

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 5, 2017

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

v.

NALLY & HAMILTON ENTERPRISES,  
INC.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2016-439  
A.C. No. 15-19757-415241

Mine: Day Branch

**DECISION**

Appearances: Mary Sue Taylor, U.S. Department of Labor, Office of the Solicitor  
618 Church Street, Suite 230, Nashville, Tennessee 37219

S. Thomas Hamilton, Nally & Hamilton Enterprises, Inc., 212 East  
Stephen Foster Avenue, Bardstown, Kentucky 40004

Before: Judge Simonton

**I. INTRODUCTION**

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Nally & Hamilton Enterprises, Inc. (“NHE” or “Respondent”), pursuant to the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. §801. This case involves Citation No. 8409739, issued on December 16, 2016 for an assessed penalty of **\$634.00**. The citation was designated as significant and substantial (S&S), highly likely to result in lost workdays or restricted duty, and the result of NHE’s moderate negligence.

The parties presented testimony and documentary evidence at a hearing held in London, Kentucky on March 2, 2017. MSHA Inspector David Faulkner testified for the Secretary. Day Branch Mine Foreman Mike Shackelford testified for Nally & Hamilton. After fully considering the testimony and evidence presented at hearing, I find that the Secretary met his burden in establishing the violation and gravity as written in the citation. I reduce Nally and Hamilton’s negligence from moderate to low and assess a penalty of **\$500.00**.

**II. STIPULATIONS OF FACT**

The parties entered the following stipulations of fact into the record at hearing:

1. Nally and Hamilton Enterprises, Inc., extracts and produces coal for resale in interstate commerce at its Day Branch surface mine. *See* Tr. 8.
2. Nally and Hamilton Enterprises, Inc., is an operator as defined by the Federal Mine Safety and Health Act of 1977 and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges. *Id.*
3. The Day Branch surface mine reported that it had 33 to 35 employees working 99,823 hours and producing 310,980 tons of coal in 2016. *Id.*
4. The civil money penalty as assessed will not affect the ability of Nally and Hamilton Enterprises, Inc., to continue in business. *Id.*

### III. FINDINGS OF FACT AND SUMMARY OF TESTIMONY

On December 16, 2016, MSHA Inspector David Faulkner<sup>1</sup> visited Respondent's Day Branch Mine ("Mine") to perform a routine inspection. Tr. 13. Prior to the inspection, Faulkner reviewed the Mine's ground control plan, in which the mine operator lists the type of mining, the seams they will mine, and any provisions the operator will follow at that specific mine. Tr. 14–15. The provisions at issue in this case (Items 6 and 7) only apply to haul roads, which the plan defines as roads where coal or mining rock trucks normally operate. *See* Ex. 3 at 14. Item 6 requires haul roads to have a grade below the manufacturer-recommended maximum for the trucks using the road. Tr. 28; Ex. 3 at 14. If there is no recommended maximum, then the road grade must be no greater than 15%. *Id.* Item 7 requires roads with grades greater than 10% to have additional safety precautions, including signs warning of steep grades and a reduced speed limit, runaway ramps, and berms at least two feet tall. Tr. 28–29, 69; Ex. 3 at 14.

Once at the Mine, Faulkner and his supervisor traveled from the parking lot up past the Creech coal seam and up to a drill bench. Tr. 16–18. On the way up, Faulkner did not see anything that made him think the road was a haul road, but later noticed that the coal seam had been mined at some point. Tr. 42, 19–20. The amount of exposed highwall signaled that about a month's worth of mining had been completed. Tr. 58–59. Faulkner thought that Respondent had recently mined the highwall because mine management added the Creech coal seam to the ground control plan roughly two months prior to Faulkner's visit. Tr. 26–27. Faulkner testified that Day Branch Mine Foreman Mike Shackelford "insinuated" that trucks had hauled coal from the seam using the road, but Faulkner did not include that fact in his notes from that day or in the citation he issued. Tr. 24–25, 31–32, 41. Shackelford later testified at hearing that NHE had removed between 25 and 30 loads of coal from the Creech seam. Tr. 73.

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<sup>1</sup> David Faulkner has worked as a mine inspector for MSHA for over 11 years and worked in the mining industry for 17 years prior to that. Tr. 11–12. He is licensed as a surface mine foreman in Kentucky and as an open pit mine foreman in Tennessee. Tr. 12. Faulkner has also completed all courses required for MSHA inspectors on topics such as accident investigation, impoundment specialist training, and regular mine inspection. Tr. 13.

Faulkner determined that the road was a haul road because of the coal seam's location relative to the rest of the equipment. Tr. 35–36. The cited road was the only way he could see to haul coal out from the seam, and he inferred that Respondent had used the cited road to haul it out. Tr. 27, 54. However, the only truck that used the road the day of the inspection was the powder truck, and Faulkner said that Respondent did not haul coal that day. Tr. 50-51.

Returning from the drill bench, Faulkner stopped roughly halfway down the road to take pictures and measure the road grade. Tr. 20–21. He used an Abney level and a laser rangefinder to measure the grade from the road's halfway point to the Creech coal seam at 25%. Tr. 29–31. Faulkner requested the powder truck's manufacturer-recommended grade maximum but found they had not been provided, so the ground control plan's prescribed 15% maximum applied. Tr. 34–35; Ex. 3 at 14. He did not ask for the coal truck's recommended maximum because in his experience the manufacturer normally did not provide it, in which case the 15% maximum would also apply. *Id.*

Shackleford testified that he measured the road grade at 13% and that the road grade was in compliance with the ground control plan when Respondent was hauling coal the week before the inspection. Tr. 70–71. Shackleford attributed any increase in road grade to a construction project on the road at the time of the inspection, which pushed materials across the road with a bull dozer and raised the grade. Tr. 70–71. He told Faulkner that they were widening the road and reducing the grade by pushing out the material. Tr. 43–44, 66–68. However, Shackleford later testified that the work they were doing on the road would only change the road's appearance and not the grade. Tr. 77. He also testified that the grade of the portion of the road in Faulkner's photographs did not change since Respondent used the road to haul coal. Tr. 22, 75–77. Based on the mountain's terrain and elevation and how the road was cut into the mountain, Faulkner believed that the road's grade had never been compliant. Tr. 27, 55.

In addition to being too steep, Faulkner also alleged that the cited road provided none of the safety features listed in Item 7. Tr. 33–34. The road did not have a speed limit sign, but did have a sign at the top of the hill that warned drivers to use lower gears. Tr. 71–72. This sign did not specifically warn that the road grade was above 10%, and Shackleford did not show it to Faulkner during the inspection. *Id.* Shackleford also noted the road had 6-foot berms, which were three times the required size. Tr. 69. However, Faulkner testified that only some of the berms measured six feet in height. Tr. 33–34.

Faulkner issued Citation No. 8409739 because Respondent “failed to follow the parameters of the Ground Control Plan,” a violation of section 30 C.F.R. §77.1000. Ex. 1. He alleged that Respondent violated Items 6 and 7 of the Mine's ground control plan and that the violation was S&S. *Id.* Using his experience investigating runaway truck accidents, Faulkner found NHE moderately negligent based on the likelihood that haul truck drivers would lose control of the truck and cause an accident on the road. Tr. 37–39; Ex. 1. He testified that the dirt road was not durable enough to provide traction to trucks, which increased the likelihood that a driver could lose control around the curve on the road. Tr. 38–39. Faulkner said this kind of accident would likely result in lost work days or restricted duty. Tr. 37, Ex. 1.

## IV. PARTY ARGUMENTS

### A. Secretary's Argument

The Secretary argues that the Respondent violated Section 77.1000 by failing to follow the safety provisions set out in Items 6 and 7 of the Mine's ground control plan. Secretary's Post-Hearing Brief (Sec'y Br.) at 11. The Secretary alleges that the Mine used the cited portion of the road to haul as many as 30 loads from the Creech coal seam. *Id.* at 8, 10. The Secretary contends that hauling coal on a road that is not compliant with Items 6 and 7 of the ground control plan could result in haul truck related accidents, which in turn could lead to lost workdays or injuries. *Id.* at 10.

Faulkner found that the grade of the cited portion of the road was greater than the maximum grade allowed by the ground control plan. Sec'y Br. at 8; Tr. 34–35. The Secretary argues that Shackelford's measurement of 13% grade was for the entire roadway, not only the cited portion. Sec'y Br. at 9. The Secretary alleges that the difference in measurements is due to the fact that the top portion of the entire roadway (the portion Faulkner cited) is much steeper than the bottom portion. *Id.*

Even at a road grade of 13%, the Secretary argues the road should have provided safety precautions required by Item 7. *Id.* Although NHE posted a sign warning trucks to use lower gears at the top of the cited road, Shackelford did not show it to Faulkner, and the Secretary argues that the sign did not properly warn of the steep grade. Sec'y Br. at 9-10; Tr. 71. The Secretary also argued that the road's berms were not high enough and the road did not have a runaway ramp in case a driver lost control due to the steep grade. *Id.* at 10.

### B. Respondent's Argument

The Respondent argues that the citation should be vacated because it was brought under a regulatory section that does not apply to road grades. Respondent's Post Hearing Brief (Resp. Br.) at 5, 10. Respondent alleges that the Secretary does not have the authority under the Mine Act to regulate road grades and improperly does so through their refusal to acknowledge plans without road grade maximums. *Id.* at 5–6. Respondent also argues that the Court should vacate the citation because the road cited was not being used as a haul road and was under construction to meet the ground control plan's standards. *Id.* at 7. Inspector Faulkner did not see any coal trucks use the road the day he cited the Mine, and he said that the powder truck would not have merited a violation on its own. *Id.*

Alternatively, Respondent argues that if the road had been used to haul coal, there was no violation because the Mine complied with the ground control plan. Resp. Br. at 8. NHE claims that the Secretary's photograph exhibits show compliance with berm size and runaway ramp requirements, and that warning signs were present on the day of the citation and the day they were hauling coal. *Id.* Respondent contends that Shackelford measured the road grade below 15% and that the road includes safety precautions required by the plan for roads over 10%. *Id.*

Finally, assuming the violation occurred, the Respondent argues that it was not S&S because there was no likelihood the road grade would result in injuries. Resp. Br. at 10. There had been no injuries before the construction and none since because the road was not used while under construction. *Id.* at 11. The Respondent also argues that it was not negligent because it was in the process of improving the road at the time of the citation. *Id.*

## V. ANALYSIS

### A. Citation No. 8409739

Inspector Faulkner alleged that Nally and Hamilton violated 30 C.F.R. § 77.1000 because it failed to maintain the haul road at 15% grade and did not provide adequate safety measures for the road, as required by its ground control plan. The provision provides in part:

Each operator shall establish *and follow a ground control plan* for the safe control of all highwalls, pits, and spoil banks to be developed...which shall be consistent with prudent engineering design and *will insure safe working conditions*.

30 C.F.R. § 77.1000 (emphasis added).

As an initial matter, Respondent argues that MSHA overstepped its authority in issuing the citation because section 77.1000 applies only to highwalls, pits, and spoil banks, and not to road grades. Resp. Br. at 5-6. NHE therefore claims that MSHA improperly cited to section 77.1000 to require compliance “in excess of the standards required by the Act and by the applicable case law.” *Id.* at 6.

I find that MSHA was within its power to regulate road grades and to issue the citation for NHE’s failure to follow its ground control plan. The Commission has held that section 77.1000 requires operators of surface coal mines to establish and follow a ground control plan. *RNS Services, Inc.*, 18 FMSHRC 523, 523 n.1 (Apr. 1996); *Revelation Energy, LLC*, 36 FMSHRC 1581, 1607 (June 2014) (ALJ) (“[Section 77.1000] simply requires that an operator follow the ground control plan, and any failure to do so is a violation of the regulation”). In addition to ensuring the safe control of all highwalls, pits, and spoil banks, the ground control plan must “insure safe working conditions” at the mine. 30 C.F.R. § 77.1000. Commission judges have found this additional mandate to extend over and above the items listed in the provision. *See Central Appalachia Mining, LLC*, 29 FMSHRC 430, 437 (June 2007) (ALJ) (Holding that section 77.1000 is applicable to blasting procedures because the provision requires operators to submit a plan that will insure safe working conditions); *Power Operating Services*, 16 FMSHRC 2331, 2341 (Nov. 1994) (ALJ) (Accepting that section 77.1000 could regulate truck dump levels and ramps, but vacating the citation because the operator adequately complied with the relevant provisions of the ground control plan).

NHE does not dispute that its ground control plan expressly requires it to maintain haul roads at a prescribed maximum grade and provide adequate safety measures for roads graded above 10%. *See Ex. 3* at 14. It is also quite clear that these haul road provisions insure safe

working conditions around the Creech coal seam. The cited road is the only means of access to the Creech coal seam and thus must be used to haul coal out of the mine. *See* Tr. 27. The road's maintenance is a necessary component of its safe, efficient, and productive development, and failure to properly maintain the road in accordance with the ground control plan could result in unsafe working conditions at and near the Creech coal seam. In acknowledging the ground control plan, MSHA clearly and justifiably believed that haul road regulations were necessary to insure safe mining conditions at Day Branch. I therefore find that MSHA possessed the authority under section 77.1000 to include and enforce the haul road provisions in Respondent's ground control plan.

I also reject NHE's contention that the cited road was not a "haul road" as defined by the ground control plan. Resp. Br. at 7. NHE's ground control plan defines a "haul road" as "roads where coal or mining rock trucks normally operate." Ex. 3 at 14. Inspector Faulkner admitted at hearing that NHE was not hauling coal on the day of the inspection, and testified that he issued the citation based on his observation of the physical condition of the highwall, the presence of the powder truck at the top of the hill near the drill bench, and because Foreman Shackelford "insinuated" that NHE hauled coal along the road prior to the inspection. Sec'y Br. at 7.

Respondent is correct to point out that a powder truck does not haul coal or mining rock and therefore does not prove that the road was a haul road under the ground control plan. However, Faulkner's other observations suffice to show that the cited road qualifies as a haul road. Faulkner credibly testified that the cited road was the only access road to the Creech coal seam and that the condition of the highwall indicated that coal had been mined and removed from the area. Tr. 36, 58. Faulkner also noted that extraction from the coal seam must have been relatively recent because NHE amended its ground control plan to add the Creech coal seam a mere two months prior to the inspection. Tr. 26-27. Faulkner's inference was confirmed during the inspection when Shackelford insinuated to him that NHE previously hauled coal along the road. Tr. 24-25, 31-32. His inference was reaffirmed at hearing when Shackelford conceded that NHE used the road to haul 25 to 30 loads of coal out from the Creech coal seam a week or so prior to the issuance of the citation. Tr. 58, 65, 73. I credit Inspector Faulkner's observations and find Shackelford's admission to carry significant weight regarding NHE's use of the road. Based on these facts, I find that the road constitutes a haul road as defined by NHE's ground control plan.

Turning now to the violation itself, I find that NHE violated provision 6 of its ground control plan. Provision 6 requires the maximum grade of any haul road to be either 15% or the maximum grade recommended by the manufacturer. Ex. 3 at 14. While Faulkner did not ask for coal truck manufacturer recommendations, NHE did not provide any at that time and Shackelford testified that none were available. Tr. 35, 73. Thus, the 15% maximum grade applies to the haul road.

Inspector Faulkner measured the grade of the road from the midpoint to the Creech coal seam with an Abney level and determined that the upper portion of the road measured at a 25% grade. Tr. 24. He used a laser rangefinder to determine that the steep grade existed for a distance of 265 feet. Tr. 29; Ex. 1. Though NHE was not hauling coal at the time of his measurement, I credit Faulkner's testimony that the slope and elevation of the mountain

foreclosed any possibility that the road's grade could have changed so drastically since NHE last hauled coal over it. Tr. 55. The elevation and slope of the mountain, as well as the manner in which the roadway was cut into the terrain of the mountain, suggested that the grade could not have been altered to such an extreme degree by the work that NHE was doing. Tr. 27.

NHE argues that Shackleford measured the road at a grade of 13%, well within the requirements of Provision 6. Resp. Br. at 9; Tr. 43, 65. Shackleford attributed Faulkner's 25% measurement to a large, temporary hump that NHE created while working on the road near the Creech coal seam. Tr. 65. He told Faulkner that NHE was widening the road and reducing the grade by pushing out material. Tr. 43-44, 66-68. He also noted that NHE did not haul over the hump because it would have been too steep. Tr. 43, 65.

I find Shackleford's testimony on this subject to be inconsistent and do not credit this measurement. Shackleford did not specify when he took the measurement, and testified that his 13% grade measurement considered the entire roadway rather than the cited 265-foot segment. *See* Tr. 70-71. It is undisputed that the upper segment of the road was significantly steeper than the lower portion, and therefore Shackleford's measurement of the entire road did not accurately reflect the grade of the cited 265-foot segment. Tr. 47-48. He conceded at hearing that the grade of the cited segment of road at the time that coal was being hauled was the same as it was in Faulkner's photographs, which highlighted only a small portion of the road. Tr. 75-77; Ex. 4. Thus, I conclude that Shackleford's 13% measurement was due at least in part to the inclusion of the portions of the road that were in compliance with the ground control plan and not at issue in this case.

Furthermore, Shackleford's claim that the hump significantly altered the road grade demonstrates that he misunderstood which segment of the road was cited. Faulkner explicitly testified that the violative segment of road was located well below the hump where NHE was performing construction. *See* Tr. 47-48, 53-54. At hearing, Faulkner drew a picture of the road clearly indicating that the cited segment was some distance from the hump, which was located at the Creech Coal seam elevation. Tr. 53; Ex. 5. His photographs of the cited area show no evidence that NHE was working on or near the cited area, as neither the hump nor any construction equipment are visible in the photographs. Ex. 4.

Even if Faulkner included the hump in his measurement, Shackleford failed to explain why NHE needed to perform maintenance work on the road if the road grade measured 13%, a permissible grade under the ground control plan. Additionally, Shackleford failed to address how pushing out material would somehow nearly double the road's grade in order to account for Faulkner's measurement. As noted above, I find that Respondent's construction work, as described by Shackleford, cannot account for the stark increase in grade along the road. Shackleford acknowledged as much when he testified that the work being done at the hump was aesthetic and would not change the grade of the road. Tr. 77. Faulkner provided similar testimony; while he was unsure exactly what the dozers were doing, they were pushing material straight out on a level area and would not affect the grade of the cited segment of road. Tr. 48, 53; Ex. 4. Based on this testimony, it is clear that NHE's construction did not significantly alter or affect Faulkner's measurement of the road grade.

Accordingly, I find that the Secretary established that NHE failed to follow provision 6 of its ground control plan, in violation of section 77.1000.

The Secretary next alleges that Respondent violated provision 7 of its ground control plan because it did not provide additional safety measures for the road. Sec’y Br. at 9. Provision 7 states that “[h]aul roads with grades exceeding 10% shall be provided with additional safety measures such as steep grade warning signs, reduced speed limits, larger berms, straddle berms, runaway ramps etc.” Ex. 3 at 14. Since the measurements of Shackleford and Faulkner both indicated that the road’s grade exceeded 10%, the issue is whether Respondent provided additional safety measures.

NHE argues that it provided oversized berms, a straddle berm, a runaway ramp, and a sign at the top of the road urging truck operators to use lower gears. Resp. Br. at 8-9. NHE conceded that it did not bring up the straddle berm and runaway ramp at hearing, and I find that neither is clearly visible in the photographic evidence. *See id.* I do not credit the presence of the straddle berm and runaway ramp, but nonetheless find that NHE provided adequate safety measures along the road in compliance with provision 7.

The photographic evidence indicates that NHE built berms exceeding the minimum height along the cited road segment. Ex. 4. The berms are visible in all of Inspector Faulkner’s photographs and clearly exceed the required minimum, in some areas by multiple feet. *See id.* Shackleford testified that NHE also placed a sign near the top of the road that cautioned drivers to use lower gears. Tr. 71. Though Shackleford did not show Faulkner the sign at the time of the inspection, the Secretary did not dispute its existence, and I credit Shackleford’s testimony as such. *Id.*

I reject the Secretary’s contention that the sign was inadequate because it did not explicitly warn trucks of the steep grade or to reduce speed along the road. Sec’y Br. at 10. A warning suggesting that trucks use lower gears signals the driver to proceed slowly and with caution. Use of lower gears also suggests that a change in grade may occur. I find that the berms were adequate and the sign appropriately warned operators that the upcoming stretch of road was steep and that lower speeds were recommended. Tr. 71. Accordingly, NHE did not violate provision 7 of its ground control plan.

In sum, NHE violated provision 6 of its ground control plan when it failed to properly maintain the haul road at or below the 15% maximum grade. However, NHE provided adequate safety measures around the road in compliance with provision 7. The citation is **AFFIRMED**.

## **B. Significant & Substantial**

A violation is significant and substantial (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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).



In order to uphold a citation as S&S, the Commission has held that 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).

The Commission has held that the second element of the *Mathies* test addresses the extent to which a violation contributes to a particular hazard. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). Analysis under the second step should thus include the identification of the hazard created by the violation and a determination of the likelihood of the occurrence of the hazard that the cited standard is intended to prevent. *Id.* at 2038. At the third step, the Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

I have already found that Nally & Hamilton violated section 77.1000, a mandatory standard, when it failed to adhere to its ground control plan and maintain the haul road at a 15% maximum grade. The discrete safety hazard posed by the violation is that the steep grade may cause a coal truck driver to lose control of the vehicle and collide with a berm or overturn the vehicle. Given the particular facts surrounding the violation, it is highly likely that the hazard would occur. The road was 10% steeper than permitted and was the only means of access to the Creech coal seam and drill bench. Tr. 27. The Mine used the road to haul coal from the highwall. Tr. 73. Inspector Faulkner testified that the roadway was made out of fresh earthen dirt and not durable stone, which reduced traction and could affect a haul truck operator's ability to brake or maintain control of the vehicle. Tr. 38-39. The road also had a relatively sharp curve, and losing control of a haul truck while driving along it could exacerbate the likelihood of injury. Tr. 37; Ex. 4. It is therefore likely that trucks would lose control or crash while hauling coal on a road with a grade of 25%.

Since the road grade was 10% higher than the prescribed maximum, it is reasonably likely that a truck operator would lose control and crash, collide, or overturn the vehicle, resulting in ejections or other serious collision-related injuries. I credit Inspector Faulkner's testimony that in his experience, injuries caused by runaway trucks in surface operations are reasonably likely to be serious. Tr. 37-38. I therefore find that the violation was S&S.

### **C. Negligence**

Under the Mine Act, operators are held to a high standard of care, and “must be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition

without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

I find that NHE's negligence is low. NHE should have known that the grade of the road was 10% higher than its ground control plan permitted, but it provided safety measures to mitigate the risk of an accident and therefore did not violate provision 7 as alleged by the Secretary. The testimony and photographic evidence prove that Respondent built large berms along the road and provided a sign urging operators to use lower gears. *See* Tr. 38-39; Ex. 4. These safety measures were adequate under Respondent's ground control plan and resulted in the vacatur of one portion of the citation, and also mitigated the potential risk of operating on the road. I also credit Shackelford's testimony that he measured the grade of the road at some point before the inspection took place. Tr. 43, 65. Although, as discussed above, Shackelford's measurement did not accurately portray the grade of the cited road segment, he nonetheless made a good faith attempt to comply with the ground control plan. I therefore reduce NHE's negligence from moderate to low.

## VI. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820(I).

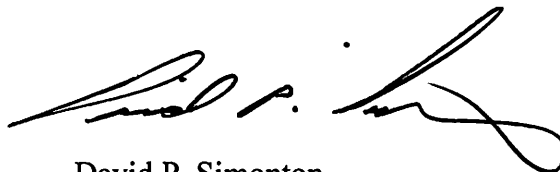
The Secretary proposed a regularly assessed penalty of \$634.00. Nally and Hamilton have no history of violating section 77.1000 in the past two years. The parties stipulated that the Day Branch Mine produced 310,980 tons of coal and employed between 33 to 35 miners working 99,823 hours in 2016. *Jt. Stip. 3*. NHE therefore qualifies as a medium to large sized operator. *See* 30 C.F.R. § 100.3. The parties also stipulated that the civil money penalty as assessed will not affect NHE's ability to remain in business. *Jt. Stip. 4*.

I discussed my gravity and negligence findings in greater detail above. NHE violated the standard, and the violation was S&S and highly likely to result in lost workdays or restricted duty. I reduced NHE's negligence from moderate to low because while NHE should have known that the road grade violated provision 6 of its ground control plan, NHE provided adequate safety measures along the road and did not violate provision 7 as alleged by the

Secretary. NHE acted in good faith to achieve compliance the same day it received the citation. After considering the statutory criteria, I assess a penalty of \$500.00.

## VII. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$500.00** within 30 days of this order.<sup>2</sup>



David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Mary Sue Taylor, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

S. Thomas Hamilton, Nally & Hamilton Enterprises, Inc., 212 East Stephen Foster Avenue, P.O. Box 327, Bardstown, Kentucky 40004

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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