FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue N.W., Suite 520N
Washington, D.C., 20004-1710
Telephone: (202) 434-9900 Fax: (202) 434-9949

August 7, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	DOCKET NO. WEVA 2011-283 A.C. No. 46-09231-235522-01
v.	:	
NEWTOWN ENERGY, INC., Respondent.	:	Mine: Coalburg No. 2

DECISION

Appearances: Benjamin D. Chaykin, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Christopher D. Pence, Allen, Guthrie & Thomas, PLLC, Charleston, West Virginia, for Respondent.

Before: L. Zane Gill, Administrative Law Judge

This case involves a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Newtown Energy, Inc. at its Coalburg No. 2 mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (2012) (the "Mine Act" or "Act"). The case comprises a single 104(d) (1) citation written on May 25, 2010, Citation No. 8110086. The parties presented testimony and documentary evidence at the hearing held in Charleston, West Virginia, on April 24, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

In their pre-hearing reports, the parties submitted the following stipulations:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 ("the Act").

2. Newtown Energy, Inc. was an "operator" as defined in Section 3(d) of the

Act at the coal mine at which the citations and orders at issue in this proceeding were issued.

3. The products of the mine at which the citations and orders at issue in this proceeding were issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.

4. Operations of Newtown Energy, Inc. at the coal or other mine at which the citations and orders at issue in this proceeding were issued are subject to the jurisdiction of the Act.

5. The maximum penalty which could be assessed for these violations pursuant to 30 U.S.C. 820(a) will not affect the ability of Newtown Energy, Inc. to remain in business.

6. The individual or individuals whose signatures appear in Block 22 of the citations and orders that are at issue in this proceeding were each acting in their official capacity and as an authorized representative of the Secretary of Labor when each citation and order was issued.

7. None of the exhibits that the parties intend to offer into evidence and that were exchanged prior to the hearing will be subject to objection as to authenticity, and the authenticity of all such documents is specifically stipulated.

8. True copies of each of the citations and/or orders that are at issue in this proceeding, with any and all modifications and abatements, were served on Newtown Energy, Inc. or its agent as required by the Act.

9. Exhibit A to the Secretary's Petition for Assessment of Civil Penalty in WEVA 2011-283 accurately sets forth the number of inspection days, size of the mine, mine operator and history of violations at issue in this proceeding.

10. Each citation or order at issue in this proceeding was timely abated, and the Respondent demonstrated good faith in achieving rapid compliance.

(Gov't Pre-hearing Rept. 3-4; R. Pre-hearing Rept. 2)

Findings and Discussion

MSHA Inspector Russell Richardson ("Richardson") issued Citation No. 8110086 during

his regular inspection of the Newtown Energy, Inc. ("Newtown") Coalburg No. 2 mine ("the mine") on May 25, 2010. (Tr. 26:10-12) Richardson wrote the citation for Newtown's alleged failure to properly lock/tag out the "cathead" power cable connector for the Number 34 shuttle car in the Number 2 section of the mine. (Tr. 31:20-23; 36:8-10; 53:18-54:3)

Citation No. 8110086 [1]

On May 25, 2010, Richardson issued Citation No. 8110086 to Newtown for a violation of 30 C.F.R. § 75.511. The citation alleges that:

> Proper lock out and tag out was not being practiced on the #2 Section. The Mine Superintendent had locked out the cathead for the #34 shuttle car and left the key in the lock while repairing the trailing cable.
>
> "This violation is an unwarrantable failure to comply with a mandatory standard."

(Ex. G-3)

The inspector alleged that a fatal injury was reasonably likely to occur, that the violation was significant and substantial ("S&S"), that one person would be affected, and that the violation was the result of high negligence on the part of the operator. (Ex. G-3) The Secretary proposed a civil penalty of $7,578.00. (Pet. Assessm't. Civ. Pen. Ex. "A")

The Violation

Newtown argued (Tr. 10:20-24) that Citation No. 8110086 should be vacated because the type of repair done on the power cable is not "electrical work" as contemplated in 30 C.F.R. § 75.511 and does not trigger an obligation to de-energize the power cable. Before I reach that issue, I must resolve a factual dispute stemming from Citation No. 8110085, issued the same day, but not part of this case: Did Richardson find two separate defects in the power cable that had to be repaired in order for Citation No. 8110085 to be abated?

Robert Herndon, who served as superintendent of the Coalburg No. 2 mine when the citation was issued (Tr. 93:12-13), testified that Richardson found only one defect, and that it

[1] Richardson issued another citation on May 25, 2010, that is not at issue in this case. Citation 8110085 (Ex. G-2) alleged that Richardson found two defects in the No. 34 shuttle car power cable that had to be repaired. It was during the repair that the circumstances underlying the citation at issue here occurred. (Tr. 40:15-41:20) Citation No. 8110085 is relevant to establish why Richardson wrote Citation No. 8110086 the way he did. It will be mentioned in the discussion below for its relevance to the contents of Citation No. 8110086.

was so minor that repairing it (to abate Citation No. 8110086) only required Herndon to apply a new exterior wrap to the cable. (Tr. 105:15-108:15) Newtown argues that such a minor repair is not "electrical work" and, as a result, there was no need to de-energize the power cable, making any failure on Herndon's part to hew exactly to the lock and tag-out procedure in 30 C.F.R. § 75.511 immaterial. Richardson, on the other hand, testified that he found two defects in the power cable – the selfsame two he cited in Citation No. 8110085 – and that one of them was a breach in the cable jacket deep enough and serious enough to expose one of the energized wires.[2] (Tr. 40:2-41:20)

Citation No. 8110085 alleged the following:

> The trailing cable on the #34 Shuttle Car operating on the #2 section was not adequately insulated or sealed so as to exclude moisture. There was one splice in the cable that had the outer jacket busted and was exposing the enter [sic] insulated power conductors and one splice had the outer jacket busted and was exposing the copper of the black power conductor.

(Ex. G-2)

There is no reason to doubt the accuracy of Richardson's testimony that he found two separate defects in the shuttle car power cable. (Tr. 40:2-14) His contemporaneous field notes confirm this (Ex. G-1 17), as does the text of Citation No. 8110085 (Ex. G-2), and his description of the repair done to abate Citation No. 8110085. (Tr. 44:19-45:6) In contrast, Herndon testified that he repaired only one break in the cable's protective sheathing and merely applied a new surface wrap. At the close-out conference with Richardson, however, Herndon failed to contest the accuracy of the citation itself, which he personally received and which clearly states that two defects were found and repaired. (Ex. G-2) Herndon testified in response to questioning by the judge that he was aware that Richardson's citation claimed that there were two defects in the power cable that had to be repaired. (Tr. 125:14-126:18) He equivocated about whether he protested to Richardson about the discrepancy at any time while the two of them were together. (Tr. 126:23-127:11) Herndon's failure to notice or raise the obvious discrepancy while Richardson was present undercuts his credibility on this point. (Tr. 65:6-23) Moreover, Newtown apparently paid the penalty for Citation No. 8110085 without contesting the accuracy of its allegations, central to which was the claim that two defects were found and repaired. I credit Richardson's testimony and find that there were two defects in the cable jacket, one of which exposed an energized inner wire. I further credit Richardson's testimony that repairing the more serious defect required Herndon and Joey Benedict (Tr. 70:20-72:1) to cut into the power

[2] In addition to being key to deciding whether there was at least one cable defect serious enough to require "electrical work" to repair, the existence and severity of the defects cited in Citation No. 8110085 would be relevant to the evaluation of the gravity, negligence, S&S designation, and unwarrantable failure determination in Citation No. 8110086.

cable to expose the copper power lead in order to repair it.

Whether Benedict (Tr. 70:24-71:5) was a certified electrician or otherwise qualified to assist Herndon, who was a certified electrician (Tr. 97:17-20), is a point that could bear on the question of whether the repairs done on the power cable were significant enough to constitute "electrical work" under the standard. With my finding that two defects were found and repaired, one of which required cutting into the cable to expose a copper power lead, Benedict's qualifications are a loose end that needs to be addressed. According to Newtown's theory, Benedict's lack of formal qualifications is indirect proof that there was only one relatively minor defect in the cable that did not require a lock or tag-out to de-energize the cable. Had the defect actually required "electrical work" to repair, it would have been improper and a separate violation of another standard (30 C.F.R. § 75.153) for Benedict to have assisted Herndon.[3] (Tr. 107:7-110:1) Since Richardson was in the vicinity during the repair and did not cite Newtown for allowing a non-qualified person to assist with "electrical work", Newtown argues that Richardson was wrong about there being two defects in the cable. His failure to cite for having an unqualified person do "electrical work" proves, according to Newtown's argument, that there was only one defect and that it was so minor as to not require "electrical work" to repair. (Resp. Post-Hearing Brief 9) However, there is another more plausible and cohesive explanation for Richardson's failure to cite Newtown for Benedict's role in this scenario, i.e., Richardson simply made a mistake. Perhaps he could have, or even should have, issued a citation for Benedict's involvement, but he did not. I find this to be the more compelling probability. In sum, I conclude that the work done by Herndon and Benedict to repair the power cable was "electrical work" as contemplated by 30 C.F.R. § 75.511 and that Citation No. 8110086 will not be vacated under this theory.

The Standard

Citation No. 8110086 was issued under 30 C.F.R. § 75.511, which reads as follows:

> No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or

[3] Herndon conceded under questioning that leaving the key in the lock on the cathead would violate federal law if "electrical work" were being done (Tr. 119:20-24) because someone could remove the lock and re-energize the line. (Tr. 120:24-121:3)

his agent.

30 C.F.R § 75.511.

The standard requires any disconnecting device, such as the cathead in this instance, to be locked out, if possible, and/or suitably tagged by the person performing electrical work. Where it is not possible to lock out the connector, it must be opened and suitably tagged to prevent its being energized.

The Secretary argues that Herndon's decision to leave the key in the only lock he could locate at the time, having been directed by Richardson to lock the power cable out to assist in his inspection activity, violated the standard. There is no dispute that Herndon's choice of options was less than perfect and no dispute that leaving the key in the lock made it at least theoretically possible that someone other than Herndon would see the lock on the cathead, misinterpret the situation, remove the lock, re-energize the power cable, and create the possibility of an electrocution. Setting aside for the moment the likelihood of such a chain of errors actually happening, and the fact that Richardson superceded the normal mining process by deputizing Herndon to assist in his inspection, the strict liability nature of the standard requires a finding that there was a violation. Herndon's attempt to comply with the standard's requirements while also following Richardson's directions resulted in a failure to adequately prevent inadvertent re-energization of the power cable, which is the *sine qua non* of the standard.

This citation leaves a bad taste in the mouth. As discussed below, Richardson cited a condition that arose solely from Herndon's efforts to assist him with his inspection. It is tempting to vacate the citation on the basis of the precedent in *Freeman United Coal Mining Co.*, but there is an essential difference between the crux of that case and this one. 11 FMSHRC 161 (Feb. 1989). In *Freeman,* an inspector ordered that work cease immediately to rehang a ventilation curtain that had just been torn away from its attachments as he was conducting his inspection. 11 FMSHRC at 162-63. The event occurred in the normal course of mining operations, but the inspector ordered that the curtain not be repaired immediately, which would have been done in the normal flow of mining operations and was already underway. *Id*. at 162. He wanted to measure airflow inby the face before the curtain repair was done, even though the condition had existed only minutes and it would take only a few minutes to complete the repair and restore airflow. *Id*. at 162-63. The inspector issued a 104(d) (2) citation alleging S&S and unwarrantable failure. *Id*. at 163. Once he determined to issue the citation, he allowed the repair work to proceed. *Id*. at 163. It took only minutes and immediately abated the violation. *Id*. at 163.

In *Freeman*, the operator asked the ALJ to vacate the citation, arguing that the inspector had interfered with the normal mining cycle by halting the repair, which created or at least prolonged the violative condition. *Id*. at 163-64 The ALJ held that the interference was immaterial because a shuttle car tearing down a ventilation brattice cannot be considered part of the normal mining cycle. *Id*. at 164. The Commission reversed and vacated the citation. *Id*. at 166. There is no doubt that the air flow was below standard and no doubt that such a violation

fits comfortably within the strict liability regimen contemplated by the Mine Act.[4] Despite that, in this and presumably other factual circumstances, the Commission recognized that a temporary deviation from a standard can occur without constituting a violation. Things occasionally happen that inevitably cause results below a standard. The key to compliance lies in expeditiously taking effective steps to come back into compliance.

I will not vacate this citation, because following the *Freeman* decision would seriously undercut the concept of strict liability without offering a satisfactory justification. Doing so would also improperly focus on the inspector's interference with the normal course of mining operations. There is a logical parallel, however, between the facts underlying *Freeman* and those in this case. In both instances, it is an act of the inspector that either creates (in this case) or exacerbates (in *Freeman*) the violating condition, but in this case, the inspector did not interfere with normal operations. Deputizing Herndon to assist with his inspection set in motion an event that was not part of the normal mining process. This *ad hoc* deputization further deviated from normal mine operations by making Herndon the inspector's factotum for a few moments, blurring the normal lines of authority and responsibility.[5] Strict liability requires adherence to the letter of the standard for the sake of uniformity and in the interest of maximum protection of miners. Rather than vacate this citation, which *Freeman* appears to support, I believe the wiser course is to find a violation of the standard, which preserves the notion of strict liability, and to deal with the "but for" aspects of the inspector's involvement during the discussion of negligence, likelihood, S&S, and unwarrantable failure. Accordingly, I conclude that Herndon's use of the defective lock constituted a technical violation of the standard.

Negligence

The Commission provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that

> Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid

[4] The Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (*citing Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989)).

[5] Herndon, and other similarly situated mine officials, face a Hobson's choice. If he had foreseen that helping the inspector would lead to a serious violation, he might have been prompted to refuse assistance and thereby face the potential of civil or criminal liability for obstructing the inspection. 18 U.S.C. § 111 (2012); 30 U.S.C. § 813(a) (2012); *Topper Coal Co.*, 20 FMSHRC 344, 347- 49 (Apr. 1998).

> violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

"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." 30 C.F.R. § 100.3(d). "A mine operator is required […] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "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." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id*. High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Citation 8110086 alleges high negligence. (Ex. G-3) For the reasons that follow, I conclude that the negligence underlying this violation is low.

Table X of 30 C.F.R. § 100.3(d) links an allegation of high negligence with the absence of mitigating circumstances.[6] Several factors mitigate significantly against a finding of "high" negligence.[7] First, and most importantly, the violation underlying this citation was a direct result of the inspection process, not the normal mining cycle. But for Richardson's direction to Herndon

[6] Richardson did not consider there to be any mitigating circumstances when he wrote the citation. (Tr. 87:2-8)

[7] Newtown's counsel suggested several other elements of possible mitigation in his cross-examination of Richardson, including the fact that the power cable was actually de-energized (Tr. 87:22-88:1), the defective lock was on the cathead for only a short time (Tr. 88:11-18), the cathead was the only one of many others at the power center that was not effectively locked out (Tr. 88:23-89:20), all catheads and receptacles at the power center were labeled (Tr. 89:21-24), the section was not producing coal at the time (Tr. 90:1-3), the miners knew the inspector was on the section (Tr. 90:4-8), the miners had all received annual refresher training on proper regard for locking and tagging (Tr. 90:9-13), or that the citation was terminated in five minutes (Tr. 90:24-91:3).

to lock out the power cable cathead to facilitate his thorough inspection of the weak splice, there would have been no reason to lock it out. (Tr. 111:2-17) Second, Richardson's failure to recognize the interplay of his direction to Herndon and the resulting violation mitigates against Newtown's negligence in that it overstates Newtown's contribution to the violation and ignores his own. Herndon's choice of means to comply with Richardson's directive was wrong under the circumstances. (Tr. 119:15-120:12) Based on his experience and training[8], he could have done something different that would have facilitated the inspection without creating a potential hazard. (Tr. 138:4-18) He chose a method that increased the likelihood of an injury-causing event. (Tr. 120:18-121:3) He cut corners[9] in an attempt to facilitate Richardson's inspection (Tr. 115:4-21), and thereby gave the inspection higher priority than the degree of safety contemplated by the standard. On the other hand, Richardson failed to factor his own role into his response to Herndon's mistake. Third, Herndon's attempt to lock out the cathead by using the lock with the key still in it was, notwithstanding its flaws, a good faith attempt to comply with Richardson's directive.[10] Fourth, the standard allows for alternate methods to satisfy its safety-promoting purpose:

> Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons.

30 C.F.R. § 75.511 (Emphasis added). It expressly contemplates situations in which it is not possible to lock out effectively, and allows for the alternative of suitably tagging. What constitutes suitable tagging is not specified in the standard, nor was I able to find any direct explanation of what that term means in practice. Counsel for Newtown did not argue this point directly (Tr. 88:5-10), and I do not consider it a basis to vacate the citation, but it should be considered an element of mitigation. Though I do not vacate the citation on the theory that Herndon's leaving the lock with the key still in it on the cathead satisfied the "suitable tagging" alternative mentioned in the standard, it did act as a signal to anyone seeing it that something out

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[8] Herndon was a qualified mine electrician with the same basic training as Richardson. (Tr. 30:15-31:5; 76:3-16)

[9] Herndon could have broken the key off in the lock, thereby making it less likely that anything untoward could happen. (Tr. 85:30-86:15) Richardson testified that Herndon chose not to because he would have had to cut the lock off the cathead later, which would have taken additional time. (Tr. 55:22-56:6)

[10] Herndon testified that he did not have a lock with him during the inspection, and had to ask several miners for a lock before he was able to acquire the one he used on the cathead. (Tr. 101:13-102:5)

of the ordinary was going on.[11] This is better than no signal at all, though far short of an actual lock out. I conclude that leaving the lock and key on the cathead is at least some evidence of Herndon's attempt to signal to other miners that extra caution was in order, even if it did not make it physically impossible to re-energize the cable. It is an element of mitigation that bears on my assessment of Newtown's negligence. Fifth, the faulty lock was on the cathead for a short amount of time.[12] These elements constitute considerable mitigation, which make a finding of "high" negligence unsupportable and justify a finding of "low" negligence.

Gravity ("Seriousness")

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Citation 8110086 categorizes the gravity of an event arising from this violation as potentially fatal for a single miner, and alleges that such an event would be reasonably likely to occur. (Ex. G-3; 84:16-85:3) From the following, I conclude that any event arising from this violation would be unlikely to occur. However, I agree with the Secretary that such an event would be potentially fatal and would involve a single person.

First, it is unlikely that a miner who is reasonably aware of his surroundings (Tr. 11:8-15) and trained to the contrary (Tr. 61:21-62:16; 80:6-81:13; 112:15-113:11) would re-energize the power cable by removing the lock and plugging the cathead back into the power center (Tr. 64:9-20; 111:22-112:14) if he sees a cathead lying on the ground with a lock and key in it (Tr. 54:22-55:1). If he did, however, it could cause an electrocution. (Tr. 41:12-20; 43:12-19; 58:11-24) The power cable carried 480 volts. (Tr. 17:15-24) Second, although there were several miners in the area (Tr. 58:2-10), and according to the testimony of Inspector Richardson, three persons were

[11]Whether Herndon actually used a tag with the defective lock is not clear in the record. (Tr. 55:7-15)

[12] There are conflicts in testimony concerning the amount of time that the lock was on the cathead. Based on the estimates the witnesses gave in their testimony, the lock was in place for between ten and thirty minutes. (Tr. 56:24-57:21; 105:5-8; 108:3-9; 110:3-18)

exposed to the electrocution hazard (Tr. 59:1-5), I see no reason or basis to deviate from Richardson's allegation that a single miner would be potentially exposed to the hazard. (Ex. G-3) Third, as to likelihood, I conclude that under the circumstances it was unlikely that the power cable would be inadvertently re-energized. Despite the obvious problem of using a defective lock to mechanically prevent the cathead being re-inserted into the power center, the lock did provide a visual cue to any miner seeing it that the cathead should not be plugged back in, perhaps similar to the visual cue a proper tag used to tag out a cable like this would provide.

It is of some importance to me in this regard that the standard itself creates a substitute for mechanically locking out, i.e., it is acceptable to "suitably" tag a cathead when an actual lock-out is not possible. It is not necessary to ponder too long about whether the facts of this case line up sufficiently with the intent of the suitable tagging proviso. Contrary to what the Commission did in *Freeman*, I am not vacating the citation on that basis. I am convinced, however, that the tagging effect of finding a lock of any sort on a cathead mitigates against a finding of greater likelihood. In light of the absence of evidence or argument of what constitutes a suitable tag, it suffices to recognize in this manner the tagging-only alternative found in the standard.

Significant and Substantial

In *Mathies Coal Co.*, the Commission 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 1, 3-4 (Jan. 1984).

In *U.S. Steel Mining Co.*, the Commission held:

> We have explained further that the third element of the Mathies 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." [. . .] We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial."

7 FMSHRC at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *see also Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

The underlying violation of a safety standard is dealt with above. It is a discrete safety hazard to perform electrical work on equipment without locking or tagging it out. An ineffective lock-out violates the standard. The likelihood that an injury caused by the violation would be of a reasonably serious nature is also discussed above. Here, I focus on the likelihood that the hazard arising from failing to properly lock or tag out will result in an injury.

It appears that Richardson issued this 104(d) citation due to the confluence of two factors: (1) the degree of certainty that an incident would occur and (2) the potential of devastating injury. The former is consistent with the third *Mathies* S&S element and is central to this portion of the analysis; the later corresponds roughly to the gravity assessment common to all citations, which was discussed above, and the fourth *Mathies* S&S factor relevant in more egregious cases.

The key to my assessment of the likelihood of an incident arising from these facts is the interplay between three factors. The first two factors, the options for effective locking and tagging found in the standard and the deterrent effect of putting a lock, albeit defective, on the cathead, were discussed above. The third factor is the setting in which this violation occurred.

Richardson did his inspection of the shuttle car power cable splice at entry No. 4. (Tr. 63:3-7; 99:2-7) At this distance from the power center, a visual observation of the cathead was arguably possible, and a shout from a miner inquiring about why there was a lock on the cathead or warning another miner working around the cathead not to tamper with the lock could be heard. (Tr. 34:21-35:4)[13] Herndon testified that because the mining machine was turned off and no coal was being produced, it would be much quieter than normal where the violation occurred. (Tr. 128:9-129:2) As a result, and premised on his statement that the power center was only 55 feet from the shuttle car (Tr. 102:22-24), anyone working on the de-energized cable would be able to see anyone approaching the power center and shout to them to leave the shuttle car cathead alone.[14] The defective lock was on the cathead for only a few minutes before Herndon told Richardson about it, during which time no work was done on the power cable. (Tr. 104:23-

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[13] Richardson testified that the power center was about 115 feet from his location and not visible. (Tr. 36:22-37:15; 46:6-9) Herndon testified that the distance was only 55 feet. (Tr. 102:14-24)

[14]This is contradicted in part by Richardson's testimony that the distance was about 115 feet. (Tr. 36:22-37:1) It is not necessary to reconcile whether there was a line of sight from the shuttle car to the power center. There is no dispute that the noise level was much less than normal, which is of some probative value.

105:11) The shuttle car's lights had been left on, which served as a secondary indicator of the power state of the system. (Tr. 49:24-50:16) The lights were out during Richardson's inspection, indicating that the power cable was de-energized. (Tr. 49:8-50:24) There were eight to ten men working in the No. 2 section on May 25, 2010 (Tr. 31:20-23; 98:11-14), who were aware that an MSHA inspector was doing an inspection in the area. (Tr. 77:5-11; 100:24-101:2)

The consequences of an unlikely concatenation of failures would be potentially fatal (Tr. 41:12-20; 43:12-19; 58:11-24), so one must be sober and realistic in evaluating the likelihood of the necessary chain of events. There are several systemic checks designed to prevent an electrocution. They are interrelated in purpose and effect. The degree of causal likelihood decreases with each additional link in the chain. All miners are initially trained and subsequently re-trained never to remove a lock placed by someone else. (Tr. 61:21-62:16; 80:6-81:13; 90:9-13; 111:22-112:14) In order for this element to fail, a miner must forget or ignore that training (Tr. 79:12-15), something that happens all too frequently. Nonetheless, several factors decrease the likelihood of that happening in this case. There was less than normal pressure to keep to a production pace, which as a matter of common sense might reduce a miner's incentive to cut corners. No coal was being mined during the time relevant to this violation because the mining machine was down for maintenance. (Tr. 75:6-9; 90:1-3; 99:2-7) There was no known impetus to re-energize a cable with a lock on it. The miners were aware that the MSHA inspector was on premises (Tr. 77:5-11; 90:1-8), which is far enough out of the ordinary to override a miner's being "on auto-pilot" while doing his job and to motivate him to be a bit more perspicacious and cautious than normal. This decreases the likelihood that a miner would carelessly and mindlessly do something as extraordinary as removing a lock someone else had put on a cathead without first finding out the reason it was there. Giving full weight to the fact that a lock with a key that cannot be removed should never be used to lock something out, the presence of the lock is nonetheless a visual cue, much the same as a tag, that should dovetail with the miners' training about never removing someone else's lock to prompt significant caution. Finally, the lock was on the cathead for only a short time. (Tr. 38:7-16) It stands to reason that a reasonably prudent miner seeing a lock with key on a power cable cathead would take steps to learn what was going on before removing it. This would take some time, making it less likely that the power cable would be inadvertently re-energized.

In sum, I am convinced and conclude that there was so little likelihood that all of the various catalysts needed to cause the cable to re-energize would coincide as to make the evaluation of it almost speculative. *Texasgulf,* 10 FMSHRC at 501-03 (The improbability of a chain of events is a proper basis not to find "reasonable likelihood" under the third prong of the *Mathies* S&S test.) As a result, I conclude that the violation was not significant and substantial.

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act. 30 U.S.C. 814(d) (2012). Taken together with "significant and substantial," it creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp*., the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure has been paraphrased as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). *See also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In *Gatliff Coal Co.*, the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. 14 FMSHRC 1982 (Dec. 1992). Consistent with the discussion of enhanced enforcement above, the Commission stated that an unwarrantable failure may trigger the "increasingly severe enforcement sanctions of section 104(d)" whereas "[n]egligence [. . .] is one of the criteria that the Secretary and the Commission must consider in proposing and assessing [. . .] [all] civil penalt[ies]." *Id.* at 1988 (quoting *E. Assoc'd Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991)). Further, "'[h]ighly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." *Gatliff Coal*, 14 FMSHRC at 1989 (quoting *E. Assoc'd Coal*, 13 FMSHRC at 186).

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also considered an operator's knowledge of the existence of the dangerous condition. *See, e.g.*, *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug.1994) (affirming unwarrantable failure determination where operator was aware of a brake malfunction failed to remedy the problem); *Warren Steen*, 14 FMSHRC at 1126–27; 1129 (knowledge of a hazard and failure to take adequate precautionary measures support unwarrantable determination). *See also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as something more than ordinary negligence. They are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.,* 31 FMSHRC 1346, 1350–51 (Dec. 2009).

Was the use of a defective lock aggravated conduct constituting more than ordinary negligence? The traditional factors used to determine unwarrantable failure do not lend themselves well to the facts of this case. For instance, most of them include a temporal element.

The extent of a violative condition can be seen as an expression of how long a condition has existed as well as how widespread it is. The former formulation duplicates or supplements the inquiry into how long a violative condition has existed, which is often formulated as a separate factor. Whether an operator has been actually or constructively placed on notice that a violating condition or practice exists or that it should be more diligent in its compliance is also largely an expression of how long the violation has existed. Finally, the operator's effort to abate a violating condition is most meaningful in light of how long the condition has existed. Unfortunately, these time-based factors are of little analytical assistance in a situation such as this where the violation arises from an act carried out in the presence of the MSHA inspector.

Another complication arises from the overlap between the high-degree-of-danger element of the traditional unwarrantable failure test and the negligence and gravity elements of the basic, underlying violation. They can both be proved by facts showing the relative seriousness and likelihood of an injury causing event. The distinguishing element is the weight given in the analysis.

Considering the traditional elements of the unwarrantable failure test set out in *IO Coal Company*, I am convinced that because this was an isolated, *ad hoc* event, noteworthy primarily because of the potential severity of consequences from an unlikely event - factors that have been given decisive weight in my analysis of negligence, gravity, and S&S - Herndon's actions were not an unwarrantable failure to comply with the relevant safety standard. 31 FMSHRC at 1350. The factors discussed above do not support a finding of aggravating circumstance or intentional misconduct.

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 the "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 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).

Applying the 30 C.F.R. § 100.3 penalty calculation to the findings and conclusions above, the penalty recommended by the matrix is $207.00. I accept the Secretary's evidence regarding the mine size, the size of the controlling entity, the ratio of violations per day, the number of persons involved, and the severity of a potential event. I adjust the calculation to reflect my findings of low negligence and unlikely gravity, and I apply the percentage point reduction for good faith abatement[15] to come to that figure. After considering all of the penalty criteria, I assess a penalty of $207.00 for this citation.

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 $207.00. Newtown is hereby ORDERED to pay the Secretary of Labor the sum of $207.00 within 30 days of the date of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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Benjamin D. Chaykin, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, VA 22209-2247

Chris Pence, Esq., Hardy, Pence, PLLC, 500 Lee Street, East, Suite 701, P.O. Box 2548, Charleston, WV 25301

[15]Herndon immediately remedied the violating condition by finding and using a functioning lock on the cathead. (Tr. 46:1-23) The parties stipulated that the violation was timely abated in good faith. (Stip. No. 10; Tr. 7:11-18)