 C.F.R. §77.1001.

b. The Violation Was Highly Likely to Result in a Fatal Injury And Was Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366655 as being "Highly Likely" to result in a "Fatal" injury to a miner and that the condition was S&S. (GX-7). These determinations were supported by a preponderance of the evidence.

Regarding the first element of S&S - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §77.1001.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Material hanging from the highwall was likely to fall under continued normal mining operations. (Tr. 164). Material falling from the highwall would contribute to the danger of a miner being struck by material. Stubblefield had previously testified that that he had seen miners struck by material falling from highwalls in the past. (Tr. 33, 53).

In its brief, Respondent presented several arguments to show that there was no hazard contributed to by this condition. However, those arguments are not compelling.

Specifically Respondent argued that there was no hazard contributed to because there was no instability and no one saw anything fall into the pit. (*Respondent's Post-Hearing Brief* at 22). I credit the testimony of Inspector Stubblefield that the material would eventually fall into the pit under continued normal mining operations, notwithstanding the fact that the material did not appear unstable at that time. (Tr. 164). There is no requirement under the *Mathies* formula that a danger be imminent, only that there be some danger contributed to by the violation. The material hanging from the edge of the highwall made the danger of material falling into the pit more likely. Therefore, the second prong of *Mathies* is met.

Respondent also argued that the inspector knew there was no danger to miners in the area because Stubblefield allowed the blasting crew to re-enter the area after the order was issued. (*Respondent's Post-Hearing Argument* at 23).



The exact nature of the decision to allow miners to return to the area is unclear. Inspector Stubblefield testified that he allowed miners to return to the area to detonate explosives that had already been loaded. (Tr. 159, 161, 201-203, 210). He specifically testified that he chose to allow the detonation rather than having the holes “washed out” because it limited exposure to the cited condition. (Tr. 160). Smith testified that Stubblefield allowed the miners to enter the area and remove the primers and caps with their hands. (Tr. 222, 228, 240-241). He said that after management explained that there was going to be rain, they asked if they could reload the holes and shoot. (Tr. 240). He testified that Stubblefield gave them permission and they did so and did not order any additional precautions before the shot. (Tr. 226-227, 231, 240-241).

The most likely explanation for this discrepancy in the testimony is that there was a misunderstanding. It is possible that Stubblefield did not realize that Respondent had asked to remove the primers and caps earlier or misheard when Respondent asked to re-enter the area and load the shots again. However, the issue is largely immaterial. Even if Smith’s testimony is accurate, and Stubblefield allowed miners to enter the area and remove caps and primers and then return to the area to load and fire a shot, the cited condition was still hazardous. If Stubblefield knowingly allowed miners to re-enter the hazardous area then he, like Respondent, committed a grievous error. However, that action in no way minimizes that danger of material falling from the highwall. Stubblefield clearly believed there was a danger and the evidence supports this determination. As a result, Respondent’s argument, even if supported by the evidence, does not change the determination with respect to the second prong of *Mathies*.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. Stubblefield testified that the cited condition was largely similar to the material found in Citation No. 8366644. In that instance, Stubblefield testified that he saw root balls weighing 50-100 pounds in the area. (Tr. 54, 88-89). However, unlike in Citation No. 8366644, in the instant matter Stubblefield saw miners working on foot below the highwall. If 50-100 pound root balls fell into the pit, they could easily strike a miner working on foot. This would be a fall of around 55-60 feet. (Tr. 163, 189-190). Given the weight of the material and the height of a fall, it is reasonably likely that a miner being struck by a root ball would suffer an injury.

In its brief, Respondent argued that safety precautions in the equipment would keep miners in the area safe. (*Respondent’ Post-Hearing Brief* at 23). This is true for the reasons discussed *supra*, with respect to Citation No. 8366644. However, unlike in the previous citation, miners here were working on foot. Safety measures contained in the equipment would not provide any protection to these miners. As a result, safe equipment would not limit the likelihood of injury here.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a “reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). A miner being struck by 50-100 pounds of material falling 55-60 feet would suffer devastating, likely fatal, injury. Clearly, fatal injuries would be reasonably serious. Therefore, the fourth prong of *Mathies* is met.

Based on the foregoing, I find that a preponderance of the evidence supports a finding that the cited condition would be “Highly Likely” to result in “Fatal” injury to one miner and further find that the S&S designation was appropriate.

c. Respondent’s Conduct Is Best Characterized As “High” Negligence and an Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator’s conduct was highly negligent in character and the result of an unwarrantable failure. (GX-7). I find that the substantial evidence supports this determination.

In the instant matter, Baker and Smith were members of management. (Tr. 99, 230, 238-239). Both had seen the material on the highwall. (Tr. 223, 235-236, 244-249). Further, Baker conducted the pre-shift examinations of the cited area. (Tr. 228-229). Smith acted as foreman in the area when Baker was not present. (Tr. 185, 229). Baker testified that he saw roots and fines on the edge of the pit (though he testified that there was no hazard). (Tr. 235, 244, 246). Perhaps most importantly, Baker had been present when the previous citation under this standard, No. 8366644, was issued. Stubblefield testified that the instant condition was substantially similar to the condition in that earlier citation. Therefore, Baker knew, or should have known, that the roots constituted a hazard to miners along the highwall. Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

Having reviewed the evidence at length, I have determined that there were no mitigating circumstances present. As a result, I find that the “High” negligence designation is appropriate.

In its brief, Respondent argued that there were several mitigating circumstances present. However, none of these arguments are compelling. First, Respondent argued that its examiners reasonably believed that no hazard was present. (*Respondent’s Post-Hearing Brief* at 21). As with Citation No. 8366644, the cited condition was obvious, and anyone entering the area would see loose roots and other material hanging from the side of the wall. Unlike Citation No. 8366644, at the time the instant order was issued, Respondent could no longer claim it was unaware of the hazard posed by that material. It is significant that Order No. 8366655 was issued by the same inspector, Stubblefield, and to the same member of management, Baker, as Citation No. 8366644. At the time of the instant order, Baker could no longer credibly claim ignorance as to the danger posed by the loose material and root balls. At hearing Baker conceded that he did not agree with Citation No. 8366644 but agreed that the instant situation was similar to that citation. (Tr. 245-246). He also tried to argue that he would not simply ignore a hazard cited by MSHA because he disagreed that it existed. However, there is really no other way to interpret the facts presented. Baker saw the cited material, he knew from the previous citation that MSHA believed it was a hazard, and he still took no action to correct the problem or even record it. Because Baker could no longer reasonably believe that the cited condition posed no hazard, it cannot constitute a mitigating circumstance.

Respondent also noted that the material appeared stable so there was no danger. (*Respondent’s Post-Hearing Brief* at 21). Relatedly, it argued that Stubblefield allowed the

blasting crew to return, again showing there was no danger. (*Id.*). For the reasons discussed with respect to gravity *supra*, Respondent knew or should have known that the material was a danger, even if there was no imminent risk of fall. Further, whether Stubblefield allowed miners to return to the area is irrelevant to Respondent's level of negligence. As a result, I find that the "High" negligence designation was appropriate.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

### **1. Extent Of The Violative Condition**

Stubblefield credibly testified that there was loose material including roots hanging right over the edge and the crest of the wall for the entire 300-foot area. (Tr. 149-152, 160-161, GX-10, p. 1-4). Nothing presented by Respondent refutes this testimony. Therefore, the instant violation was extensive.

### **2. The Length of Time of the Violation Existed**

The condition had to exist at the time when the wall first began developing. (Tr. 174). Stubblefield believed the first steps in the blasting process started November 4 because that was the first day noted in the examination record. (Tr. 176, 190-191). An examination record would exist even if no hazards were found. (Tr. 243). Baker agreed with this reasoning and insisted Respondent would not work before a pre-shift examination, though he did not know the exact date development began. (Tr. 240, 243-244). Therefore, it is undisputed that the condition existed for several days and many shifts.

### **3. Whether the violation is obvious or poses a high degree of danger**

As discussed with respect to the gravity determination, this condition was highly dangerous. Miners were working on foot below the root balls and other materials. (Tr. 148-150, 160-161). It was highly likely that one of the miners would be struck by material and face a fatal injury. Further, the condition was obvious. Stubblefield testified that anyone in the area would see the hazard. (Tr. 164-167, 177-178). In fact, Respondent's pre-shift examiner, Baker, had seen the condition but had simply failed to list it as a hazardous condition. (Tr. 198, 235-236, 243-244, 246).

In its brief, Respondent argued that the condition posed no hazard. Superficially, it stated that there was no instability on the highwall and miners were allowed to reenter the area to set off a detonation. (*Respondent's Post-Hearing Brief* at 21). These arguments are rejected for the same reasons discussed with respect to gravity, *supra*.

**4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.**

The evidence clearly establishes that the Secretary provided direct notice to Respondent in the form of Citation No. 8366644. Both Stubblefield and Baker testified that the instant matter was very similar to that earlier citation. (Tr. 192-193, 246). It is significant that Baker specifically received this earlier notice and was the pre-shift examiner responsible for the instant cited area. Therefore, Respondent knew that MSHA considered hanging material along the edge of a highwall to be a hazardous condition. Respondent also knew that MSHA expected the management to monitor highwalls and to correct any problems that occurred with hanging material. This notice was explicit and had occurred just a few weeks earlier. Therefore, I find Respondent had notice that greater efforts were necessary for compliance.

**5. The operator's efforts in abating the violative condition**

Smith and Baker credibly testified that Respondent took actions to ensure that material was not hanging over the edge of the wall. However, it is undisputed that Respondent failed to remove the small root balls and other materials that were hanging over the edge. (Tr. 149-152, 160-161). Therefore, Respondent took some action to abate the violative condition, but those efforts were insufficient.

**6. Operator's knowledge of the existence of the violation**

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition and the hazard it posed. Therefore, Respondent knew or should have known that the hanging material was unacceptable.

In light of the cited condition's large extent, lengthy time, obviousness, high degree of danger, lack of abatement, Respondent's notice, Respondent's knowledge and the fact that Respondent's actions were best characterized as "high" negligence, I find that the violation was an unwarrantable failure on the part of the operator.

**d. Penalty**

In this matter, the Secretary proposed a penalty of \$18,742.00 for Order No. 8366655. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$18,742.00.

**IV. Contentions of the Parties Regarding Order No. 8366656**

With respect to Order No. 8366656, the Secretary asserts that Respondent violated 30 C.F.R. §77.1005(a), that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable

Failure to comply. (GX-8)(*Secretary's Post-Hearing Brief* at 37-43). The Secretary believes that the proposed penalty of \$18,742.00 is appropriate. (*Id.* at 43-44).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 19-20). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 22-23). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 21). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

## **V. Findings of Fact and Conclusions of Law Regarding Order No. 8366656**

### **a. The Secretary Has Failed to Carry His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1005(a).**

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366656, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Mine Operator as failed to adequately scale the highwall of loose unconsolidated materials, in the form of rocks, in the Leatherwood (5A) pit, in the right side of the Cow Head area of the mine. This area begins at the point where the active pit turns the point out of the Cow Head Hollow and extends along the contour cut to where the drill bench begins, for a distance of Three Hundred Feet (300') by visual observation. There are several hill seams with cracks which separate sections of rock from the solid wall and the overall condition of the highwall is jagged. Order #8366655 is issued today for failure to adequately strip loose materials a safe distance from the top of the highwall. The history of the mining industry has shown that highwall failures can, and do occur, such as occurred recently on 10/28/2011 which claimed the lives of Two (2) miners. This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management.

(GX-8). The document also contained a modification, stating:

This Order is modified to allow the Miner Operator to resume mining operations at this mine. He has developed an action plan to address stripping loose material a safe distance back from the top of the highwall and the scaling of loose materials from the highwall. His plan states that loose materials will be stripped a minimum of Ten Feet (10') back from the top of the wall in all locations, and loose materials will be scaled from the wall by use of dozers and excavators. The plan also states that the area affected by the Order will be barricaded a minimum distance of Thirty Feet (30') away from the wall. No miners will be allowed in this area on foot. This barricaded area will be bypassed by the mining sequence. The area will be reclaimed by using dozers and rock trucks to dump and push materials against the wall until it is reclaimed. Miners from both First and Second Shifts were trained in this plan today along with the Acknowledged Ground

Control Plan for this mine, as well as performing adequate examinations of work areas and equipment

(GX-8). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-8). Finally, the Order was terminated with Stubblefield noting:

The affected area has been bypassed by the mining sequence and is being reclaimed by using dozers and rock trucks to dump and push materials against the wall.

(GX-8).

The cited standard, 30 C.F.R. §77.1005(a) (“Scaling highwalls; general.”), provides the following:

Hazardous areas shall be scaled before any other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work.

30 C.F.R. §77.1005(a).

According to Judge Paez, in order to prove a violation of the cited standard, “[t]he Secretary must then show either (1) that work was performed in the hazardous area before the area was scaled, or (2) though the hazardous area was scaled, no safe means to and from the hazardous area was provided.” *Humphrey’s Enterprises, Inc.*, 2011 WL 7463292, \*5 (Dec. 21, 2011)(ALJ Paez).

Stubblefield issued the instant order because there were seams or cracks in unconsolidated rock in the wall with the potential for failure. (Tr. 152-153, 168, 197, GX-10, p. 4-6). He believed these seams indicated that different laminated layers of stone had become destabilized during blasting. (Tr. 154-156, GX-10, p. 4). Stubblefield believed these cracks could have been caused by natural hill seams that were weakened during blasting. (Tr. 156-157, 208). Stubblefield testified that this condition was caused by a failure to properly scale the wall. (Tr. 153, 169). Stubblefield also testified that there was no indication of previous attempts to scale the area. (Tr. 154, 169, 195-198). Stubblefield and Smith agreed it was possible for a wall to look good and scaled during development but for it to get worse after additional blasting and weather changes. (Tr. 201, 227).

However, after carefully reviewing the testimony and the photographs provided by the inspector (GX-10), I find that the Secretary failed to carry the burden. Smith and Baker credibly testified that they did not see any loose, cracking, or unconsolidated material in the area. (Tr. 224-225, 236, 248). The photographs support this testimony. Baker testified that he would not have put his crew in danger. (Tr. 226). Smith testified he believed Respondent would have barricaded the material immediately if material fell during development, but it did not. (Tr. 248). The structural integrity of the wall appeared the same as any other wall Smith had ever worked

on. (Tr. 249). Perhaps more importantly, both Smith and Baker testified that Respondent used excavators and dozers to scale walls regularly and that this was a priority. (Tr. 225, 239). Respondent had tried to pull loose material with equipment and found it was secure. (Tr. 225). These locations can be seen in the photographs. Further, there was no indication at hearing of any freezing or thawing cycles that may have caused material to loosen after scaling.

In short, Respondent presented credible evidence to rebut the Secretary's assertion regarding the loose nature of the rocks. Respondent's witnesses testified credibly about Respondent's efforts to scale and the integrity of the wall. The photographs, rather than supporting the Secretary's case, provided some support to Respondent's arguments. The Secretary's only legal support for its case was one *L&J Energy Company, Inc.*, 16 FMSHRC 424 (Feb. 1994)(ALJ Weisberger). In that case, loose material was validly cited on an active highwall even though Respondent had already scaled the area. *Id.* at 444. However, in contrast to the instant order, the situation in that case had freezing and thawing cycles, which loosened the rocks. *Id.* at 441. There was no evidence of freezing and thawing here. Nor was there any other reason to believe that any particular section of the wall was loose, just Stubblefield's assertion that the hill seams had come apart in a way that was not clearly visible on the photographs. Further, in *L&J Energy Company, Inc.*, the fact that rocks were loose in the area was proven when one rock actually fell. *Id.* at 444. While a rock did not need to fall here in order to prove the material was loose, I believe there needed to be some credible, supported evidence to show that a fall was possible. No such evidence exists on this record. Therefore I find the Secretary failed to show by a preponderance of the evidence that Respondent violated 30 C.F.R. §77.1005(a).

In light of the Secretary's failure to establish that Respondent violated the cited standard, it is not necessary to discuss the gravity or negligence designations. Order No. 8366656 and the related civil penalty are hereby **VACATED**.

## **VI. Contentions of the Parties Regarding Order No. 8366657**

With respect to Order No. 8366657, the Secretary asserts that Respondent violated 30 C.F.R. §77.1713(a), that this violation was Highly Likely to result in Fatal injuries to one miner, that the violation was S&S, and that it resulted from High Negligence and an Unwarrantable Failure to comply. (GX-9)(*Secretary's Post-Hearing Brief* at 44-48). The Secretary believes that the proposed penalty of \$18,742.00 is appropriate. (*Id.* at 48-49).

Respondent argues that there was no violation of the cited standard. (*Respondent's Post-Hearing Brief* at 20). Further, it argues that even if there were a violation of the cited standard, that it would not be S&S. (*Id.* at 22-23). Further, it argues that its actions did not display an unwarrantable failure to comply. (*Id.* at 21). Finally, Respondent presumably believes that the penalty should be vacated or, in the event the order is found valid, reduced pursuant to its proffered gravity and negligence determinations.

## **VII. Findings of Fact and Conclusions of Law Regarding Order No. 8366657**

- a. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1713(a).

On November 19, 2011, Inspector Stubblefield issued a 104(d)(1) Order, No. 8366657, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Mine Foreman has failed to conduct an adequate examination for hazardous conditions, in the right side of the Leatherwood Seam (5A) pit of the Cow Head area of this mine. Order #8366655 is issued today for failure to strip loose materials a safe distance from the top of the highwall in this area, and Order #8366656 is issued today for failure to adequately scale the highwall of loose unconsolidated materials from the highwall in this area. The On-Shift Examination Record Book for this mine indicates no hazardous conditions reported or, corrective actions taken in this area since 11/04/11, continuing through today. The conditions cited in the above orders are obvious to anyone entering the pit area. These conditions should have been found, recorded in the examination record, and corrected before the mining sequence was allowed to continue. This history of the mining industry has shown that failure to conduct adequate examinations exposes miners to hazards such as those conditions which led to the issuance of this order, that are highly likely to cause an accident which would be fatal. This mine was cited previously for this same practice on 11/01/11 (see Citation #8366645). This is an unwarrantable failure to comply with a mandatory standard and constitutes more than ordinary negligence on the part of mine management.

(GX-9). The document also contained a modification, stating:

The Mine Operator has developed an action plan to address the conditions that initially led to the issuance of this Order. Training has been conducted today with the Mine Foreman's [sic] from both First and Second Shifts, and miners from both shifts, on the Action Plan, which covers stripping loose materials a safe distance back from the top of the highwall, and scaling the highwall to remove loose materials, and adequate examinations of those areas. The Ground Control Plan was covered, and pre-operational examination of equipment was also addressed.

(GX-9). The Order was also amended to change the type of action from a 104(d)(1) Order to a 104(d)(2) Order. (GX-9).

In the instant matter, it is undisputed that the required examination was conducted by Baker in the highwall area. (Tr. 198, 443). Smith had also acted as foreman in the area while Baker was away. (Tr. 185, 229). The highwall was an active area in the mine. It is further undisputed that root balls and other loose material were placed near the edge of the highwall. (Tr.



149-152, 160-161). The area was developed from November 4, but it was undisputed that nothing had ever been recorded in the book. (Tr. 173-174, 179, 199).

In light of this evidence and my previous findings, I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the act would have recognized that the cited material was not permitted. As I found with respect to Order No. 8366655, the underlying condition constituted a hazard and should have been obvious to Baker. The underlying standard specifically required loose, hazardous material to be stripped a safe distance from the top of the highwall. 30 C.F.R. §77.1001. With his knowledge of the previous citation, Baker should have recorded it in the examination record and taken steps to correct the condition. The failure to do so constituted a violation of §77.1713(a)

In its brief, Respondent argued that the order should be vacated because the underlying order should be vacated. (*Respondent's Post-Hearing Brief* at 20). As discussed *supra*, Order No. 8366655 was validly issued. Therefore, Respondent's argument is not supported by the record.

b. The Violation Was Reasonably Likely To Result In A Fatal Injury And Was Significant And Substantial In Nature.

Inspector Stubblefield found the gravity of the cited danger in Order No. 8366657 as being "Highly Likely" to result in a "Fatal" injury to one miner and that the condition was S&S. (GX-9). These determinations were supported by a preponderance of the evidence.

Respondent's failure to conduct an adequate examination of the cited highwall exposed miners in the area to the hazards discussed in Order No. 8366655. Furthermore, the parties' arguments in support of their positions with respect to this designation were identical to those made with respect to Order No. 8366655. (*Secretary's Post-Hearing Brief* at 44-45, *Respondent's Post-Hearing Brief* at 22-23). As a result, the reasoning provided *supra* with respect to the gravity of Order No. 8366655 is incorporated here by reference. Therefore, I find that Order No. 8366657 was "Reasonably Likely" to result in "Fatal" injuries to one miner and was S&S.

c. Respondent's Conduct Was The Result Of "High" Negligence And An Unwarrantable Failure.

In the order at issue, Inspector Stubblefield found that the operator's conduct was highly negligent in character and the result of an unwarrantable failure. (GX-7). I find that the substantial evidence supports this determination.

With respect to knowledge, Baker was a member of management, he conducted the pre-shift examination in the area, and he was aware that there was material near the edge of the wall. (Tr. 228-229). Further, Baker had specific knowledge that MSHA believed this material was a hazard and a violation of the underlying standard. However, he chose not to record or correct the cited condition. (Tr. 198, 243). Therefore, Respondent knew or should have known that a violation existed and was negligent. The question that remains is the degree of that negligence.

Having reviewed the evidence at length, I have determined that there were no mitigating circumstances present. As a result, I find that the “High” negligence designation is appropriate.

In its brief, Respondent argued that there were several mitigating circumstances present. Specifically, Respondent made the same arguments regarding the examiner’s belief about the lack of a hazard, the stable nature of the material present, and the fact that the inspector allowed miners to return to the area. As such, the reasoning provided with respect to negligence in Order No. 8366655 is incorporated here and Respondent’s arguments are rejected.

The Secretary also found that the cited condition constituted an unwarrantable failure to comply. I will now turn to the six *IO Coal* factors with respect to that determination:

### **1. Extent Of The Violative Condition**

Baker testified that Respondent would not allow work to occur in the cited area unless a pre-shift examination had been conducted. (Tr. 212, 243). The area had been developed on November 4, which was several weeks before the order was issued. (Tr. 176, 190-191). As a result, many examinations would have been conducted in this area. Therefore, the instant violation was extensive.

### **2. The Length of Time of the Violation Existed**

Stubblefield testified that this area had been developed around November 4 but at no time was the cited condition listed in the record book. (Tr. 173-174, 179, 199). This testimony was unrefuted. Therefore, the condition had existed at least for several shifts.

### **3. Whether the violation is obvious or poses a high degree of danger**

As discussed with respect to the underlying citation, this unrecorded and uncorrected condition was highly dangerous. Miners were working on foot below the root balls and other materials. (Tr. 148-150, 160-161). It was highly likely that one of the miners would be struck by material and suffer a fatal injury. Further, the condition was obvious as anyone entering the area would see the hazard. (Tr. 164-167, 177-178, 184, 188-189). In fact, Respondent’s pre-shift examiner, Baker, had seen the condition but had simply failed to list it as a hazardous condition. (Tr. 198, 235-236, 243-244, 246).

In its brief, Respondent argued that the condition posed no hazard. Superficially, it stated that there was no instability on the highwall and miners were allowed to reenter the area to set off a detonation. (*Respondent’s Post-Hearing Brief* at 21). These arguments are rejected for the same reasons discussed with respect to gravity, *supra*.

**4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.**

As with the underlying citation, Respondent received direct, explicit notice in the form of Citation No. 8366644 that loose, hanging materials like the root balls were a hazard. Further, Respondent learned of the importance of listing the loose material in the examination record from Order No. 8366645. Baker had been responsible for the inadequate pre-shift examination cited in Order No. 8366645 and the instant matter. He agreed with Stubblefield that the instant condition was substantially similar to the earlier citation. (Tr. 192-193, 246). As a result, Respondent knew that this examination was inadequate. Therefore, I find Respondent had notice that greater efforts were necessary for compliance.

**5. The operator's efforts in abating the violative condition**

Baker conducted examinations of the area and actually saw the underlying condition. (Tr. 198, 235-236, 243-244, 246). He failed to recognize the condition as a hazard. (Tr. 198, 236, 243). There is no evidence of any abatement conducted before the order was issued because of this failure to recognize the hazard.

**6. Operator's knowledge of the existence of the violation**

As discussed *supra*, the preponderance of the evidence shows that Baker knew or should have known about the violative condition and the hazard it posed. There was no longer any reasonable basis to believe that the cited condition should not be placed in the examination record. Therefore, Respondent knew or should have known that the hanging material was unacceptable and that the examination was inadequate.

In light of the cited condition's large extent, lengthy time, obviousness, high degree of danger, lack of abatement, Respondent's notice, Respondent's knowledge and the fact that Respondent's actions were best characterized as "high" negligence, I find that the violation was an unwarrantable failure on the part of the operator.

**e. Penalty**

In this matter, the Secretary proposed a penalty of \$18,742.00 for Order No. 8366657. Having affirmed the Secretary's determinations in all respects, no deviation from the proposed penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$18,742.00.

## **ORDER**

It is hereby **ORDERED** that Citation and Order Nos. 8369000, 8369001, 8344920, 8366644, 8366645, 8366655, and 8366657 are **AFFIRMED** as amended. It is hereby **ORDERED** that Order No. 8366656 be **VACATED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$51,484.00 within 30 days of the date of this decision.<sup>19</sup>

/s/ John Kent Lewis  
John Kent Lewis  
Administrative Law Judge

### Distribution:

Anthony M. Berry, Esq., U.S Department of Labor, Office of the Solicitor, 211 7<sup>th</sup> Avenue North, Suite 420, Nashville, TN 37219

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509

Thomas Hamilton, Esq., Saltsman & Willett, PSC, 212 East Stephen Foster Avenue, Bardstown, Kentucky 40004

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<sup>19</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 25, 2015

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

v.

KENAMERICAN RESOURCES, INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2013-0211  
A.C. No. 15-17741-305075

Mine: Paradise #9

## **DECISION AND ORDER**

Appearances: LaTasha Thomas, Esq., U.S. Department of Labor, Office of the Solicitor,  
Nashville, TN, for Petitioner;

Jason Hardin, Esq., Fabian & Clendenin, Salt Lake City, UT, for  
Respondent.

Before: Judge L. Zane Gill

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a 103(a) citation, 30 U.S.C. § 813(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Kenamerican Resources, Inc. (“Kenamerican” or “Respondent”) at its Paradise #9 mine.

The parties submitted briefs, affidavits, and documentary evidence. All submissions pertain to the sole issue of whether advance notice was given in violation of Section 103(a) of the Mine Act. For the reasons stated below, I find that there is no genuine issue of material fact and the Respondent is entitled to summary decision as a matter of law.

### **Undisputed Facts**

On April 20, 2012, MSHA Inspector Doyle Sparks and six other inspectors traveled to Kenamerican’s Paradise #9 mine to conduct an investigation into a complaint about an alleged hazardous condition. (Ex. S-B) Before the inspectors traveled into the mine to begin their investigation, MSHA seized control of the mine’s communication system. (Ex. S-C) While listening on the mine’s communication line, Sparks overheard a call from the #4 unit in which a person asked the dispatcher if there was “company outside,” to which the dispatcher responded, “yeah, I think there is.” (Ex. S-B, C) Sparks issued Citation No. 8502992 to Respondent under Section 103(a) of the Mine Act alleging that “[d]uring a Hazard Complaint inspection [...] mine personnel provided advance notice to miners underground that MSHA inspectors were on mine property.” (Ex. S-A)

## Standard of Review

The Commission held that “summary decision is an extraordinary procedure.” *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). It is “granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67. When weighing the parties’ arguments, all inferences are “viewed in the light most favorable to the party opposing the motion.” *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted).

## Section 103(a) of the Mine Act<sup>1</sup>

Section 103(a) explicitly states that “no advance notice of an inspection shall be provided to any person.” 30 U.S.C. § 813. As Congress explained:

[I]t is important that ... *no advance notice* of an inspection be given to any person [...] Indeed, *in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained*, a warrant requirement would seriously undercut this Act's objectives.

S. REP. 95-181, 1, 1977 U.S.C.C.A.N. 3401, 3427.

In *Topper Coal Company*, the Commission found that a mine operator violated the Mine Act’s prohibition against advance notice in Section 103(a) when mine management warned two underground miners that “federal inspectors” were coming and to “watch out and be careful.” *Topper Coal Co.*, 20 FMSHRC 344, 346, 348-49 (Apr. 1998) In *Solis v. Manalapan Min. Co.*, the court found that the statements “two federal inspectors [are] out there” and “shut the belts off [...] because there are six federal mine inspectors on the property” violated Section 103(a)’s prohibition against advance notice. No. CIV. 10-115-GFVT, 2010 WL 2197534, at \*1 (E.D. Ky. May 27, 2010) However, the court also commented that the statements “has anyone showed up yet” and “did our company show up” were ambiguous at best and implied that they did not constitute advance notice. *Id.* at \*5.

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<sup>1</sup> Respondent relied heavily on MSHA’s Program Policy Manual; however, the Commission has repeatedly found that PPMs are not binding on the court or the Secretary. *Black Diamond Construction, Inc.*, 21 FMSHRC 1188, 1202-03; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996). The PPM, however, codifies MSHA’s practical and functional need to create a single field rule for its inspectors and is intended as guidance to explain under what circumstances it is appropriate to give advance notice. This scenario is absent from the facts before me. Therefore, the analysis here is centered on the clear language of Section 103(a) of the Mine Act.

## Analysis and Conclusion

The Secretary does not allege any dispute of material fact as to the existence of a violation, just to gravity and negligence. The alleged dispute of fact as to the secondary issues of gravity and negligence, which was not analyzed and only tangentially mentioned in the Secretary's motion papers, does not preclude summary decision as to the primary issue of whether a violation occurred. Indeed, the statements allegedly made by mine personal, which led to the issuance of a citation, are not disputed by either party. Therefore, since the Secretary did not identify any issue of material fact regarding the violation, the Respondent is entitled to summary decision as a matter of law.

Section 103(a) states that "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). There is an exception to this rule found in Section 103(g)(1), which gives MSHA the authority to notify the mine "forthwith" – a *de facto* advance notice – when a miner representative gives notice of what he believes to be an imminent danger. 30 U.S.C. § 813(g)(1). Since MSHA was on site to respond to a hazardous condition complaint and had apparently not deemed it to be an imminent danger, the analysis hinges on whether the undisputed statements made by mine personnel constituted advance notice, not whether a 103(g)(1) exception applied.

Here, a miner underground hailed the dispatcher and asked if there was "company outside," to which the dispatcher replied, "yeah, I think there is." These statements, though undisputed, do not allow me to conclude that a prohibited advance notice was communicated. They are ambiguous and vague, very similar to those made in *Manalapan* where the court commented that similar statements were ambiguous at best. Therefore, I am unable to conclude as a matter of law that these statements were prohibited advance notice.<sup>2</sup>

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<sup>2</sup> If this case were to proceed to trial, the Secretary would have the burden of proving that the intercepted communication was an advance notice. Rule 56 of the Federal Rules of Civil Procedure ("FRCP") contemplates this scenario and justifies the granting of summary judgment where the non-moving party is unable to meet its ultimate burden. The Commission has analogized summary decision to summary judgement under Rule 56 of FRCP. *Hanson Aggregates New York, Inc.*, 29 FMSHRC at 9. If the Secretary, at this juncture, fails to marshal evidence that would at least support a reasonable inference that the subject statements, as vague as they were, still conveyed an advance warning contemplated and prohibited by the Act, a trial would be useless, and Kenamerican is entitled to judgment as a matter of law. The court may not deny summary judgment on the basis of speculation. § 2727 Grounds for Summary Judgment—Burden of Proof and Presumptions, 10A Fed. Prac. & Proc. Civ. § 2727 (3d ed.)

The lack of a genuine issue of material fact entitles Kenamerican to a summary decision as a matter of law. The vagueness of the statements precludes a finding that they constituted a prohibited advance notice in violation of Section 103(a) of the Mine Act.<sup>3</sup>

**WHEREFORE**, Citation No. 8502992 is **VACATED**.

/s/ L. Zane Gill  
L. Zane Gill  
Administrative Law Judge

Distribution: *(Certified Return Receipt)*

LaTasha Thomas, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street,  
Suite 230, Nashville, TN 37219-2456

Jason Hardin, Esq., Fabin & Clendenin, 215 South State Street, Suite 1200, Salt Lake City, UT  
84111-2323

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<sup>3</sup> The Respondent argued that Section 103(a) as applied in this case violated its First Amendment right because it is a content-based restriction. Because there was no violation found, and in the interest of judicial economy, I decline to address this argument.



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

August 25, 2015

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

v.

JOHN RICHARDS CONSTRUCTION,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No.: WEST 2014-440-M  
A.C. No.: 24-02070-343369

Mine: Richards Pit

## **SUMMARY DECISION** **ORDER DENYING DEPOSITIONS** **ORDER DENYING ORAL ARGUMENT**

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against John Richards Construction (“JRC”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815. The Secretary seeks a civil penalty in the amount of \$1,000.00 for one alleged violation of section 103(a) of the Act.

The Secretary filed a Motion for Summary Decision with an accompanying Memorandum of Points and Authorities (“Sec’y Br.”) and attached exhibits (“Exs. P-1 through P-4”), and JRC responded with a Reply Brief (“Resp’t Br.”) opposing the Motion, requesting the court to order depositions of MSHA inspector Peter Crites and his supervisor, Curtis Petty, and requesting an oral argument on the Motion. Both parties subsequently filed Reply Briefs in further support of their respective positions (“Sec’y Reply Br.” and “Resp’t Br. II”). The following are issues for resolution in this case: (1) whether JRC violated section 103(a) of the Act, and if so, (2) the appropriate penalty.

Commission Rule 56(e) states that “[d]iscovery shall not unduly delay or otherwise impede disposition of the case.” 29 C.F.R. § 2700.56(e). Respondent has not presented any evidence that it requested depositions prior to filing its Reply Brief, and this court does not find that they would be appropriate or necessary at this late stage of the proceedings. There is more than sufficient evidence in the record to resolve the matter at issue, and further discovery would prove unduly burdensome to orderly and expeditious disposition of the case. Therefore, JRC’s request to take depositions is hereby **DENIED**.

Pursuant to Commission Rule 67(b), “[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). When considering a motion for summary decision, the court looks at the record “‘in the light most favorable to . . . the party opposing the motion,’ and . . . ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Based on the facts represented by the parties, I find that there is no genuine issue as to any material fact, and that oral argument is unnecessary to resolve this matter. Therefore, Respondent’s Motion for an Oral Argument is hereby **DENIED**. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law on the issue of whether JRC violated the Act. Accordingly, I **AFFIRM** the Citation, as issued, and assess a penalty against Respondent.

## **I. FACTUAL BACKGROUND**

The Richards Pit is a sand and gravel mine in Seeley Lake, Montana, owned and operated by JRC. Ex. P-1 at 2, ¶ 6. John Richards is the owner of JRC. Aff. of John A. Richards ¶ 1. On Friday, July 19, 2013, at 11:40 am, MSHA Inspector Peter Crites arrived at the Richards Pit to conduct a regular inspection. Ex. P-1 at 2, ¶ 7-8. Upon arrival, Crites proceeded to the office building in front of the mine, where he notified JRC office personnel, Cindy Llewellyn and Kim Myre, that he was there to conduct an inspection and asked to speak to Richards. Ex. P-1 at 2, ¶ 8-9; P-2 at 9-10. Llewellyn told Crites that Richards was in Missoula, Montana, on business, and that she could not let Crites enter the mine. Ex. P-1 at 3, ¶ 10; P-2 at 10. Crites asked if there was anyone else on-site that could accompany him on an inspection, and Llewellyn responded that she “thought Kerry the mechanic was out there,” but regardless, she could not let the inspector enter. Ex. P-2 at 10.

At this point, Llewellyn called Richards, and Crites went outside to his vehicle to call his supervisor, Curtis Petty. Ex. P-1 at 3, ¶ 11; P-2 at 10. Llewellyn then went out on the porch and let Crites know that Richards was on the phone, and that he had directed her to lock the gate, which she then proceeded to do. Ex. P-1 at 3, ¶ 12, 14; P-2 at 10. Llewellyn later informed him that Richards had also instructed her and Myre to prevent access by parking their vehicles in front of the gate. Ex. P-1 at 3, ¶ 15; P-2 at 11. However, there is no indication in the record of whether Llewellyn and Myre actually moved their vehicles to the gate. Crites spoke with Richards on the phone, and Richards told the inspector that “[he] could not enter the premises without [Richards] being there to accompany him.” Resp’t Br. at 1; Ex. P-1 at 3, ¶ 13. According to Crites, Richards “repeated this direction to not enter the mine site at least four (4) more times,” and JRC has not disputed this claim. Ex. P-1 at 3, ¶ 13.

Crites spoke to Richards again on the phone; Richards informed him that he would be returning some time between 4:00 and 4:30 p.m., and reiterated that Crites should not enter the property until his arrival. Ex. P-1 at 3, ¶ 16; P-2 at 11; Answer to Pen. Pet. Around noon, Crites

observed a male individual enter a vehicle on the inside of the locked gate and drive off the premises, presumably from another entrance. Ex. P-1 at 3, ¶ 17. In a signed statement provided to the Secretary, Myre speculated that this man would have been Mark Smith, an employee who was at the site to pick up a paycheck. Ex. P-2 at 9. Following the instructions of his supervisor, Petty, Crites waited at the mine, issued a citation, left it on the front porch of the office at 4:15 p.m., and drove away at 4:20 p.m.; Richards had not returned to the mine by that time. Ex. P-1 at 4, ¶ 20-22.

## **II. MATERIAL FACTS**

### **1. There are No Genuine Issues of Material Fact**

JRC contends that there are disputed facts in this matter that can only be resolved through an oral argument and hearing. However, looking at the record in the light most favorable to Respondent, I am unable to find any material fact in dispute.

JRC takes the position that the “gate is not on the mine site,” but rather that it is adjacent to the Richards Pit, and that Crites would have had “to cross [Richards’] private property not part of the mine” to access the mine. Resp’t Br. at 1; Ex. P-2 at 2. Furthermore, JRC states that “[i]t is a disputed fact that [Llewelyn] locked the gate.” Resp’t Br. at 1. However, Llewellyn, herself, states, “I told [Crites] per [Richards] I was to go lock the gate at which time I did.” Ex. P-2 at 10. Myre’s statement is nearly identical, explaining that “[Llewelyn] locked the gate per [Richards’] instructions.” Ex. P-2 at 9. Moreover, Richards’ own notes state that he instructed Llewellyn to lock the gate and block access. Ex. P-2 at 11. JRC has not advanced any evidence to the contrary and, therefore, I find that, upon Richards’ orders, Llewellyn did, in fact, lock the gate, which provided access to the mine through adjacent property.

Respondent also alleges that “[t]he inspector did not follow proper procedure.” Resp’t Br. at 2. However, it is unclear as to what procedure Respondent is referencing. JRC has quoted a series of requirements from MSHA’s Program Policy Manual without specifying which one Crites failed to follow or how it would affect the outcome of this case. Resp’t Br. at 2. Consequently, I find no genuine factual dispute respecting Crites’ conduct in initiating the inspection.

### **2. Any Facts in Dispute Are Not Material**

None of the remaining facts, while disputed, are material to the disposition of this proceeding. JRC disputes Crites’ observations of fresh gravel at the mine, arguing that the mine was not in operation, and that no miners were present on the day of the inspection. Resp’t Br. at 2. However, the validity of these allegations would have no bearing on the Secretary’s right of entry under section 103(a). An authorized agent of the Secretary may conduct regular inspections of a mine irrespective of whether it is operating at the time or miners are present. As the judge found in a similar case involving a denial of entry, “[i]f [the operator] could not find someone to [accompany the inspector], [the operator] was obliged to permit [the inspector] to conduct his inspection unaccompanied.” *F.R. Carroll, Inc.*, 26 FMSHRC 97, 102 (Feb. 2004) (ALJ).

JRC also contends, contrary to Crites' Affidavit, that Crites did not give anyone at the company notice that it would be cited for refusing entry. Resp't Br. at 2. In this regard, Crites has stated that he "explained to [Richards] MSHA's right to entry under the Mine Act and that JRC would be cited for a violation of section 103(a) of the Mine Act if entry was refused." Ex. P-1 at 4, ¶19. Without disputing that Crites explained MSHA's right of entry under the Act, JRC responds that "[a]t no time did Mr. Crites tell JRC or the office staff that they would be cited [*sic*] for a violation of section 103(a) of the Mine Act for refusing entry." Resp't Br. at 2. It is unnecessary, however, to resolve this factual dispute. While it is reasonable to believe that an inspector, upon denial of entry, who engaged in repeated conversations with mine personnel and management over this issue, would have advised an operator of MSHA's rights under section 103(a) and that failure to permit entry would result in a violation, there is no requirement that an inspector threaten an operator or otherwise warn it of an impending citation in order to achieve cooperation and compliance.

Lastly, in the context of contesting the Secretary's proposed penalty assessment of \$1,000.00, JRC states that it is a disputed fact whether Richards acted in good faith by returning to the mine as soon as possible. Resp't Br. at 3. Whether Richards' decision to return to the mine late in the afternoon constitutes good faith compliance does not affect the fact of violation, but rather is a criterion considered in setting an appropriate penalty.

### **III. FACT OF VIOLATION**

Crites issued 104(a) Citation No. 8762607, alleging a violation of section 103(a) of the Act that had "no likelihood" of causing an injury resulting in "no lost workdays," and was caused by JRC's "high" negligence. The "Condition or Practice" is described as follows:

Mr. John Richards, owner of Richard's Pit, John Richards Construction, refused to allow an authorized representative to enter the mine. Mr. Richards stated via telephone that the MSHA inspector could not enter the mine to conduct an inspection without his presence. Two office personnel and a mechanic were present. Cindy Llewellyn, one of these office personnel, was instructed by Mr. Richards via telephone to lock the gate and position two cars in front of it. She proceeded to lock the gate. The mechanic and the two office personnel got in their cars and left the mine site. Prior to leaving, Ms. Llewellyn stated that she would be back and Mr. Richards would be there at 4 o'clock. Cindy was advised that refusal to allow the inspection was a violation of the provisions of Section 103(a) of The Mine Act. John Richards is well aware of this provision of The Mine Act, and has impeded past inspections. This condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

Ex. P-1A at 1-2. The citation was terminated on Monday, July 22, 2013, upon Crites' return to the Richards Pit, when Richards permitted him entry for an inspection. Ex. P-1A at 3.

The Secretary argues that JRC directly denied Crites entry to the mine, in violation of section 103(a), when Richards repeatedly told him that he could not enter the mine until he returned. Sec'y Br. at 8. The Secretary also argues that Richards' direction to his employees to lock the entrance gate and park their vehicles to block Crites' access to the mine constituted an indirect denial of entry. Sec'y Br. at 8. Respondent, on the other hand, denies that it interfered with the inspection in a way that frustrated the inspector's legitimate objectives, and defends Richards' behavior on safety grounds. Resp't Br. at 1-2.

#### **IV. DISCUSSION & ANALYSIS**

Section 103(a) of the Act, in pertinent part, provides that, for the purpose of making any inspections under the Mine Act, any authorized representative of the Secretary "shall have a right of entry to, upon or through any coal or other mine." 30 U.S.C. § 813(a). It is well-settled Commission precedent that a refusal to permit an inspection is a violation of section 103(a) for which a penalty must be imposed. *Waukesha Lime and Stone Co.*, 3 FMSHRC 1702, 1703 (July 1981).

The issue presented in this matter is whether JRC's verbal refusal to permit Crites' entry until 4:00 to 4:30 that afternoon, when Richards was set to return from Billings, and JRC's subsequent actions of locking the gate, constituted a denial of the Secretary's right of entry in violation of section 103(a) of the Act.<sup>1</sup> I find that it did.

JRC indirectly denied the inspector entry when its employees locked the gate to the mine upon Richards' orders. While this indirect denial would, by itself, justify affirming the Citation, Richards, by his own admission, directly denied Crites access to the mine. In JRC's Reply, the company states that Richards told Crites that "[he] could not enter the premises without [Richards] being there to accompany him." Resp't Br. at 1. Apparently, Respondent does not consider Richards' conduct a denial of entry, advancing two theories as to why there was not "any interference from the mine operator that frustrated the [inspector's] legitimate objectives." Resp't Br. at 2. First, the mine was deserted, non-operational, and "exactly the same when inspected as when Mr. Crites first arrived at the mine." Resp't Br. at 2-3. Second, the gate, itself, "was a chain and bar about knee high" and, therefore, Crites could have "stepped over the chain

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<sup>1</sup> JRC has not asserted that Crites denied anyone the right to accompany him during his inspection pursuant to section 103(f) of the Act and, therefore, the argument need not be addressed in detail. It would be inapplicable here in any event, as section 103(f) only offers "a representative of the operator . . . an *opportunity* to accompany the Secretary or his authorized representative during the . . . inspection." 30 U.S.C. § 813(f) (emphasis added). Crites provided ample opportunity for any available representative of the operator, including the mechanic that Llewellyn thought was on-site, the employee who was picking up a paycheck, or the office personnel, themselves, to accompany him during the approximate four and a half hours that he waited for Richards to return. Llewellyn, instead, informed Crites that he could not enter the mine even if Kerry, the mechanic, were present that day.

and entered” if he had wished to exercise his section 103(a) rights. Resp’t Br. at 2. Neither argument is persuasive.

As the Commission has explained, “[s]ection 103(a) expressly requires that no advance notice be given an operator prior to an inspection and gives authorized representatives of the Secretary an explicit right of entry to all mines for the purpose of performing inspections authorized by the Act.” *Calvin Black Enterprises*, 7 FMSHRC 1151, 1156 (Aug. 1985). The Commission has found unreasonable delay to constitute a section 103(a) violation, at least in the context of an accident investigation. *See U.S. Steel Corp.*, 6 FMSHRC 1423, 1433 (June 1984). Similarly, Commission Administrative Law Judges (“ALJs”) have also found section 103(a) violations in cases involving unreasonable delays of inspections. *See, e.g., F.R. Carroll, Inc.*, 26 FMSHRC 97, 102 (Feb. 2004) (ALJ) (finding an operator’s request to delay an inspection by five hours unreasonable and a violation of section 103(a)); *Sanger Rock & Sand*, 11 FMSHRC 403, 406-07 (Mar. 1989) (ALJ).

Crites attempted to begin his inspection at or around 11:40 on Friday morning. He was directly denied entry by JRC and told to wait until 4:00 or 4:30 that afternoon. I find that by refusing Crites’ entry and demanding that the inspection be delayed until Richards’ return, JRC not only interfered with the inspector’s right of entry, but also undermined the prohibition against giving operators advance notice of inspections.

While Respondent claims that the conditions of the mine remained unchanged between Friday morning when Crites attempted his inspection, and the following Monday when the inspection finally occurred, the primary purpose of “unannounced inspections proceeding without delay” is to “encourage compliance by preventing mine operators from concealing hazardous violations upon learning that mine inspectors have arrived on the premises.” *F.R. Carroll, Inc.*, 26 FMSHRC at 102. Even in a related case where neither the respondent nor any of its employees were present at the mine site on the day of the inspection, and where the ALJ found the operator’s request for a delay of the inspection to have been made in good faith, the judge reasoned that “had the inspector agreed to delay the inspection [as per the operator’s request] it is possible they could have made efforts to clean up any violations before the inspector arrived on site the following day.” *DJB Welding Corp.*, 32 FMSHRC 728, 731 (June 2010) (ALJ). The judge concluded that “exceptions cannot be carved out from a statutory mandate that explicitly states ‘no advance notice of an inspection shall be provided to any person.’” *Id.* I agree.

JRC’s second argument is, likewise, without merit. While JRC’s gate might have been a minor obstacle, in and of itself, the Commission has only required for a section 103(a) violation that entry be refused, not that it be made physically impossible. In *Calvin Black Enterprises*, 7 FMSHRC 1151, 1157 (Aug. 1985), the Commission clarified that operators need not physically prevent inspectors from conducting their inspections in order to violate section 103(a). In that case, there was sufficient evidence of a section 103(a) violation where inspectors were advised that they were trespassing and needed to obtain written permission from the mine’s owner before inspecting the mine. *Id.* As the Commission explained, “MSHA inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect.” *Id.* In the instant case, based on his conversations with Richards and Llewelyn, and

JRC's subsequent blocking of the gate, Crites would have been justified in thinking that he might have to force entry or subject himself to possible confrontation in order to gain entry.

Having failed to rebut that its actions constituted a denial of entry under section 103(a) of the Act, JRC seeks to defend its conduct by explaining that Richards' presence was required "to insure company policies are followed for the safety of anyone on [his] property." Resp't Br. at 1. The company's apparent argument is that it was necessary for Richards to accompany Crites for his own safety. However, section 103(a) does not contain any such condition or limitation on the Secretary's right of entry. Therefore, Respondent has failed to proffer a valid defense for Richards' actions and, by his direction, that of his employees, and I find that section 103(a) was violated.

The Commission has recognized that "denial of access to an MSHA inspector . . . is an action not to be taken lightly." *Tracey & Partners*, 11 FMSHRC 1457, 1464 (Aug. 1989). In line with this recognition, ALJs have regularly found denial of entry to be serious violations. *See F.R. Carroll, Inc.*, 26 FMSHRC at 103; *Higman Sand & Gravel, Inc.*, 23 FMSHRC 876, 877 (Aug. 2001) (ALJ); *Topper Coal Co., Inc.*, 17 FMSHRC 945, 955 (June 1995) (ALJ), *aff'd*, 20 FMSHRC 344 (Apr. 1998); *John Cullen Rock Crushing & Gravel*, 16 FMSHRC 909, 915 (Apr. 1994) (ALJ); *Sherman Lime and Rock Co.*, 4 FMSHRC 384, 394 (Feb. 1982) (ALJ). Accordingly, I find the gravity of this violation to be very serious.

On the face of the citation, Crites alleges that Richards is well aware of the requirements of section 103(a), and that he has impeded past inspections. Ex. P-1A at 1-2. In Crites' Affidavit, he states that he reviewed MSHA's inspection history of the mine prior to his arrival on July 19, and discovered that Richards "had previously called the local Sherriff on an MSHA inspector for trespassing," and had "taken measure[s] to interfere with inspectors taking photographs of conditions violating the Mine Act." P-1 at 4, ¶ 24. Moreover, in establishing jurisdiction, the Secretary cites to a case that illuminates another instance of obstructive behavior at the Richards Pit. Sec'y Br. at 3 n.1. In that case:

When [MSHA] Inspector Smith arrived he talked to Mr. Carl Tanner[, an agent of JRC]. When Tanner discovered that Smith was an MSHA employee, Tanner told Smith that he was going to shut the plant down. Tanner walked through the plant to the other side, shut it down, and left with the other employee. As they were leaving, Tanner told Smith that he was not going to participate in the inspection and that he could "[w]rite anything you want - I've seen it all before."

*John Richards Construction*, 23 FMSHRC 1045, 1046 (Sept. 2001) (ALJ) (citation omitted). This evidence, taken together, suggests an uncooperative attitude and pattern of obstructive behavior on the part of the company, dating back several years, that should not be tolerated.

Furthermore, the Commission has held "that an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (Apr.

1998) (quoting *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)). JRC has advanced no argument that Richards was unaware of MSHA's right of entry, that the inspector did not inform him of that right, or that Richards had not told his employees to block the gate with their vehicles. Therefore, based on the circumstances surrounding the instant violation and JRC's history of contempt for MSHA's authority to inspect its facility, I conclude that Richards' communications with Crites and his instructions to his staff constituted a deliberate denial of entry. Accordingly, I find JRC highly negligent in violating the Act.

## **V. PENALTY**

The Secretary has specially assessed a proposed penalty of \$1,000.00 for this violation pursuant to his Part 100 Regulations, and justifies this assessment by stating that the denial of entry was intentional and a very serious violation of the Act. Sec'y Br. at 11. JRC argues that a special assessment would serve no public good and notes that a regular assessment, under the Secretary's Part 100 Regulations, would be \$100.00. Resp't Br. at 3.

Part 100 of the Secretary's Regulations states that "MSHA may elect to waive the regular assessment . . . if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). The U.S. Court of Appeals for the District of Columbia Circuit has held that "[t]he special assessment . . . is designed for particularly serious or egregious violations." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1129-30 (D.C. Cir. 1989). In cases involving denial of entry, there are different levels of egregious conduct, including, at the most extreme end of the spectrum, situations in which mine management has physically assaulted inspectors in order to prevent inspections, resulting in serious injury. *See, e.g., Baker Coal Co.*, 2 FMSHRC 2626, 2627 (Sept. 1980) (ALJ). While the instant matter does not involve behavior that would reasonably be found to be extreme, there is clear evidence that JRC is well-versed on the Secretary's right of entry under section 103(a), and that this behavior is not isolated. JRC's history of obstructive and uncooperative behavior toward MSHA inspectors makes this violation particularly egregious. Therefore, I find that the Secretary was well-justified in proposing a specially assessed penalty.

Notwithstanding the Secretary's authority to propose a specially assessed penalty, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

I find that JRC is a small operator with no prior violations of section 103(a) of the Act during the relevant time period and, therefore, an overall violations history that is not an aggravating factor in assessing an appropriate penalty. *See* Ex. P-4 at 2. JRC asserts that the proposed penalty "would be devastating to this small mine's continued operation," but outside of this bare assertion, Respondent has not proffered any evidence that would support this claim. Resp't Br. at 3. The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). *See also Steele Branch Mining*, 18 FMSHRC 6, 15 (Jan. 1996).



Therefore, I find that the proposed penalty will not affect JRC's ability to continue in business. I also find, given Richards' adherence to his position despite clear warnings from Crites, that JRC failed to demonstrate good faith in achieving rapid compliance after notice of the violation. The remaining criteria involve the gravity of the violation and JRC's negligence in committing it. As has been discussed fully, I find the violation to be very serious, and the result of the operator's high negligence.

It has been established that this serious violation of section 103(a) of the Act had no reasonable likelihood of causing an injury resulting in lost workdays or restricted duty, that JRC was highly negligent, and that it did not demonstrate good faith in achieving rapid compliance. Therefore, I find that the penalty of \$1,000.00, as proposed by the Secretary, is appropriate.

### **ORDER**

**WHEREFORE**, the Secretary's Motion for Summary Decision is **GRANTED**, and it is **ORDERED** that Citation No. 8762607 is **AFFIRMED**, as issued, and that John Richards Construction **PAY** a civil penalty of \$1,000.00 within 30 days of the date of this Decision.<sup>2</sup>

/s/ Jacqueline R. Bulluck  
Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Tyler P. McLeod, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 515, Denver, CO 80204

John Richards, John Richards Construction, 2824 Highway 83 North, P.O. Box 316, Seeley Lake, MT 59868

/rd

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<sup>2</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
UNITED STATES CUSTOM HOUSE  
721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
303-844-3577 FAX 303-844-5268

August 28, 2015

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

v.

YENTER COMPANIES,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-429-M  
A.C. No. 48-00007-343734 J2W

Mountain Cement Company

## **DECISION**

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Rodney L. Smith, Esq., Sherman & Howard, LLC, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Yenter Companies (“Yenter”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Denver, Colorado, and filed post-hearing briefs. A section 104(d)(1) citation and order were adjudicated at the hearing. Yenter Companies is an independent contractor performing blasting operations at a quarry operated by Mountain Cement Company near Laramie, Wyoming.

## **I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. In resolving conflicts in the testimony, I have taken into consideration such factors as the interests of each witness, the consistency of each witness’s testimony, and the consistency of each witness’s testimony with the testimonies of other witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

Yenter is a drilling, blasting, and rock stabilization contractor that has been in business since 1977. Yenter has conducted all blasting operations for Mountain Cement Company at its Laramie, Wyoming, quarries for about 25 years. The blaster in charge is Jim Wasmuth and his

assistant is Norman Jariell. Wasmuth has several pertinent blasting certifications and he has been in charge of the blasting operations for Mountain Cement since 1989.

#### **A. Order No. 8754714**

On January 7, 2014, MSHA Inspector John C. Kalnins<sup>1</sup> issued Order No. 8754714 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.6306(a) of the Secretary's safety standards. (Ex. P-1). The citation alleges that there was no barricade at the blast area in the quarry to keep miners from entering a live blast area. The order further states that the blaster was on the blasting site getting ready for the blast and that, if a miner entered the area, he may have received fatal injuries.

Inspector Kalnins determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, and that any injury could reasonably be expected to be fatal. He determined that Yenter's negligence was high and that one person would be affected. Section 56.6306(a) mandates that "[w]hen explosive materials or initiating systems are brought to the blast site, the blast site shall be attended; barricaded and posted with warning signs, such as 'Danger,' 'Explosives,' or 'Keep Out;' or flagged against unauthorized entry." 30 C.F.R. § 56.6306(a). The Secretary proposed a penalty of \$2,000.00 for this order.

#### **Discussion and Analysis**

MSHA cited Yenter for failing to barricade the blast site in order to keep miners from entering a live blast area. Yenter was responsible for the shot blasting area at that time. (Tr. 179). The parties disagree as to the presence of any barricades or blasting notices on the day of the blast. The Secretary's only witness, MSHA Inspector John Kalnins, testified that on January 7, 2014, the requisite barriers or blasting notices were not present when he entered the quarry owned by Mountain Cement. (Tr. 14). Inspector Kalnins also testified that only after Wasmuth noticed that a MSHA inspector was present did Wasmuth start to put up cones barricading the blast area. (Tr. 22). Wasmuth, on the other hand, testified that the "Blasting Today" sign was opened by Jariell, his assistant. (Tr. 93). Jariell likewise testified that he opened the "Blasting Today" sign around 7:00 a.m. (Tr. 133) and that both he and Wasmuth attended the site in order to prevent anyone from entering it for the entire time they loaded and wired the shots. (Tr. 137). Wasmuth further testified that he placed three cones on the access road prior to the blast, but had removed the center cone the day of the blast so he could access the site. (Tr. 94-5). Mountain Cement safety manager, Charles Murphy, testified that he did not see any cones barricading the blast area upon entering the area with Mr. Kalnins, but that he did see the Danger - Blasting sign to the right of the blast site access road. (Tr. 183-84).

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<sup>1</sup> Kalnins had been an inspector with the MSHA Denver field office for six years at the time of the hearing. (Tr. 7). Prior to his employment with MSHA, he worked at open-pit sand and gravel operations and in construction as a laborer, foreman, and project manager. (Tr. 8). Inspector Kalnins testimony at the hearing was often confusing and muddled. Although I do not question his honesty, his memory of the events that transpired the day of the inspection was often inaccurate. I find that his testimony was not persuasive with respect to several key issues.

The parties disagree as to the requirements of the safety standard. The Secretary contends that the standard “requires that when explosive materials or initiating systems are brought to a blast site the operator [is required to] ensure that the blast site is (1) attended, (2) barricaded, *and* (3) posted with warning signs.” (Sec’y Br. 9) (emphasis added). In the alternative, the operator has the option of flagging the site against unauthorized entry. *Id.* Yenter, on the other hand, argues that the safety standard presents alternatives that an operator may use to comply. It notes that the standard uses the word “or” rather than “and” in the list of options available to an operator. In support, Yenter points to the preamble to the safety standard, which provides:

Moreover, the final regulation gives operators compliance flexibility by providing alternative methods on how to demarcate the blast site. Under this final regulation, once initiation systems are brought to the blast site, mine operators must either: (1) attend to the blast site; (2) barricade and post the blast site with warning signs, such as “Danger,” “Explosives,” or “Keep Out;” or (3) flag the blast site, to be in compliance with paragraph (a).

61 Fed. Reg. 36790, 36793 (July 12, 1996).

I find that the Secretary did not establish that Yenter violated the safety standard. The language of the safety standard is clear; it provides several alternatives for compliance. “Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010). The intent of the Secretary, as set forth in the preamble, supports the plain language in the safety standard itself and this clear meaning would not lead to absurd results.

One of the alternatives for compliance is for the blast site to be “attended” by the operator. The term “attended” means the “presence of an individual or continuous monitoring to prevent unauthorized entry or access.” 30 C.F.R. § 56.2. The term “blast site” is defined, for purposes of this case, as an “area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes.” *Id.* Both Wasmuth and Jariell spent the morning in the blast site loading and wiring the explosives. Wasmuth and Jariell were present at the blast site from the time they started working until they exited the area to initiate the blast. The only way to access the blast site was via the road they used to enter the area earlier that morning. (Ex. J-1). The area surrounding the blast site was open land with sparse vegetation. (Ex. R-1). A person could not have approached the blast site without being seen by either Wasmuth or Jariell. (Tr. 101, 137-38). I find that the evidence establishes that the blast site was “attended,” as that term is defined by the Secretary.

Although it is not critical to my holding, I credit the testimony of Jariell that he opened the “Blasting Today” sign the morning of January 7, 2014. That sign warns anyone entering Mountain Cement’s quarry site from the public road that blasting would be occurring that day. (Ex. R-8). The sign does not prevent anyone from driving along the main access road and onto the secondary roadway that leads to the blast site.

There had been three orange cones across this secondary roadway, but when Wasmuth entered the area at the beginning of his shift that day, he removed the center cone to drive into the area and did not stop to replace the center cone. Thus, there were two orange cones on the roadway, but a vehicle could still pass through even though the roadway was only the width of one vehicle. (Tr. 16). Wasmuth also testified that he placed a sign along the side of the secondary roadway about 100 yards beyond the two cones when he first entered the area. (Tr. 95). The sign said “Danger, Blasting, Keep Away.” (Tr. 95-96). Inspector Kalnins testified that he observed Wasmuth putting up the danger sign only when he saw the inspection party approaching the blast site around 1:00 in the afternoon. (Tr. 21). Murphy, who drove the inspector to the quarry, did not see Wasmuth pull the danger sign from his truck as the inspection party approached. He testified that the sign was already present along the side of the road as they entered. (Tr. 182, 197). I credit the testimony of Murphy and Wasmuth on this issue. Wasmuth replaced the missing middle cone just before the blast countdown was commenced. (Tr. 106).

The Secretary takes the position in his brief that because the secondary roadway leading to the blast site was not barricaded against entry, a violation was established. He states that “Wasmuth’s failure to replace the cone constitutes a violation of the cited standard by Yenter.” (Sec’y Br. 10). He concludes that “[e]ven if the Court finds that the site was appropriately attended and warning signs were posted, the site was not barricaded while explosives were present. Therefore, Respondent violated Section 56.6306(a).” (Sec’y Br. 11). His position is contrary to the plain and clear wording of the safety standard which requires that a blast site be attended, barricaded and posted, or flagged against authorized entry. Yenter attended the blast site and posted danger signs. Those actions complied with the safety standard. For these reasons, the citation is **VACATED**.

### **B. Citation No. 8754730**

On January 7, 2014, MSHA Inspector Kalnins issued Citation No. 8754730 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.6306(g) of the Secretary’s safety standards. (Ex. P-3). The citation alleges that after a blast in the quarry, miners went into the blasting area before the area had a post-blast examination. The citation further states that a miner entering the blasting area before it is examined for misfires could receive fatal injuries.

Inspector Kalnins determined that an injury was reasonably likely to occur, the violation was S&S, and that an injury could reasonably be expected to be fatal. He determined that Yenter’s negligence was high and that one person would be affected. Section 56.6306(g) mandates that “[w]ork shall not resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform this examination.” 30 C.F.R. § 56.6306(g). The Secretary proposed a penalty of \$2,000.00 for this citation.

### **Discussion and Analysis**

MSHA cited Yenter for allowing unauthorized persons to enter the blast area before a post-blast inspection was completed and an all-clear notice was given. Yenter’s company policy allows for the assistant blaster to perform all of the blaster in charge’s duties, save clearing

misfires, so long as the former is under the supervision of latter. (Tr. 157). Jariell testified that he performed the post-blast inspection immediately after the blast and issued an all-clear. (Tr. 143). Jariell and Wasmuth testified that only one person, Mountain Cement pit boss Scott Swinford, entered the blast area before an all-clear was given. (Tr. 117,148). This testimony was corroborated by Charles Murphy, the safety manager for Mountain Cement. (Tr. 201). Inspector Kalnins, on the other hand, testified that several Mountain Cement employees entered the blast area before the all clear was given. Swinford had witnessed blasts performed by Yenter in the past but Wasmuth, Jariell, and Murphy testified that they had not previously observed Swinford enter a blast area prematurely as he did in this instance. (Tr. 116-17, 149, 187, 191)

I find that the Secretary established a violation. The evidence establishes that, once the shot was fired, Swinford drove his vehicle down the access road and “parked just in front of the face of the shot[.]” (Tr. 203, 196). The all-clear had not been given at that time. Inspector Kalnins believed that several other people entered the blast area, but the evidence clearly demonstrates that only Swinford prematurely traveled to the blast area.<sup>2</sup> (Tr. 117, 148, 204). Mountain Cement disciplined Swinford by suspending him for three days without pay. (Tr. 205). Inspector Kalnins issued an imminent danger order and the section 104(d)(1) citation and order that are the subject of this case after observing Swinford drive to the blasting area.<sup>3</sup>

Yenter argues that although Swinford wrongfully entered the blast area before the all-clear signal was given, the Secretary did not establish a violation because there is no evidence that Swinford entered the blast area before Jariell finished examining the blast area for misfires. Yenter also argues that there was no proof that Swinford conducted any “work,” as that term is used in the safety standard, before the all-clear was given. The Secretary only proved that Swinford drove into the blast area.

I reject Yenter’s argument. It is clear that Swinford entered the blast area prematurely. It is possible, but unlikely, that Swinford arrived at the blast area after Jariell completed his post-blast examination but before he actually gave the all-clear signal. It would not have taken Swinford as long to drive to the blast area as it would take Jariell to complete his examination.<sup>4</sup> While it is true that Swinford did not walk upon the blast area to conduct any “work,” he did drive into the blast area for a work-related purpose. Given the purpose of the safety standard, the term “work” should be interpreted broadly to include the act of entering the blast area before the post-blast examination has been completed.

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<sup>2</sup> The term “blast area” includes a much larger area than a “blast site.” “Blast area” is defined, in part, as “the area in which concussion (shock wave), flying materials, or gases from an explosion may cause injury to persons.” 30 C.F.R. § 56.2.

<sup>3</sup> Yenter did not contest the imminent danger order.

<sup>4</sup> Swinford no longer works for Mountain Cement and he did not testify at the hearing.

I find that the Secretary did not establish that the violation was the result of Yenter's unwarrantable failure to comply with the safety standard.<sup>5</sup> The citation alleges that "[b]laster Jim Wasmuth engaged in aggravated conduct constituting more than ordinary negligence in that he knew the proper blasting procedures and still let miners access the hazardous area." The evidence establishes that Wasmuth did not permit miners to enter the blast area before he completed his examination. At some point Wasmuth saw Swinford's truck in the blast area, but he did not authorize or permit him to enter the area.<sup>6</sup> (Tr. 117-18). Swinford was an employee of Mountain Cement, not Yenter. The primary dispute between the parties with respect to this issue is whether Swinford habitually entered the blast area prematurely. The Secretary argues that Swinford frequently traveled to the blast area immediately following a blast before the post-blast examination had been completed. He maintains that Wasmuth, acting on behalf of Yenter, did not take any steps to stop this practice. Respondent maintains that Wasmuth and Jariell made sure that people did not prematurely enter the blast area until the all clear signal was given, in accordance with Yenter policy.

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<sup>5</sup> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5) whether the violation was obvious; (6) whether the condition posed a high degree of danger; and (7) the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353.

<sup>6</sup> During the blast, two groups of miners blocked access to the blast area. Swinford used his truck to block the main haulage road to the south of the access road to the pit and the blast area. Other personnel were in that area, including Inspector Kalnins and Murphy who were in the same vehicle during the blast. Others blocked the access from the north along the same haulage road. Murphy testified that, as they watched Swinford drive toward the blasting area, he told Inspector Kalnins that he did not know why Swinford had left the area before the all-clear was given. (Tr. 186). Murphy further testified that when he asked Kalnins whether he should contact Swinford on the radio, Kalnins replied "No, let's just see where he is headed." *Id.* Kalnins, on the other hand, testified that Murphy tried to contact Swinford, but was not successful. (Tr. 61-62). Given the inspector's confusion about the events of the day, I credit Murphy's testimony.

Swinford had witnessed many blasts conducted by Yenter. Both Wasmuth and Jariell testified that they had never observed Swinford drive to the blast area before the post-blast examination was completed. (Tr. 117-18, 149) I credit their testimony. Murphy testified that he overheard Swinford tell Inspector Kalnins that “he has always done it that way.” (Tr. 190). This testimony is hearsay and it is not clear what the phrase “done it that way” means with respect to Swinford’s conduct. It could simply mean that he is always the first Mountain Cement employee at the blast site, not that he always jumped the gun and entered the blast area before Yenter had completed its post-blast examination.<sup>7</sup>

Although Yenter, as the blasting contractor, “has a duty to ensure the safety of miners within the blast area,” its failure to prevent Swinford from entering the blast area in this instance did not rise to the level of aggravated conduct. *Orica Nelson Quarry Services*, 35 FMSHRC 3004, 3012 (Sept. 2013)(ALJ). The violation occurred instantaneously without warning. The Secretary argues that the violation was extensive because it was a regular practice for employees to enter blast areas before the all-clear had been given. I credit the testimony of Wasmuth and Jariell that they followed Yenter’s blast security measures and prohibited others from entering the area before their post-blast examination had been completed. (Tr. 116-17, 148). The Secretary did not establish that Yenter habitually allowed Mountain Cement employees to enter the blast area before completion of the post-blast examination. Yenter had not been put on notice that greater efforts were necessary to comply with the safety standard. For the same reason, I find that Wasmuth and Jariell, acting for Yenter, did not know that Swinford would attempt to enter the blast area prior to the all-clear being given. As a consequence, Yenter did not have an opportunity to abate the violative condition prior to its occurrence. Traveling into a blast area before the all-clear signal is given creates an obvious and serious safety hazard. Because Yenter did not know that Swinford would enter the blast area prematurely until the moment he did so, Yenter did not have knowledge of the violation prior to its occurrence.

I find that Yenter exhibited moderate negligence. In determining whether an operator has met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard. *JWR Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014). I find that Yenter was not indifferent to the necessity to prevent miners from entering the blast area before the area was examined and its conduct in this respect did not amount to a serious lack of reasonable care. Neither Wasmuth nor Jariell knew or expected that Swinford would drive into the blast area. Yenter had a policy that prohibited miners from entering a blast area until the all-clear notice was given. (Tr. 161-62; Ex. R-5 at 9-10).

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<sup>7</sup> Inspector Kalnins wrote in his notes “miners went into the blasting area before the area had a post blast examination. The miners stated that this was the way it was always done.” (Ex. P-4). As stated above, the inspector erroneously believed that many miners had prematurely entered the blast area. This written statement suffers from the same ambiguity due to the inspector’s confusion about the events that took place at the quarry that day.



I find that the Secretary established that the violation was S&S.<sup>8</sup> There was a violation of a safety standard that created a discrete safety hazard. The hazard included the risk of a misfire and the possible presence of noxious gasses. Explosive material could have ignited on its own or as a result of Swinford's presence upon exiting his vehicle.

Whether it was reasonably likely that the hazard contributed to by the violation will result in an injury is the closest issue. The "reasonably likely" requirement does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation will cause an injury. *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Cumberland Coal Resources*, 33 FMSHRC 2357, 2365 (Oct. 2011). I find that entering a blast area before it has been examined and cleared is hazardous and that a serious injury is reasonably likely given continued mining operations. I find that the hazard created by this violation was reasonably likely to lead to an injury and that such an injury would be of a reasonably serious nature.

The gravity of the violation was serious for the reasons described above. The violation could have contributed to a fatal or permanently disabling injury.

I **MODIFY** Citation No. 8754730 to a 104(a) citation with moderate negligence. In all other respects the citation is affirmed. Although I am not bound by the penalty point system developed by MSHA, I note that if the penalty is recalculated using MSHA's system taking into consideration my moderate negligence finding, the penalty would be \$392.00 with the reduction for good faith abatement. 30 C.F.R. § 100. 3. I find that a penalty of \$400.00 is appropriate for this violation. I considered all of the penalty criteria in assessing this penalty. I took particular note of Yenter's small size and its lack of any previous history of violations.

## II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The parties stipulated that Yenter has no history of previous MSHA

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<sup>8</sup> An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

violations during the relevant time period. (Tr. 5). Respondent is a small independent contractor. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Yenter to continue in business. The gravity and negligence findings are set forth above.

### III. ORDER

Order No. 8754714 is **VACATED** for the reasons set forth above. Citation No. 8754730 is **MODIFIED** to a section 104(a) citation with moderate negligence. Yenter Companies is **ORDERED TO PAY** the Secretary of Labor the sum of \$400.00 within 30 days of the date of this decision.<sup>9</sup>

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

Distribution:

Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3518

Rodney L. Smith, Esq., Sherman & Howard L.L.C., 633 Seventeenth Street, Suite 3000, Denver, CO 80202-3622

RWM

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<sup>9</sup> Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

# **ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

August 3, 2015

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

v.

KENTUCKY FUEL CORPORATION,  
Respondent.

PENALTY PROCEEDING

Docket No. KENT 2012-979  
A.C. No. 15-19475-286532

Mine: Beech Creek Surface Mine

## **ORDER DENYING JOINT MOTION TO APPROVE SETTLEMENT**

Before: Judge Moran

In this civil penalty proceeding involving an alleged violation of 30 C.F.R. 77.1000, Citation No. 8259158 states that “[t]he fly rock prevention plan (general safety precautions) which were incorporated into the acknowledged ground control plan on August 5, 2011, is not being complied with on this date.” The cited standard, titled “Highwalls, pits and spoil banks; plans,” provides:

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 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 Secretary has filed a joint motion to approve settlement in which he seeks a 97% reduction of the amount from that which was initially proposed, from \$30,200.00 to \$1,000.00. Despite a resubmission of the motion, the “basis of compromise” presented by the Secretary remains inadequate and prevents the Court from carrying out its responsibilities under section 110(k) of the Mine Act. Accordingly, for the reasons which follow, the Secretary’s motion is DENIED.

The Joint Motion begins with the Secretary’s standard, one-size-fits-all language:

The Mine Safety and Health Administration (“MSHA”) proposed civil penalty for the citation at issue [sic] [is] in accordance with the statutory penalty criteria in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and MSHA’s civil penalty regulations at 30 C.F.R. Part 100.

Representatives for the Secretary and Respondent have discussed the alleged violation and MSHA's proposed penalty, and seek to settle the contested citation in the above captioned docket as follows: . . . [m]odify the citation from "reasonably likely" to "unlikely", remove the S&S designation, and modify from "high" to "moderate" negligence, and from "fatal" to "lost workdays or restricted duty[.]"

In reaching this settlement, the Secretary has evaluated the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation and order as indicated above.

Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

Second Jt. Mot. at 1-2 (paragraph designations omitted).

In the alternative to its fiat, the Secretary then reluctantly offered up what he considered to be a justification for the 97% reduction. Initially, in his first settlement motion submission, the justification stated, *in full*:

Basis of compromise of penalty: The Respondent contends that the violation was not reasonably likely to lead to a reasonably serious injury because the boreholes were not loaded with explosives. Respondent asserts that it was not highly negligent because there were no boreholes drilled deeper than 10 feet and there were only 7 rows of boreholes. While the Secretary does not necessarily agree with Respondent's position, he has agreed to modify the citation from 'reasonably likely' to 'unlikely', to remove the S&S designation, and to modify from 'high' to 'moderate' negligence, and from 'fatal' to 'lost workdays or restricted duty', and to accept a reduced penalty. The Secretary believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.

Initial Jt. Mot. at 3.

This case was, until recently, assigned to another judge.<sup>1</sup> That judge found the initial justification insufficient and required a resubmission. The resubmission, now before the undersigned, was identical to the quoted language above, but added the following:

*The Respondent further asserts that it did not exceed the maximum number of 8 rows in length for the blasting pattern in no spoil areas. The Respondent contends*

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<sup>1</sup> On July 21, 2015, this docket was reassigned to the undersigned.

*it was not highly negligent because the shot did not exceed the maximum 32 holes, as there were only 20 holes drilled. The Respondent further contends it was not highly negligent because it did not exceed the maximum six and three-quarter inch drill bit. The Respondent asserts it was not highly negligent because it did not exceed the maximum twelve feet by twelve feet drill pattern.*

Second Jt. Mot. at 3 (emphasis added).

The Secretary's portion of the resubmission added *nothing*, only repeating, *exactly*, what it stated with the first submission:

While the Secretary does not necessarily agree with Respondent's position, he has agreed to modify the citation from 'reasonably likely' to 'unlikely', to remove the S&S designation, and to modify from 'high' to 'moderate' negligence, and from 'fatal' to 'lost workdays or restricted duty', and to accept a reduced penalty. The Secretary believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.

*Id.*

There are several deficiencies with the submissions.<sup>2</sup> The starting point to appreciate the deficiencies in the motions begins with the text of the citation itself, which contends:

The fly rock prevention plan (general safety precautions) which were incorporated into the acknowledged ground control plan on August 5, 2011, is not being complied with on this date. Item seven (7) was not being complied with in that a total of seven rows of holes were drilled where it is required to be a minimum of two and a maximum of four rows on the no spoil side. The pattern had been drilled out and was awaiting the loading process. Failure of mine management to follow their ground control plan stipulations would lead to serious injuries to miners and/or residents living directly below the blast site.

Citation No. 8259158.

The "Subsequent Action" then states: "The Operator is now following the safety precautions incorporated into their ground control plan. The cited area was shot on 10-21-11 according to their plan." Citation No. 8259158-01.

The issuing inspector marked the section 104(a) citation as significant and substantial, the negligence as high, the likelihood of an injury as highly likely, and the type of injury as fatal. The follow-up, as noted, reflected that the operator "*is now following the safety precautions incorporated into their ground control plan.*" *Id.* (emphasis added). The cited area was then shot, one day after the citation was issued.

MSHA considered the matter serious enough to specially assess the alleged violation, with that process bringing about the proposed penalty of \$30,200.00. The special assessment

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<sup>2</sup> A motion to approve settlement was e-filed on February 4, 2015. A revised motion to approve settlement was e-filed on March 25, 2015.

provision, found at 30 C.F.R. § 100.5, provides that “MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment . . . [and that] [w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a).” 30 C.F.R. § 100.5(a)-(b).

As even the second motion reveals, of the 214 words offered to justify the settlement, only 145 of those deal with the basis for the reduction, all offered by Respondent. Of course, evaluating a settlement is not a matter of counting words, but in general, as the Court has explained on many occasions, larger reductions require a more complete explication than modest reductions. In this instance, the words offered by Respondent consist of assertions only, free of any context or explanation, stating:

the boreholes were not loaded with explosives . . . no boreholes drilled deeper than 10 feet and there were only 7 rows of boreholes, . . . it did not exceed the maximum number of 8 rows in length for the blasting pattern in no spoil areas, . . . the shot did not exceed the maximum 32 holes, as there were only 20 holes drilled . . . it did not exceed the maximum six and three-quarter inch drill bit . . . [and] it did not exceed the maximum twelve feet by twelve feet drill pattern.

Second Jt. Mot. at 3.

The Court acknowledges that it is possible that these assertions do bear on the issue of negligence, but the motion provides no information explaining such relationship, even though this was the second submitted motion. To accept such unexplained reasons would make a mockery of the settlement review process. Parties must explain *how* the assertions justify the reduction, and not simply present assertions which are not obviously self-explanatory.

The Secretary provided a proposed order for the Court to grant the motion. For the Secretary’s part of the rationale, in the 55 words he provides ratifying the settlement, absolutely no information explaining the relationship of the assertion to the negligence is set forth, nor does the Secretary even maintain that he agrees with the assertions at all. Instead, the Secretary merely offers that he

does not necessarily agree with the Respondent’s position, but he recognizes legitimate factual and legal disputes and believes that the proffered settlement is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to modify the order as indicated above. The Secretary has also agreed to accept a reduced penalty.

Second Proposed Order at 1.

The Court is therefore left to guess as to both the import of Respondent’s assertions and what “legitimate” factual and legal disputes are brought to bear by those assertions. Further, the Secretary does not concede that he agrees with either the assertions or the legal disputes that are involved, whatever those may be.

Given that this matter was specially assessed and that technical issues are involved, the Secretary has a duty to advise whether it consulted with the issuing inspector about Respondent’s claims and how those claims may impact the degree of negligence, if at all. Failure to so consult



ignores the MSHA official with firsthand knowledge, the inspector who issued the citation, and sends a message to all inspectors that their safety and health enforcement efforts are inconsequential.<sup>3</sup> Further, the Secretary will need to explain how the several assertions made by Respondent bear upon the claim that Respondent was not highly negligent. So too, the claim that the violation was not S&S because the boreholes were not then loaded with explosives makes no sense because, in the course of continuing normal mining<sup>4</sup> one would expect that such boreholes would be so loaded, consistent with the sole purpose of drilling boreholes.

Finally, although all mine safety standards are important, the subject of blasting, an inherently dangerous activity, and the hazards of flyrock are particularly noteworthy and have been the subject of several cases and safety studies. Several litigated cases underscore the gravity associated with that activity and the importance that proper procedures be employed.

For example, in *Revelation Energy*, 36 FMSHRC 1581, 1587, 1600 (June 2014) (Judge Andrews), a violation of § 77.1000 was found to be significant and substantial where flyrock fell in an inhabited area approximately 1000 feet from a blast site. It was determined that the *respondent failed to strictly follow their Ground Control Plan*, as required. *Id.* at 1603. Similarly, in *Central Appalachia Mining, LLC*, 29 FMSHRC 430, 430-31 (June 2007) (Judge Barbour), flyrock from a highwall blast flew into the pit where miners were working. Vehicles were hit, and a miner suffered a compound fracture when his leg was hit. *Id.* at 433. The judge found that the violation of 30 C.F.R. § 77.1000 was S&S. *Id.* at 444. In *Lakeview Rock Products*, 34 FMSHRC 244, 246 (Jan. 2011) (Judge Moran), flyrock penetrated the roof of a home located above the highwall and 600-700 yards away from the detonation site.

Beyond case examples, MSHA has issued blasting alerts addressing these issues. *See, e.g.*, Blasting Safety Alert: 6 Fatalities from blasting accidents 2010-2013, <http://www.msha.gov/Alerts/SABulletins/BlastingAlert12014.pdf>. Studies also warn of these hazards. *See* T. S. Bajpayee et al., *Blasting Injuries in Surface Mining with Emphasis on Flyrock and Blast Area Security*, 35 J. Safety Res. 47 (2004). These resources note that serious injuries and fatalities result from improper *practice* during rock blasting. Fatalities have resulted where the hole diameter and blast pattern used in the blast were also different from the approved plan. The studies note the importance of following a good blasting plan. Proper blast design has been identified as the single most important tool to prevent blasting problems.

Yet another example of the dangers from flyrock is reflected in an MSHA investigation of a surface coal mine fatal surface blasting accident when flyrock from a blast struck a miner with 20 years of mining experience. *The accident occurred because safe procedures for conducting blasting operations were not followed.* *See* Mine Safety and Health Admin., CAI-2007-09, *Report of Investigation: Surface Coal Mine: Fatal Surface Blasting Accident*, <http://www.msha.gov/FATALS/2007/ftl07c09.pdf> (involving CAM Mining, LLC, July 16, 2007).

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<sup>3</sup> To consult does not mean that the Secretary must accede to an inspector's viewpoint. Rather, it is a matter of acquiring information from the issuing inspector in the face of a respondent's assertions.

<sup>4</sup> Per the *Mathies* four-part test for determining S&S, the violation in issue is to be evaluated assuming continued normal mining operations.

These cases and MSHA's alerts and studies demonstrate that the dangers of flyrock are real, not theoretical. Therefore, Kentucky Fuel Corporation's adherence to its flyrock prevention plan is essential. Accordingly, the proffered settlement is rejected. The parties are directed to either submit a new settlement or to be prepared to present their evidence relating to this matter at the hearing now scheduled to hear other Kentucky Fuel dockets before the Court, commencing on August 18, 2015. Should a new settlement motion be submitted, the parties are advised to be prepared to try this case at the upcoming hearing, if the new submission is also wanting.

So Ordered.

/s/ William B. Moran  
William B. Moran  
Administrative Law Judge

Emily O. Roberts, Attorney, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Jennifer Thomas, Attorney, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

James F. Bowman, P.O. Box 99, Midway, WV 25878

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

August 3, 2015

LOCAL 5929, UNITED MINE  
WORKERS OF AMERICA,  
Applicant,

v.

BIG RIDGE INC.,  
Respondent.

COMPENSATION PROCEEDING

Docket No. LAKE 2012-88-C

Mine: Willow Lake Mine  
Mine ID: 11-03054

## **ORDER GRANTING MOTION FOR SUMMARY DECISION**

Before: Judge Moran

This compensation proceeding is before the Court upon an application for compensation under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821 (2006) (“Mine Act”). On October 28, 2011, MSHA Inspector Larry Morris issued section 103(k) Order No. 8436067, idling the Willow Lake Mine, following an unplanned roof fall that occurred the previous day. On November 3, 2011, Applicant, Local 5929, United Mine Workers of America (UMWA), filed a claim for one week’s compensation with the Commission, stating that the mine remained idle, and providing the names and signatures of the 142 miners seeking compensation. In its letter, Applicant stated that the order should be modified to a section 107(a) withdrawal order, since “MSHA would not release the mine until they could be sure the miners['] safety was protected.” Letter of November 3, 2011.

On February 13, 2012, the Commission received Respondent Big Ridge Inc.’s Motion for Summary Decision. Respondent argues that one week’s compensation is not due under section 111 of the Mine Act because MSHA’s inspector issued the order under section 103(k), rather than under section 104 or section 107, and it was the Secretary’s authority to choose what type of order to issue. Moreover, Respondent contends that a section 107(a) order would not be appropriate as no violation of a mandatory health or safety standard had been alleged. Mem. of Law in Supp. of Mot. for Summ. Decision at 4-5.

This case was subsequently assigned to the Court on March 28, 2012. As of the date of this Order, Respondent’s Motion remains unopposed. Commission Procedural Rule 67(d), 29 C.F.R. § 2700.67(d), governs oppositions to motions for summary decision, and the consequences for a party’s failure to oppose such a motion:

(d) Form of opposition. An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a

reference to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. *If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.*

29 C.F.R. § 2700.67(d) (emphasis added). Respondent's Motion for Summary Decision was filed almost three and a half years ago, and the time for filing a response has long passed.

As Applicant has failed respond to Respondent's motion, thereby failing to prosecute its case in a timely manner, Respondent's Motion for Summary Decision is **GRANTED**. With no submission on the issue from the UMWA, the Court is without the benefit of a full briefing from both sides on this issue of importance concerning whether compensation is due under section 111 where an idling originates under a section 103(k) order. Because of this significant deficiency, the Court does not address the substantive issue, electing instead to resolve the motion strictly on the basis of the Applicant's procedural failure to respond to the Motion.

Accordingly, without reaching the merits of the case, this compensation proceeding is hereby **DISMISSED WITH PREJUDICE**.

/s/ William B. Moran  
William B. Moran  
Administrative Law Judge

Distribution:

Greg Fort and Rodney Shires, Miner Representatives, United Mine Workers of America, Local 5929, 540 N. Commercial St., Suite #101, Harrisburg, IL 62948

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

August 6, 2015

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

TXI OPERATIONS LP,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2015-22-M  
A.C. No. 41-02820-360803

Mine: Hunter Cement Plant

## **ORDER DENYING SETTLEMENT**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.<sup>1</sup> The CLR has filed a motion to approve settlement.<sup>2</sup> Of the seven citations in the docket, three have been vacated and two have been modified with reduced penalties.<sup>3</sup> For the reasons that follow, the motion to approve settlement is denied.

### **Citation No. 8854618**

The Secretary seeks to lower the penalty for Citation No. 8854618 from \$585.00 to \$264.00, a reduction of 55%. This citation alleges a violation of 30 C.F.R. § 56.14107(a), which requires that “[m]oving machine parts shall be guarded to protect persons from contacting . . . moving parts that can cause injury.” The regulation gives several examples of moving parts that must be guarded. In support of the penalty reduction, the justification, in its entirety, as presented by the Secretary, states:

The Secretary requests that Citation No. 8854618 be modified from “Moderate Negligence” to “Low Negligence.” The Respondent asserts that the ball mill has

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<sup>1</sup> The Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance she has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

<sup>2</sup> In paragraphs 2 and 3 of the Motion for Decision and Proposed Order Approving Settlement, the Secretary continues to stake out his position that he need not explain the basis for settlement, a position which is immaterial and impertinent to the issues legitimately before the Commission. Those paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

<sup>3</sup> Two of the citations, Nos. 8776488 and 8854623, were settled at the proposed amounts, with no changes.

been guarded in this manner for years, and that MSHA did not provide fair notice about additional guarding requirements on the mill. The Respondent further asserts that the mill is guarded well in most areas, and that injury would be unlikely to occur because of the existing guarding. Under these specific circumstances, the negligence herein is more appropriately described as “Low Negligence.”

Motion at 3.

The deficiencies in the motion are obvious. To begin, it recites only Respondent’s assertions; the Secretary does not weigh in or otherwise comment at all upon the merits of Respondent’s claims, nor does the Secretary inform if the negligence reduction sought, from moderate to low, results in the 55% reduction under the application of the Part 100 formula. More fundamentally, the Secretary does not offer anything but silence in reaction to the issue of Respondent’s claim that its negligence should be deemed “low.”

Furthermore, the text of the citation, for which the issuing inspector asserted that the conditions found were significant and substantial and reasonably likely to result in a permanently disabling injury, seems to contradict the statement, tacitly accepted by the Secretary, as provided in his motion that “the mill is guarded well in most areas.” It must be noted that such a claim is itself an unusual basis for mitigation as, for example, it would be akin to saying that “while one of our trucks had inoperative brakes, most of our other trucks have good brakes.” Beyond that flaw in reasoning, the citation, as highlighted below, seems to identify at least three and perhaps four separate places<sup>4</sup> on the Finnish Mill that were not adequately guarded:

The Finnish Mill 1 & 2 Trunion **Flange interlock shaft is not guarded** to protect miners from contacting the moving machine parts. This condition is located next to the work platform between the motor drive and Mill Outlet Housing. **The unguarded bolted moving machine part has an area exposed that is about 8 ft tall and 12 inches wide.** There is lube sight glass at this location within 12 inches of the moving machine part. The Finnish Mill motor drive shaft that is about a 14 inch diameter with about 3 inches of the width not guarded. There is also a sight glass next to this moving machine part. **The Mill itself is not adequately guarded along the work platform. The existing guard does not extend out far enough to protect miners from contacting the Ball Mill housing** that is about 14 inches from the platform. **There is a 20 inch by 20 inch section of guarding missing at the end of the work platform next to the Mill Inch Drive** exposing the Mill bearing. Miners access these areas as needed for inspections and maintenance. These **conditions** exposed the miners accessing these areas to

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<sup>4</sup> If the Court misinterprets this, the Secretary should explain if this is one unguarded spot. If it is in fact three or four areas, the Secretary is directed to acknowledge that state of affairs.

serious type injuries in the event of an accident. Standard 56.14107a was cited 7 times in two years at mine 4102820 (7 to the operator, 0 to a contractor).

Citation No. 8854618 (emphasis added).

Finally, the motion does not state whether Respondent's allegations were discussed with the issuing inspector, which is important where, as here, the settlement rationale merely presents Respondent's contradictory assertions to the findings of the MSHA inspector. For these multiple reasons, the Court cannot approve the proposed settlement of this citation.

### **Citation No. 8854631**

The Secretary also seeks to lower the penalty of Citation No. 8854631 from \$585.00 to \$118.00, a reduction of 80%, and modify the likelihood of injury or illness from "reasonably likely" to "unlikely," in addition to removing the significant and substantial designation. In support of the settlement, the Secretary simply engages in regurgitation of Respondent's arguments:

The Respondent asserts that the hazard is minimal; the shaft in question is very small, the opening is very small, and protected from accidental contact. The Respondent asserts that the shaft is smooth, and accidental contact would be unlikely, as would the shaft's ability to cause injury. Therefore, under these specific circumstances, the gravity herein is more appropriately described as "Unlikely, and Non-Significant and Substantial."

Motion at 3.

As explained for Citation No. 8854618, above, the Secretary offers *nothing* illuminating in reaction to Respondent's claims. He does not assert that there are legitimate factual disputes, much less identify what they are. In the face of that silence, the citation contradicts Respondent's contentions:

The #2 Load Out FK Pump key way shaft is not guarded to protect miners working in the area from contacting the moving machine part. The key way shaft and tabbed bearing seal are about 41 inches off the ground level, about 3 inches in diameter and have an area about 4 inches wide of exposure. This service point for this pump is about 5 inches from the moving machine part that is **greased daily while in operation**. The **once provided guard** for this pump shaft was not in the area. This condition exposed the miner performing maintenance to serious type injuries in the event of an accident.

Standard 56.14107a was cited 10 times in two years at mine 4102820 (10 to the operator, 0 to a contractor).

Citation No. 8854631 (emphasis added).

As the citation clearly avers, the service point is a mere five inches from the exposed shaft and is accessed daily. The citation states that not only was it unguarded, but a guard had been there and was missing. Respondent, furthermore, does not provide any facts as to *why* “accidental contact would be unlikely,” nor does it give any indication of how the shaft would be protected from accidental contact.

Thus, the rationale for settlement of this citation fails due to the same shortcomings identified in Citation No. 8854618. The settlement motion merely presents Respondent’s claims, without stating the Secretary’s position regarding them, and the motion does not state whether Respondent’s assertions were discussed with the issuing inspector. The putative rationale seems to buy into Respondent’s claims, but only by inference, and it then jumps to the conclusion that the unlikely and non S&S designations are the more appropriate descriptions. With these notable, identified deficiencies, the Court cannot approve the proposed settlement of this citation.

### **Vacated Citations**

In this settlement, the Secretary has also decided to vacate three of the seven citations. The Secretary has, of course, provided no reasoning for his decision to vacate these three citations and presently does not have such an obligation. The Court, however, can publish the text of the citations that are being vacated.

Vacated Citation No. 8776481 was issued for a violation of 30 C.F.R. § 56.11002, which requires handrails and, when necessary, toeboards, to be provided for elevated walkways. The citation states:

The provided hand rail along the right side of the stair way landing leading to the top of the Blending Silos is not provided with a top rail. There is about a 30 inch wide section without the top hand rail. The existing hand rail is about 28 inches off the landing level. The travel way/work platform for the silo inspection doors is not provided with toe plates[,] creating a 43 inch long by 8 inch wide opening. There was loose material and 1/2 inch metal pipes laying next to the opening. From this platform to the lower travel way is about 80 ft. This area would only be accessed for silo inspections/clean out activities. This condition exposed the miners that would be working or traveling in the area to fatal injuries in the event of an accident.

Standard 56.11002 was cited 1 time in two years at mine 4102820 (1 to the operator, 0 to a contractor).

The citation was abated eight days later, with the inspector stating that “[t]he provided hand rail along the right side of the stair way landing leading to the top of the Blending Silos is now provided with a top rail. The openings around the work platform at the lower landing have been closed. This citation is hereby terminated.” Citation No. 8776481-02. The inspector designated this violation as low negligence and unlikely to cause injury, but concluded that, if an injury did occur, it would be fatal.



Vacated Citation No. 8776496 was issued for a violation of 30 C.F.R. § 56.11001, which requires that a “[s]afe means of access shall be provided and maintained to all working places.” The citation provides:

Safe means of access is not being maintained around the lower work platforms and travel ways at the Limestone Storage Bins at the K2 side of the mine. There are numerous openings (Cardox Ports) in the sides of the storage bin allowing material to fall to the lower working levels. The material observed falling from about 25 ft above ranged up to about 1-2 inches in diameter. There are numerous 6 inch wide “I” beams along the storage bin tower that have an accumulation of unconsolidated material piled on/resting on the “I” beams upwards of 60 ft over the travel way below [where] rocks were also observed. The rocks that had fallen from the elevated area range up to about 3 inches in diameter. Miners travel and work in these areas daily for inspections and/or maintenance. These conditions exposed the miners working or traveling in the area to serious type injuries in the event of an accident.

Standard 56.11001 was cited 3 times in two years at mine 4102820 (3 to the operator, 0 to a contractor).

The time to abate the citation was extended once: “The mine operator has been granted an extension on the termination due date and time to allow the material to be cleaned from the “I” beams. The area is barricaded while the work is still under progress. This citation is hereby extended to 06/28/2014 @ 0700 hours[.]” Citation No. 8776496-01. The citation was terminated, with the inspector stating that “[t]he mine operator has cleared the loose material from the overhead I beams and has closed the openings in the side wall of the storage bin allowing for Safe means of access around the lower work platforms and travel ways terminating this citation.” Citation No. 8776496-02.

As noted, the area was barricaded, and the citation, which was issued on June 24, 2014, was then extended until four days later, a fact indicative of the breadth of the problem. Ultimately, it was terminated two weeks later, on July 7, 2014. The inspector found a lost workday or restricted duty injury was reasonably likely to occur and that the violation was significant and substantial and the result of moderate negligence.

Vacated Citation No. 8854627 was issued for a violation of 30 C.F.R. § 56.4603(b), which states, in part: “To prevent accidental release of gases from hoses and torches attached to oxygen and acetylene cylinders . . . cylinder valves shall be closed when . . . [t]he torch and hoses are left unattended.” The citation provides:

The oxygen and acetylene torch left unattended at the Clinker Bin Drag Chain head pulley work platform was not bleed [sic] off prior to the miners leaving the area for lunch. There were no other persons observed in the immediate area at the time of the inspection. There was grease and oils in the area from the maintenance work being performed. In the event of an accident should the hoses or valves at the torch head become damaged and the oxygen come into contact with the oils or

grease, Miners in the immediate area would be exposed to serious injuries relating from a fire or explosion due to the uncontrolled release of flammable gases.

The citation was terminated later the same day, with the inspector stating that “[t]he oxygen and acetylene lines have been bleed [sic] off.” Citation No. 8854627.

The inspector evaluated the probability of the alleged violation to cause an injury as unlikely, with the expected injury to be lost workdays or restricted duty, and he deemed that the violation was caused by moderate negligence.

The Secretary provides no reasoning for his decision to vacate the three citations above, although the Court acknowledges that, under current practice, the Secretary has the authority to vacate citations without oversight, per *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). As no reasoning has been provided, the Court, the issuing inspectors, and the affected miners can only guess at the Secretary’s motivation for vacating these three citations. However, the ability to vacate citations without explanation does not prevent the Court from disclosing to the public the texts of the citations, as it has done so here.

### **Conclusion**

Because the Secretary has not provided sufficient information for the Court to approve the settlement, the Secretary’s motion to approve settlement is **DENIED**. The Court directs the Secretary to either provide additional information to support the settlement and aver that he has consulted with the issuing inspector regarding Respondent’s contentions, or to prepare for a hearing on Citation Nos. 8854618 and 8854631. The Secretary is to inform the Court within 14 days of this Order of his intention to either submit an amended motion to approve settlement or proceed with a hearing on these matters.

/s/ William B. Moran  
William B. Moran  
Administrative Law Judge

Distribution:

Ms. Karen Johnston, Jackson Kelly PLLC, 1099 18<sup>th</sup> Street Suite 2150, Denver, CO 80202

Maria C. Rich, MSHA, 1100 Commerce St. Rm. 462, Dallas, TX 75242

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004

August 6, 2015

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

v.

CONSHOR MINING, LLC,  
Respondent.

## CIVIL PENALTY PROCEEDINGS

Docket No. KENT 2008-90  
A.C. No. 15-18861-128273

Docket No. KENT 2008-481  
A.C. No. 15-18861-135978

Docket No. KENT 2008-560  
A.C. No. 15-18861-137279

Docket No. KENT 2008-561  
A.C. No. 15-18861-137261

Docket No. KENT 2008-562  
A.C. No. 15-18861-137278

Docket No. KENT 2008-782  
A.C. No. 15-18861-143281

Docket No. KENT 2008-1082  
A.C. No. 15-18861-149206

Mine: No. 1

## ORDER OF DISMISSAL

Before: Judge Feldman

The captioned civil penalty proceedings are before me based upon petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d),

against the Respondent, Conshor Mining, LLC (“Conshor”). The captioned dockets concern a total of 16 citations, for which the Secretary proposes a total civil penalty of \$1,193,659.00.<sup>1</sup>

Further action in these matters has been held in abeyance pending Commission resolution of the novel question of the evidentiary requirements necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2). In this regard, the Commission vacated its interlocutory review of the issue of the evidentiary indicia necessary to demonstrate a repeated flagrant violation after the Secretary deleted the three alleged repeated flagrant designations at issue in Docket Nos. KENT 2008-562 and KENT 2008-782. *Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). Action in these matters was further delayed pending Commission review of the requirements for a repeated flagrant violation in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013). However, the Commission was deprived of the opportunity to delineate the evidentiary requirements for a repeated flagrant violation as a consequence of the Secretary’s ultimate deletion of the subject repeated flagrant designations. *Id.* More recently, in *Oak Grove Resources, LLC*, 37 FMSRHC \_\_\_, slip op. (June 23, 2015), the Commission denied interlocutory review of the same question after the Secretary opposed interlocutory resolution of this long-standing and unresolved issue.

On June 8, 2015, the Secretary reported, albeit belatedly, that Conshor was the subject of a final Chapter 7 bankruptcy proceeding that culminated on December 10, 2014, which, in effect, dissolved Conshor as a corporate entity and discharged Conshor from its debts. *Sec’y Mot. to Consolidate and for Order to Show Cause*, Ex. 1 (June 8, 2015). The Secretary was well-aware that there was a pending Chapter 7 bankruptcy proceeding involving Conshor because the Mine Safety and Health Administration (MSHA) participated as a creditor against Conshor, having filed a proof of claim seeking to recover outstanding civil penalties for uncontested or adjudicated violations outside the scope of these proceedings. *Id.*, Ex. 1 at 7-9. The relevant undisputed facts are as follows:

- Conshor filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code on July 11, 2012. *Id.*, Ex. 1 at 1.

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<sup>1</sup> Ten of the 16 citations at issue were originally designated by the Secretary as repeated flagrant violations under section 110(b)(2) of the New Miner Act. Three alleged repeated flagrant violations at issue in Docket Nos. KENT 2008-562 and KENT 2008-782 were deleted by the Secretary, at which time the Commission vacated its interlocutory review concerning the evidentiary requirements for a repeated flagrant violation. *See Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). The remaining seven alleged flagrant violations in Docket Nos. (fn. 1 cont.) KENT 2008-481, KENT 2008-560, and KENT 2008-561, were designated by the Secretary as “repeated” based on the Secretary’s reliance on alleged “predicate violations.” Although the Commission in *Wolf Run* has concluded that a prior history of violations is a relevant consideration, neither the Commission nor the Secretary, have definitively identified the necessary parameters for predicate violations that can serve as a basis for a repeated flagrant designation. *See Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013).

- The Trustee's Final Account and Distribution Report was submitted to the Bankruptcy Court on June 17, 2014. *Id.*, Ex. 1 at 3.
- The Trustee's Report listed Conshor's creditors, along with claims asserted, claims allowed, and claims paid to those creditors. *Id.*, Ex. 1 at 7-9.
- Any claims not paid were discharged. *Id.*, Ex. 1 at 3.
- MSHA was listed as a creditor in the bankruptcy proceeding, asserting \$1,664,142.59 in claims. *Id.*, Ex. 1 at 7-9.
- The Trustee's Report indicates that \$697.43 was paid to MSHA, with the remainder discharged. *Id.*, Ex. 1 at 9.
- The total claims discharged without payment totaled \$3,983,573.10. *Id.*, Ex. 1 at 3.
- On March 20, 2014, Conshor filed Articles of Dissolution with the Commonwealth of Kentucky. The dissolution became effective retroactively as of December 31, 2012. *Response o/b/o Conshor to Order to Show Cause*, Ex. F (July 17, 2015).

In view of the above, the Secretary filed a motion for an order to show cause "why Conshor's notices of contest of the penalties assessed in these consolidated cases should not be dismissed and the penalties affirmed," in light of Conshor's bankruptcy. *Sec'y Mot. to Consolidate and for Order to Show Cause*, at 2 (June 8, 2015). I construe the Secretary's motion as a request for a default judgment. Conshor's former counsel in these proceedings opposes the Secretary's motion, and instead seeks the dismissal of these dockets as moot. *Response o/b/o Conshor to Order to Show Cause*, at 2 (July 17, 2015).

To avoid the mootness sought by Conshor's former counsel, the Secretary could have filed a motion for a default judgment at any time prior to June 17, 2014, when the bankruptcy trustee submitted her Final Account and Distribution Report to the bankruptcy court, which would have been granted. The Secretary then could have sought recovery of the civil penalties proposed in these matters by filing a proof of claim with the U.S. Bankruptcy Court for the Eastern District of Kentucky. In addition to the \$1,664,142.59 asserted by MSHA in Conshor's bankruptcy proceeding, the Secretary could have filed a proof of claim for recovery of the proposed penalties in these matters. The Secretary, however, failed to do so.

As a consequence of his failure to pursue collection of these claims through bankruptcy, the Secretary, in effect, seeks to circumvent the bankruptcy process. However, bankruptcy is the sole means through which creditors can collect from an insolvent debtor.

Conshor filed Articles of Dissolution with the Commonwealth of Kentucky on March 20, 2014. *Id.*, Ex. F. The dissolution was retroactively effective as of December 31, 2012. *Id.* Conshor's debts were discharged in bankruptcy on December 10, 2014. As a legal matter, the fact that the business entity Conshor Mining, LLC, was discharged in bankruptcy, renders any litigation against Conshor moot. For the federal courts have recognized that a case is

moot “when it is impossible for the court to grant any effectual relief whatever to a prevailing party.” *In re Kurtzman*, 194 F. 3d 54, 58 (2nd Cir. 1999). Moreover, the “cases and controversies” language in Article III of the Constitution prohibits declaratory relief in moot cases. *E.g.*, *Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 955 (May 1990). In addressing the question of mootness, the Commission has recognized:

The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of the countervailing rights. A case is moot when the issues presented no longer are “live” or the parties no longer have a legally cognizable interest in the outcome.

*Id.* (citing 10A *Wright & Miller* § 2727 (pp. 602-17) (footnotes omitted)).

Although the Commission has noted that the “case and controversies” requirement of Article III does not “literally apply to federal administrative agencies like the Commission,” the Commission has addressed its proper role in determining mootness:

[A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded by mootness. . . . However, in exercising this discretion, an agency receives guidance from the policies that underlie the “case or controversy” requirement of [A]rticle III. In particular, the agency’s determination of mootness is informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy. *See [Tennessee Gas Pipeline Co. v. FPC]*, 606 F.2d 1373, 1379-80 (D.C. Cir. 1979).; *Lucas Coal Co. v. Interior Board of Mines Operations Appeals*, 522 F.2d 581, 587 (3d Cir. 1975). As a result, we conclude that an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the [A]rticle III “case or controversy” requirement.

*Id.* (citing *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2751-52 (October 1980), *aff’d sub nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 452 (10th Cir. 1983)).

In the final analysis, the Secretary now seeks to extract civil penalties from the proverbial stone. Consequently, any attempt to recover civil penalties from Conshor must be dismissed as moot.<sup>2 3</sup>

### **ORDER**

In view of the above, the Secretary's request for a default judgment **IS DENIED** and **IT IS ORDERED** that the captioned dockets **ARE DISMISSED** as moot.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

Distribution: (Regular and Certified Mail)

Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-5321

Jonathan R. Ellis, Esq., Steptoe & Johnson, PLLC, Chase Tower, Eighth Floor, P.O. Box 1588, Charleston, WV 25326-1588

/acp

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<sup>2</sup> The mootness and impropriety of the Secretary's desire to impose civil penalties through a post-dissolution default judgment, against a mine operator that cannot contest citations or engage in settlement negotiations in that it ceases to exist, is further evidenced by the overstated \$1,193,659.00 civil penalty sought to be imposed in these matters. For example, in the settlement reached in *CAM Mining, LLC*, 37 FMSRHC \_\_\_, slip op. (July 30, 2015), the Secretary agreed to delete the repeated flagrant designation for the subject citation that resulted in a reduction of the penalty initially sought by the Secretary from \$140,000.00 to \$4,000.00. In these proceedings, it is noteworthy that the Secretary's has deleted three of the repeated flagrant designations alleged against Conshor, thus negating the imposition of enhanced civil penalties for at least three of the alleged subject violations.

<sup>3</sup> Summary disposition of a civil penalty proceeding requires an order to show cause prior to the entry of any order of dismissal in instances where a party fails to comply with an order of a judge or the Commission's rules. 29 C.F.R. § 2700.66. In this instance, an order to show cause is not a prerequisite for the dismissal of this matter as the dismissal is not based on a failure of compliance.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE NW, SUITE 520N  
WASHINGTON, D.C. 20004

August 13, 2015

SECRETARY OF LABOR, MSHA,  
on behalf of RAYMOND MCKINNEY,  
Complainant,

v.

BLACK RIVER COAL, LLC,  
Respondent.

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. VA 2015-261-D

MSHA Case No.: NORT-CD 2015-02  
War Creek No. 1 Mine  
Mine ID: 44-06859

## **ORDER DENYING SECRETARY'S MOTION IN LIMINE AND MOTION TO STRIKE**

This matter is before me based on the Secretary of Labor's Application for Temporary Reinstatement filed on behalf of miner Raymond McKinney pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"). 30 U.S.C. § 815(c)(2). The temporary reinstatement hearing is scheduled for August 18, 2015, in Abingdon, Virginia.

Under section 105(c)(2) of the Mine Act, "if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The scope of a temporary reinstatement hearing is narrow and limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought. *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

On August 7, 2015, the Respondent provided Secretary's counsel with a prehearing report reflecting that the Respondent intended to introduce into evidence in this proceeding McKinney's personnel file and pre-operation checklists for a relevant scoop. The Respondent's prehearing report also reflected that it planned to call Mark Huffman, Patrick Graham, Raymond Simpson, Kriss Proffit, and Joe Price, as witnesses. On August 12, 2015, the Secretary filed a Motion in Limine and Motion to Strike that seeks to preclude introduction of the aforementioned documents and the testimony of the named witnesses.

The Respondent's counsel, who is experienced appearing in mine safety matters, is well aware of the narrow scope of a temporary reinstatement proceeding. It is true that it is not the judge's duty to resolve conflicts in testimony in deciding the temporary reinstatement issue. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). However, due process requires that the Respondent is given the opportunity to introduce evidence it



believes supports its claim that McKinney's discrimination complaint has been frivolously brought. Whether such evidence is relevant, and as such, admissible, can only be determined at the hearing, at which time I will rule on any evidentiary objections proffered by the Secretary. *See* 29 C.F.R. § 2700.55(c), (e) (Commission judges are authorized to regulate the course of the hearing by ruling on offers of proof and receiving relevant evidence).

### **ORDER**

In view of the above, **IT IS ORDERED** that the Secretary's a Motion in Limine and Motion to Strike **IS DENIED**.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

#### Distribution:

Melanie A. Stratton, Esq., U.S. Department of Labor, Office of the Solicitor, 201 12<sup>th</sup> Street South, Suite 500, Arlington, VA 22202-5450

Mark Huffman, Black River Coal, LLC, 818 North Eisenhower Drive, Beckley, WV 25801

Michael A. Olivio, Esq., Olivio Law Firm, 813 Quarrier Street, Charleston, WV 25301

Billy Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, 2452 Sir Barton Way, Suite 101, Lexington, KY 40509

/acp

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 26, 2015

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

v.

STEVE B. REES, employed by PRAIRIE  
STATE GENERATING COMPANY,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-130  
A.C. No. 11-03193-366707A

Mine: Lively Grove Mine

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

v.

MICHAEL WELCH , employed by  
PRAIRIE STATE GENERATING  
COMPANY, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-144  
A.C. No. 11-03193-366708A

Mine: Lively Grove Mine

## **ORDER DENYING RESPONDENTS' MOTION TO DISMISS 110(c) DOCKETS**

These cases are before me under section 110(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(c). Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. LAKE 2015-144 and LAKE 2015-130 to me on January 29, 2015, and March 9, 2015, respectively. On March 10, 2015, I consolidated these cases with Docket No. LAKE 2013-187, which contains the order the Mine Safety and Health Administration ("MSHA") issued to Prairie State Generating Company, LLC ("Prairie State"), that forms the basis of these proceedings. These consolidated cases are set for hearing on September 23–24, 2015.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

MSHA issued Order No. 8440269 to Prairie State on June 26, 2012. MSHA subsequently initiated an investigation to assess Steven B. Rees ("Rees") and Michael Welch ("Welch") (together, "Respondents") for potential liability as agents of Prairie State under section 110(c) of the Mine Act. On November 7, 2014, MSHA issued its proposed penalties of \$1,500.00 each to Rees and Welch, who contested the penalty assessments on November 19, 2014. On January 19,

2015, the Secretary of Labor (“Secretary”) filed his Petition for the Assessment of Civil Penalty in Docket No. LAKE 2015-144, alleging that Welch knowingly authorized, ordered, or carried out Prairie State’s violation of 30 C.F.R. § 75.360(a). Due to a clerical error, the Secretary filed his Petition for the Assessment of Civil Penalty in Docket No. LAKE 2015-130 on February 19, 2015, along with a Motion to Permit Late Filing, which I granted.

On July 24, 2015, Respondents filed a Motion to Dismiss and Memorandum of Law in support of the motion, requesting these dockets be dismissed due to the Secretary’s delay in issuing the penalty assessments to Rees and Welch. The Secretary filed a response in opposition to the motion.

## II. PRINCIPLES OF LAW

Section 105(a) of the Mine Act requires that the Secretary “shall, within a reasonable time after the termination of [an] inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited.” 30 U.S.C. § 815(a). The Commission has held that the inquiry of what constitutes a reasonable time “turns on whether the delay is reasonable under the circumstances of each case, as the Commission examines whether adequate cause existed for the Secretary’s delay in proposing a penalty and considers whether the delay prejudiced the operator.” *Sedgman*, 28 FMSHRC 322, 338 (June 2006) (citing *Salt Lake Cnty. Rd. Dep’t*, 3 FMSHRC 1714, 1716–17 (July 1981); *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13–14 (Jan. 1996); *Black Butte Coal Co.*, 25 FMSHRC 457, 459–61 (Aug. 2003)). The Secretary can satisfy the showing of adequate cause by providing a non-frivolous explanation for the delay. *Long Branch Energy*, 34 FMSHRC 1984, 1991 (Aug. 2012) (discussing the reasonable time requirement as embodied by Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a)). Once the Secretary meets his burden, the operator must show some actual prejudice arising from the delay. *Id.* Allegations of mere potential prejudice or inherent prejudice are not sufficient. *Id.*

In determining the reasonableness of the time it takes the Secretary to propose a penalty, the “starting point” in the calculation is the completion of the Secretary’s inspection or investigation. *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261–62 (2005) (“*Twentymile*”); *Sedgman*, 28 FMSHRC at 340.

Although the “reasonable time” requirement does not explicitly extend to section 110(c), Commission Administrative Law Judges have applied the requirement to penalty cases against individuals under section 110(c) of the Mine Act. *See Scott Carpenter*, 36 FMSHRC 2311, 2313 (Aug. 2014) (ALJ); *Steve Adkins*, 35 FMSHRC 1481, 1482 (May 2013) (ALJ); *Christopher Brinson*, *Gerald Hastings*, *Ronald Colson*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ); *Dyno Nobel East-Central Region*, 35 FMSHRC 265, 266 (Jan. 2013) (ALJ). Both the Secretary and Respondents apply the reasonable time requirement in section 105(a) of the Mine Act and cite to the Commission’s two-part analysis for determining whether a case should be dismissed for undue delay.<sup>1</sup> (*See* Resp’ts Mot. at 4–5, 10–17; Sec’y Resp. at 5–6, 10.)

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<sup>1</sup> Although the Secretary nominally suggests the Commission alter its approach to such cases, Petitioner’s argument embraces the Commission’s requirement that actual prejudice be present before a case can be dismissed for delay. (*See* Sec’y Resp. at 10–13.)

### III. ANALYSIS

Respondents argue that MSHA failed to file its section 110(c) penalty assessments within a reasonable time. (Resp'ts Memo. at 10–15.) Respondents further assert that MSHA cannot establish adequate cause for the delay in this matter because the delay between the initial inspection and the assessment was so long and the section 110(c) investigation was relatively simple. (*Id.* at 13–15.) Respondents especially note that the Secretary made no effort to begin the investigation for 500 days, a delay nearly as long as MSHA's internal guidance suggests that the entire 110(c) investigation and assessment process should take. (*Id.* at 7, 14.) In addition, Respondents assert that the delay has caused prejudice in the form of lost memories and missing witnesses. (*Id.* at 16–17.)

The Secretary first asserts that it assessed the penalties within a reasonable time, having completed the investigation into Respondents' personal liability on August 12, 2014, and issued the penalties on November 7, 2014.<sup>2</sup> (Sec'y Resp. at 2–3, 8–10.) Additionally, the Secretary asserts that the significant increase in MSHA's caseload and the additional layers of review necessary when individual agents' interests are at stake slowed the investigation and assessment process. (*Id.* at 9.) Finally, the Secretary claims that Respondents have failed to show a legally cognizable prejudice. (*Id.* at 9–12.)

The Secretary's paperwork for these investigations, submitted by Respondents, shows the completed case file was forwarded to MSHA's Technical Compliance and Investigation Office ("TCIO") on June 2, 2014. (Resp'ts Memo. at 21–22.) No further activity appears in the Secretary's paperwork. (*Id.*) The Secretary avers the investigation was completed two months later, on August 12, 2014. (Sec'y Resp. at 3.) The Secretary's penalty assessments in this matter followed in November 2014. Commission precedent indicates that a delay in the filing of penalty assessments by either three months or five months is not unreasonable. *See Sedgman*, 28 FMSHRC at 341 (finding an 11-month delay under section 105(a) to be reasonable).

Nevertheless, I look to both the Secretary's justification for the slow assessment and the Respondents' claims of prejudice. The Secretary's simple explanation of a case backlog does little to illuminate the five-month gap between the investigation's completion and the assessment, let alone the 28-month period from the initial inspection. Nevertheless, the Commission has found delays in the prosecution of cases excusable when explained by sharp increases in MSHA's national caseload. *See Long Branch*, 34 FMSHRC at 1993–95; *Rhone Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 1993–94 (Oct. 1993). However, the Commission has recognized that the Secretary's workload rose substantially due to recent increased enforcement efforts and a higher rate at which operators contest the resulting citations. *See Long Branch*, 34 FMSHRC at 1993–95. Accordingly, the Secretary's explanation for the delay is not frivolous. Therefore, I determine the Secretary has established adequate cause for the delay.

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<sup>2</sup> The Secretary insists that the Commission lacks the authority to dismiss an assessed penalty where an assessment was not filed in a reasonable time. (Sec'y Resp. at 2–8.) Contrary to the Secretary's assertion, it is a basic principle of administrative law that a substantive agency proceeding may be overturned upon a showing of prejudice. *Salt Lake Cnty. Rd. Dep't*, 3 FMSHRC 1714, 1716 (July 1981). The Commission has considered and rejected the Secretary's contention. *See Sedgman*, 28 FMSHRC at 338.

Given my finding of adequate cause, I turn to Respondents' allegations of prejudice. First, Respondents assert that during the Secretary's 28-month investigation, an important witness to the June 26, 2012, inspection left the mine and "will need to be found to provide his recollection of the facts." (Resp'ts Memo. at 16.) Although the disappearance of a key witness could prejudice a party, Respondents have not claimed that their witness cannot be found. Rather, Respondents assert that they potentially may have difficulty contacting their witness. Respondents merely allege potential prejudice, not actual prejudice.

Next, Respondents claim they are prejudiced because Rees is no longer able to recall the events of June 2, 2014, when the underlying order issued. (Resp'ts Memo. at 16.) In support, Respondents point to MSHA's interview of Rees from January 2014, in which Rees stated that he could not remember any details from the June 2014 inspection. (*Id.* at 16, 23–24.) Respondents' argument fails to allege facts distinguishing this case. With the passage of time, memories fade and details blur. This degradation of evidence is inherent to any aging case, and is precisely why Congress enacted a five-year statute of limitations for federal civil lawsuits. *See Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1221 (2013). Barring evidence showing that Rees's memory loss resulted from something other than the usual passage of time, Respondents assert only an inherent prejudice.<sup>3</sup>

Given the Secretary's non-frivolous explanation and Respondents' failure to show that they were actually and meaningfully prejudiced by the Secretary's delay, I determine that the Secretary's petitions for penalty should not be dismissed at this stage of the proceedings. I note, however, that it is the Secretary's burden to prove his charges "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). A gap of more than three years between an initial inspection and the eventual hearing regarding the inspection raises significant questions about the reliability of any testimonial evidence presented at that hearing.

Respondent's Motion to Dismiss these proceedings is hereby **DENIED**. These consolidated cases will be called for hearing on September 23–24, 2015, in St. Louis, Missouri.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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<sup>3</sup> I also note that Rees's lost recollection is somewhat self-serving. It was fully within Rees's power to memorialize the events of June 2, 2012, by taking notes of the day.

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Emelda Medrano, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, 8th Floor, Chicago, IL 60604  
(medrano.emelda@dol.gov)

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222  
(rhmoore@jacksonkelly.com)

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222  
(awolfson@jacksonkelly.com)

/lct