FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, D.C. 20004-1710

October 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2012-242
Petitioner	:	A.C. No. 15-19027-270522
	:	
v.	:	
	:	
IKERD MINING CO., LLC,	:	Mine: Flatwoods
Respondent	:	

DECISION

Appearances: Latasha T. Thomas, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Dan Thompson, Esq., Somerset, Kentucky, on behalf of Ikerd Mining Company, LLC.

Before: Judge Zielinski

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Ikerd Mining Company, LLC, is liable for two violations of the Secretary's Mandatory Safety Standards for Surface Coal Mines, and Surface Work Areas of Underground Coal Mines,[1] and proposes the imposition of civil penalties in the amount of $105,000.00. A hearing was held in London, Kentucky, and the parties filed post-hearing briefs.[2] For the reasons that follow, I find that Ikerd committed the violations and impose civil penalties in the total amount of $46,000.00.

[1] 30 C.F.R. Part 77.

[2] A Briefing Order, entered on August 29, 2013, directed that post-hearing briefs be filed on or before September 30, 2013, and that any reply briefs be filed on or before October 14, 2013. The Secretary filed a brief on September 30. Respondent did not file a brief within the time allowed. On October 1, most government operations were shut down due to a Congressional budget impasse that continued through October 16. On October 21, Respondent filed a Motion to File Brief, along with a tendered two-page brief. The motion noted only the fact of the government shut-down, and did not offer a justification for Respondent's failure to timely file the brief. The Secretary determined not to oppose the motion. Respondent's motion is granted, and the brief is accepted for filing.

Findings of Fact and Conclusions of Law

At all times relevant to the violations at issue, Ikerd operated the Flatwoods Mine, a surface coal mine in Clay County, Kentucky. In December 2010, it opened a new section of the mine, approximately one mile from its ongoing operations. In order to reach the new site, a road had to be constructed through rugged terrain. Track mounted equipment, excavators and dozers, were initially used for road construction and site preparation. In early February 2011, Ikerd began using haul trucks at the site. The trucks would travel the newly constructed road to the site in the morning, and return for refueling at the end of the day. However, the road to the site was too steep for the trucks to climb without assistance, particularly one section through a hollow that had a 39% grade. At the beginning of the shift, the trucks would descend to the low point of the road, raise their beds, and a dozer would push them up the steep portion of the road to the work site. The process would be repeated in the evening when the trucks traveled back to the re-fueling site. Trucks were empty when they traveled the road, and Ikerd was in the process of improving the road to make it less steep.

On February 15, 2011, a truck operator with 2-3 years of experience, began to work at the site. He operated a truck that had been out of service for approximately two weeks while a hydraulic pump was replaced. The operator's first day at the site was unremarkable, until the shift ended and he attempted to return to the refueling site. As he descended the steepest part of the roadway, he lost control of the truck, which rolled up on a berm and "barrel-rolled" off the opposite side of the road. Tr. 24. The truck landed on its side, 20 to 30 feet below the road surface. Photographs of the accident scene were introduced into evidence. Ex. G-3. An on-board computer, that recorded information about the truck's operation, disclosed that the driver had started down the grade in second gear, rather than first, which may have been a contributing factor to the accident. Tr. 15, 39. The driver suffered a fractured rib, a fractured collarbone, and a wound on his forehead that required 17 stitches to close, injuries that were expected to prevent his return to work for at least 30 days.

David A. Faulkner headed MSHA's investigation of the accident, which was conducted the following day.[3] In informal interviews, the driver indicated that the brakes on the truck were not functioning properly, and that he had advised the mechanic of the problem but had not noted it on his pre-operational examination report. After the truck was recovered, Faulkner examined it and noted the presence of rust and other material accumulated on the right front brake disc and caliper. The left front disc and caliper showed normal wear, and Faulkner concluded that the right front brake was not operational. The condition of the brake components are depicted in photographs. Ex. G-3F, G-3G.

Faulkner interviewed Billy Conway Speaks, the mine superintendent, who readily admitted that he had conducted workplace examinations of the roadway and work site and was

[3] Faulkner has 17 years of mining experience, including experience as a truck driver and mechanic. He joined MSHA in 2006.

well aware that the road was too steep for truck travel. Tr. 13, 20. The road was used as a matter of necessity, because it was the only means of accessing the new work site. Faulkner was aware of regulatory guidelines that provided for a maximum road slope of 10%, with 15% permitted for short distances. He was also aware of information provided by the truck manufacturer that the recommended maximum grade for operation of the truck was 17%.[4] Tr. 36. The 39% grade, which dictated that the trucks be pushed uphill by a tracked piece of equipment, was clearly a hazardous condition, as Speaks conceded. Tr. 13, 20.

On April 27, 2011, at the conclusion of the investigation, Faulkner issued the two citations at issue, citing the failure to report and correct the truck's defective brakes, and the failure to report and correct the hazardous condition of the roadway. Ikerd timely contested the civil penalties assessed for the violations.

Citation No. 8353675

Citation No. 8353675 was issued pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 77.1606(c) which requires that mobile haulage equipment be inspected before being placed in operation and that equipment defects affecting safety be reported and corrected before the equipment is used. The violation was described in the "Condition and Practice" section of the citation as follows:[5]

> As the result of an accident investigation the following defect affecting safety has been recognized to exist on the Caterpillar 773F haul truck, S/N EED00786, without being corrected before the truck was placed into operation on 02-15-2011: (1) The right side front steering axle brake assembly is operating improperly. Photos taken after the accident reveal the brake caliper to be covered with materials indicating that the brake capacity is restricted or limited. Without properly operating brakes the operator will lose control resulting in a serious accident.

Ex. G-1.

Faulkner determined that the violation had resulted in a lost work days or restricted duty injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $52,500.00 was specially assessed for the violation.

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[4] It is unclear whether the guidelines and recommendations were intended for empty or fully loaded trucks.

[5] Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

The Violation

The haul truck was inspected by the driver prior to being placed into service. He told Faulkner that he identified a problem with the front brakes and that the mechanic knew about the problem. However, it was not recorded on the pre-operational check list, and was not reported, by either the driver or the mechanic, to the mine operator. Tr. 33. Speaks was unaware of the problem with the truck's brakes. Tr. 14. He questioned whether the driver had "calibrated" the brakes properly, by use of a valve in the cab of the truck. Tr. 14,16. The precise nature of the "calibration" process was not explained. Faulkner concluded that the right front brake was not operational, based upon his observation that the brake disk on the right side showed no signs of wear. Tr. 33-34, 38.

Faulkner's conclusion that the truck's right front brake was not operational appears reasonable, and is confirmed by the photographs, and the verbal report of the driver. As such, it was a defect affecting safety that should have been corrected before the equipment was used.

Ikerd argues that it "did not violate 30 C.F.R. 77.1606(c) because the [brake] defect was not known and could not have been known by Ikerd." Resp. Br. at 1. While, as noted *infra*, Ikerd is not charged with knowledge of the defect, that is no defense to liability. It is well-settled that the Mine Act imposes liability for a violation of a standard against an operator without regard to fault. *E.g. Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011) (citing *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C.Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)).

I find that the standard was violated.

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[6] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. 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*, 6 FMSHRC 1, the Commission further explained:

[6] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

> 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation 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).

> . . . .
> . . . .

> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). 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, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of 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); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

A violation of a safety standard has been established. It contributed to a hazard, that a miner's ability to maintain control of the truck would be impaired. The occurrence of an event resulting in injury was reasonably likely, if not highly likely, and, in fact, occurred. Any injury resulting from loss of control of the truck would be reasonably serious, if not fatal, as were the injuries sustained by the truck operator. I find that the violation was S&S.

Negligence

Faulkner concluded that Ikerd's negligence was moderate, primarily because the problem with the brakes had not been reported to Speaks, who was unaware of it. Speaks had been told by the mechanic that the truck "was ready to go," after the hydraulic pump had been replaced. Tr. 22. The truck's rear brakes apparently functioned, and the front brakes were partially operable. Faulkner conducted interviews of the involved individuals and concluded that neither Speaks, nor any other member of the mine's management, was aware of the brake problem. I find that Ikerd's negligence with respect to the violation was low to moderate.

Citation No. 8353676

Citation No. 8353676 was issued pursuant to section 104(d)(1) of the Act. It alleges a violation of 30 C.F.R. § 77.1713, which requires that at least once during each working shift, each active working area and each active surface installation shall be examined by a certified person and any hazardous conditions found must be reported to the operator and corrected. Records of such examinations must be signed by mine managers, and must include the nature and location of any hazardous conditions found, and the action taken to abate the conditions. The violation was described in the "Condition and Practice" section of the citation, as amended, as follows:

> As the result of an accident investigation involving a Caterpillar 773F haul truck that occurred on 02-15-2011, it is determined that the operator failed to record a daily examination that correctly identified hazards as observed for the active work areas, roadways and active travelways of this mine. The investigation revealed roadway grades measuring up to 39% were allowed to exist adjacent to and prior to the location of the accident without being recorded or corrected. During informal interviews conducted on site on 02-16-2011, the mine Superintendent stated that he knew the roadway was too steep but had no other access to the work area for the haul truck. The haul trucks have traveled the roadway approximately seven shifts with no record of the hazardous condition. The mine Superintendent engaged in aggravated conduct by acknowledging a safety hazard and failing to take corrective action. At least once during each working shift, or more often if necessary for safety, each active working area 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. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-2.

Faulkner determined that the violation had resulted in a lost work days or restricted duty injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was high, and rose to the level of unwarrantable failure. A civil penalty in the amount of $52,500.00 was specially assessed for the violation.

The Violation

Through post-accident interviews, Faulkner determined that Speaks had conducted workplace examinations, and was well aware of the hazardous condition of the roadway.[7] He had not recorded the condition on reports of the examinations, and the condition had not been corrected before rubber-tired haul trucks were allowed to operate on the road. The standard was violated.

S&S

The violation contributed to a discrete safety hazard, that a driver would lose control of a truck while traversing the steep portions of the road, resulting in an accident. Truck drivers used the road twice each day for at least one week, and the hazard was reasonably likely to, and in fact did, result in a serious injury. The violation was S&S.

Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp*., 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). It is conduct that is "not justifiable" or "inexcusable." *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990), *citing Emery Mining*, 9 FMSHRC at 2001.

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that 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 that greater efforts were necessary for

[7] Ikerd argues that it did not violate the standard because it "did not fail to inspect the area on a daily basis." Resp. Br. at 1. The argument overlooks the fact that the citation was modified on April 27, 2011, by deleting an allegation that daily examinations had not been conducted. Ex. G-2.

compliance. *See Manalapan Mining Co.* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C.Cir. 1999). While some factors may be irrelevant to a particular factual scenario, *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *Manalapan ,*35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

There is little question that the violation was the result of Ikerd's unwarrantable failure. Through its mine superintendent, Ikerd had full knowledge of the existence of the obvious condition and the hazard it contributed to. It had existed for seven or eight shifts, and posed a high degree of danger to miners operating trucks on the roadway and any other person who might be struck by an out-of-control truck. While the operator was apparently not put on notice that greater compliance efforts were necessary, and may have been making improvements to the road, those factors are easily outweighed by those that strongly point to a conclusion that the violation was the result of Ikerd's unwarrantable failure.

The Appropriate Civil Penalties

As the Commission 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:
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> > 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).
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> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no

> presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Findings on Penalty Criteria

Good Faith - Operator Size

The violation was promptly abated by prohibiting travel by rubber-tired equipment on the road. The parties stipulated that the mine produced 75,513 tons of coal in 2011, which placed it in the medium-sized category.

History of Violations

Ikerd's history of violations is reflected in a report generated from MSHA's database, typically referred to as an "R-17." Ex, G-4. That report shows that Ikerd had 32 violations with a final order date between January 27, 2010 thru April 26, 2011. However, the overall violation history is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC 616, 623-24 (May 2000). Qualitative violations' history information can be found on assessment forms filed with the petition, which reflect that Ikerd had 34 violations that became final, and 23 inspection days, in the pertinent time period. The Secretary's Part 100 regulations for regular penalty assessments assign penalty points for total of violation history, ranging from 0 points for 0 to 0.3 violations per inspection day to 25 points for in excess of 2.1 violations per day. Under the regulations, Ikerd's history of violations was moderate, and I so find.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

Ability to Continue in Business

The parties stipulated that the mine is temporarily idle. Stip. 5. Speaks testified that, to his knowledge, the mine has not been in operation for more than 2 years. He also indicated that Ikerd held several other mining permits, none in operation, and that he had heard that it was attempting "to get a contract mine going." Tr. 18. Speaks knew of no substantial assets held by Ikerd that would allow it to pay the assessed penalties, that it was subject to a "reclamation obligation" of approximately $500,000.00, and that it had no means to cover that obligation by mining "in this market." Tr. 17-18. To his knowledge, Ikerd had no substantial resources, and was subject to outstanding judgments in the "millions" of dollars. Tr. 18-19. The record was left open to allow the submission of information as to Ikerd's financial condition. Ikerd submitted, post-hearing, a copy of a "U.S. Return of Partnership Income," IRS Form 1065, for the year 2011. That document has been made a part of the record, and designated exhibit R-1. The un-executed form, purportedly prepared by a CPA firm, reflects that Ikerd Mining, LLC, had a net ordinary business loss of $4,381,951.00 for the pertinent period.

Aside from the fact that Speaks worked for Ikerd "off and on for 42 years," his competency to testify regarding Ikerd's financial condition is not apparent from the record. While it is not inconsistent with the information reflected on the tax return, it provides, at best, a shaky foundation for Ikerd's claim that the imposition of the assessed penalties would adversely affect its ability to continue in business. Moreover the tax return presents an incomplete picture of Ikerd's financial condition. One of the significant items comprising the business loss is a sum of $4,738,329.00, on line 20 of the form, labeled "other deductions." The form instructs that a statement explaining the amounts claimed is to be attached, and the return bears a notation "see statement." No statement was attached to the copy of the return submitted by Ikerd. Schedule L on page 5 of the return shows "Total liabilities and capital" of $15,767,878 at the beginning of the year and $5,029,529 at the end of the year.

In the absence of proof that the imposition of penalties would adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse effect would occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). The operator must, therefore, introduce specific evidence to show that the proposed penalties would adversely affect its ability to continue in business. *Broken Hill Mining Co.*, 19 FMSHRC 673, 677-78 (Apr. 1997). While this potentially mitigating factor may not be available to an operator that has gone out of business,[8] the "ability to continue in business"

[8] Reduction of penalties in such circumstances could create an economic incentive to avoid a penalty by going out of business and perhaps, re-entering the mining business under a different business entity. *Unique Electric*, 20 FMSHRC 1119, 1123 (Oct. 1998); *Ember*

criterion is relevant to an operator that has ceased operations, but has not dissolved its business entity. In such cases, the issue to be considered is whether the penalties will adversely affect its ability to resume operations. *Spurlock* 16 FMSHRC at 700; *Georges Colliers, Inc.*, 23 FMSHRC 822, 826 n5 (Aug. 2001) (citing *Spurlock*).

The information presented as to Ikerd's financial condition is sketchy. Ikerd is no longer conducting mining operations, and the mine's status is listed as "temporarily idle" on MSHA's web site. It apparently intends to resume operations when and if economic conditions justify doing so, and Speaks believed that Ikerd may have been attempting to commence a contract mining operation as of the time of the hearing. Because of the cyclical nature of the mining business, tax returns showing operating losses for specific periods have been found insufficient to establish that proposed penalties would adversely affect an operator's ability to continue in business. *Sierra Rock Products, Inc.*, 35 FMSHRC 49 (Jan. 2013) (ALJ). Detailed evidence of an operator's precarious financial condition has also been rejected where the proposed penalties were a small fraction of its other debts, and there was no showing that the penalties, as opposed to other financial considerations, would threaten the operator's ability to continue in business. *Thueson Construction Co.*, 34 FMSHRC 2241, 2258-60 (Aug. 2012) (ALJ). In *Spurlock*, the Commission declined to reduce penalties based on the operators' "mere speculation" that the penalties would result in the imposition of judicial liens that would foreclose its ability to obtain financing. 16 FMSHRC at 700.

Accepting Speaks' "understanding" that Ikerd has substantial outstanding obligations, the information submitted falls far short of establishing that the proposed penalties of $105,000.00 would adversely affect its ability to continue in business. No officer or official of Ikerd's testified as to its condition or its ability, or lack thereof, to re-enter the mining business. The status of Ikerd's assets, e.g., whether it owns equipment that could be employed in re-entering the mining business, is unknown. More importantly, Ikerd has proffered no explanation as to how imposition of the proposed penalties, which are considerably smaller than outstanding obligations mentioned by Speaks, would actually affect its ability to re-enter or to continue in business. I decline to reduce the proposed penalties based upon this factor.

The Secretary's Penalty Assessment Process – Special Assessments vs. Regular Assessments

The Secretary specially assessed penalties for both violations at issue. The total of the penalties assessed, $105,000.00, is substantially higher than the approximately $14,700.00 in penalties that would have been assessed pursuant to the Secretary's regular assessment formula. I discussed considerations involved in determining appropriate penalties at some length in a recent decision. *American Coal Company*, 35 FMSHRC 1774, 1819-24 (June 2013). That discussion will not be repeated here. However, the methodology set forth in *American Coal* for determining the amount of the penalty to be imposed for a violation will be followed here, and in future cases.

Contracting Corp. 33 FMSHRC 2742, 2751-59 (Nov. 2011) (ALJ).

Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties, as Commission judges are obligated to do, is to avoid the appearance of arbitrariness.[9] Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $1.00 to $70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of that regular assessment formula provides a useful reference point that would promote consistency in the imposition of penalties by Commission judges.[10]

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. Other unique circumstances may dictate lower or higher penalties. Violations involving "extreme gravity" and/or "gross negligence," or, as previously stated in section 105(a) of the Secretary's penalty regulations, "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate substantially higher penalty assessments.[11] A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, e.g., a higher penalty resulting from the special assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

Citation No. 8353675

Citation No. 8353675 is affirmed as an S&S violation. A specially assessed civil penalty in the amount of $52,500.00 was proposed for this violation. While the gravity of the violation was serious, the operator's negligence was low to moderate. Neither the gravity nor the operator's negligence justify a significant departure from the product of the regular assessment formula, which would have resulted in a penalty of approximately $3,406.00. That formula

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[9] *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd,* 736 F.2d 1147 (7th Cir. 1984).

[10] See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

[11] The subject language, which was included in a list of factors that might justify a special assessment, was deleted in 2007. *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13592 - 13,621 (March 22, 2007).

assigns additional penalty points based on the fact that an injury actually occurred. However, here the injury was relatively minor considering that a fatality could easily have resulted. Considering the factors itemized in section 110(i), I impose a penalty of $6,000.00 for this violation.

Citation No. 8353676

Citation No. 8353676 has been affirmed as an S&S violation and an unwarrantable failure to comply with the safety standard. A specially assessed civil penalty in the amount of $52,500.00 was proposed for this violation. A penalty calculated under the Secretary's regular assessment formula would have resulted in a penalty of approximately $11,307.00. The serious gravity of the violation, coupled with Ikerd's high negligence, justifies an enhanced penalty.[12] Considering the factors itemized in section 110(i), I impose a penalty of $40,000.00 for this violation.

ORDER

Based on the foregoing, it is:

ORDERED: That Citation Nos. 8353675 and 8353676 are **AFFIRMED,** and it is;

FURTHER ORDERED: That Ikerd Mining Co., LLC, pay civil penalties in the amount of $46,000.00 within 45 days of this order.[13]

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Dan Thompson, Esq., P.O. Box 857, Somerset, KY 47502

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[12] While the violation was attributable to Ikerd's unwarrantable failure, its negligence was mitigated somewhat by the fact that the trucks used the road only twice per day, while unloaded. A driver could maintain control of a truck by using extreme caution, descending in first gear and using brakes as needed. The driver that was injured attempted to descend in second gear, and had not reported a problem with the brakes.

[13] 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.