FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 3, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-351
Petitioner,	:	A.C. No. 05-04591-274457
	:	
v.	:	Docket No. WEST 2012-827
	:	A.C. No. 05-04591-285698-01
	:	
BOWIE RESOURCES, LLC,	:	
Respondent	:	Bowie No. 2 Mine

DECISION

Appearances: Jeffrey M. Leake, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Bowie Resources, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Glenwood Springs, Colorado. The Secretary presented closing arguments and Bowie filed a brief on Citation No. 8141233.

Bowie operates the Bowie No. 2 Mine in Delta County, Colorado. One section 104(a) citation and one section 104(d)(2) order were adjudicated at the hearing and Bowie also agreed to pay the Secretary's proposed penalty of $100.00 for Citation No. 8473704 in WEST 2012-351. The Secretary proposed a total penalty of $53,912.00 for the citation and order that were adjudicated.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8141233; WEST 2012-351

On October 13, 2011, MSHA Inspector Jack William Eberling issued Citation No. 8141233 under Section 104(a) of the Mine Act, alleging a violation of Section 75.403 of the Secretary's safety standards. The citation states that dark, dry coal dust and fines were upon the mine floor of a haul road within two entries of the faces being mined. Mobile equipment using electric 480V trailing cables traveled upon this haul road and the cables were dragged over the mine floor. A rib/floor rock dust sample was taken. The condition existed for about 2.5 hours

from the beginning of the shift. Belt air measuring 18,900 cfm ventilated the area and the air flowed into the section where seven miners were working. (Ex. G-7).

Inspector Eberling determined that an injury or illness was reasonably likely to occur and that such an injury or illness could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial ("S&S"), the operator's negligence was moderate, and that seven persons would be affected. Section 75.403 of the Secretary's safety standards requires that where rock dust is required to be applied the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. 30 C.F.R. § 75.403. The Secretary proposed a penalty of $1,412.00 for this citation.

I find that the Secretary established a violation of section 75.403 because the ventilation plan does not expressly exempt Bowie from the safety standard's requirement to adequately rock dust the area in question. Section 75.403 requires a certain level of noncombustible content in all dust where rock dust is required to be applied and section 75.402 details where that requirement is in effect. In essence, rock dusting under section 75.403 is required unless one of five exceptions applies:

1. The dust in the area is too wet to propagate an explosion,
2. The dust in the area is too high in incombustible content to propagate an explosion,
3. The area is within 40 feet of a working face,
4. The area is inaccessible or unsafe to enter,
5. The Secretary or his authorized representative has permitted an exception.

30 C.F.R. § 75.402. I find that none of these exceptions apply here.

First, Inspector Eberling tested the dust for wetness and determined that the dust was not too wet to obviate the necessity to rock dust. (Tr. 250-52). The area in question was at a slightly higher elevation than its surroundings, so it did not retain water for long. Kenneth Smith, a safety technician for Bowie, testified that there was no visible dust in the air and the mine floor was moist, compact, and wet. (Tr. 304). I credit the testimony of the inspector that the floor was not too wet to eliminate the need for rock dusting.

Second, the inspector observed that the floor was dark, which indicated that the concentration of non-combustible material was not at the requisite 80% as per the safety standard. (Tr. 245-46). The inspector took a sample of the material and subsequent laboratory testing later determined that the sample consisted of 44.3% non-combustible material. (Tr. 247-49; Ex. G-10). Bowie did not argue that the sample itself was faulty, but did argue that dust sampling must be taken from representative areas of the mine floor, rather than from areas where discrete coal accumulations exist. (Resp. Br. 13, citing *Consolidation Coal Co.*, 22 FMSHRC 455, 465-66 (Mar. 2000) and *McElroy Coal Co.*, 15 FMSHRC 17, 21 (Jan. 1993)). Bowie argues that because coal haulage roadways are places where coal spillage naturally occurs, samples must be taken from areas of the mine floor without spillage. (Resp. Br. 13). However, Bowie introduced no evidence to suggest that the sample taken by Inspector Eberling was not a representative sample of the dust upon the floor. I find that the sampling comported with the requirements of the safety standard.

Third, there is no argument or evidence that the area was within 40 feet of a working face. Fourth, there is no evidence that the area was inaccessible or unsafe to enter.

Bowie's principle argument relates to the fifth exception. Bowie's position is that language in its ventilation plan permitted an exception to the requirements of the safety standard. Specifically, it refers to page 12 of the mine's ventilation plan where it provides that "[r]oadways used in transportation of coal in the working section shall be kept wet and/or compacted." (Ex. R-3). Bowie maintains that this provision was designed to control respirable dust and the potential for ignitions; as long as the floor of a roadway is wet or compacted, Bowie complies with the requirements in section 75.403 under the ventilation plan. I disagree, as discussed below.

Bowie argues that the ventilation plan provision is in place to both control the amount of respirable dust in the air and to prevent ignitions. (Resp. Br. 3). I agree that keeping the floor wet and/or compacted may reduce the potential for ignition, but complying with the ventilation plan provision does not excuse Bowie from rock dusting. Nothing in the ventilation plan discusses the rock dusting requirement or any exception thereto. Nothing in the ventilation plan suggests that the subject provision was meant to supersede the requirements of sections 75.402 and 403.

Lastly, Bowie unsuccessfully contends that rock dusting the cited area will cause slick conditions if the rock dust is wet and will create respirable dust and visibility issues if the rock dust is dry. (Resp. Br. 11-12; Tr. 304-06, 322, 329). Smith testified that dusting the floor would create problems such as respirable dust in the air and slick and slimy conditions. (Tr. 305-06). Kyle Ledger, a face foreman for Bowie, agreed that the road should not be dusted, as dry dust could create a visual hazard and wet dust would make the floor hazardous for travel. (Tr. 322, 329). I must look to the language of the approved ventilation plan in place at the time of issuance, which does not exempt Bowie from the rock dusting requirement. Bowie can seek to change the language in the plan to address these problems.

Inspector Eberling designated the citation as S&S.[1] He determined that injury or illness was reasonably likely to occur because the material on the ground was dry coal fines. (Tr. 250-52). In addition, the direction of airflow would carry any fire in the cited area toward the face

[1] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

where miners worked. (Tr. 254). The equipment in use in the area requires a 480-volt trailing cable, which due to the rough terrain found in underground mines is typically subject to mechanical damage and resulting failures and faults of the cable. (Tr. 255-59). Such a failure or fault would create a temperature well above the ignition point of coal. (Tr. 259). If a damaged trailing cable ignited the coal fines, the inspector determined that lost workdays or restricted duty could reasonably be expected to result from a fire. (Tr. 267-68). Such injuries could result from smoke, which could cause lung or brain injuries. (Tr. 268-70).

I find that the condition described in Citation No. 8141233 was not reasonably likely to contribute to an injury. Inspector Eberling testified that the failure of a shuttle car cable *could* be an ignition source. (Tr. 256-57). The fact that a violative condition could result in an injury is not sufficient for an S&S finding. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1677-78 (Dec. 2010) (citing *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)). The only possible ignition source was a damaged trailing cable of a shuttle car. There was no evidence that any of the cables were damaged or would likely become damaged to the extent necessary to start a fire before such cable was replaced or repaired. There was no indication that a cable was hot and there was no evidence of methane in the atmosphere. The Secretary did not fulfill his burden to show that the citation was S&S. The gravity of the violation was only moderately serious.

I also find that Bowie's negligence was low. Although Bowie's interpretation of the mine's ventilation plan was incorrect, the interpretation was made in good faith. Bowie genuinely believed that it was not required to meet the combustibility standard for roadways used in the transportation of coal so long as the road dust was compacted or wet. No roadway at this mine was ever cited for a violation of the combustibility. I find that Bowie did not take this position solely as a litigation strategy.

Based upon the above, the citation is **MODIFIED** to non-S&S and to low negligence. A penalty of $1,000.00 is appropriate for this violation.

B. Order No. 8141442; WEST 2012-827

On August 18, 2011, MSHA Inspector Brad Allen issued Order No. 8141442 under Section 104(d)(2) of the Mine Act, alleging a violation of Section 75.400 of the Secretary's safety standards. (Ex. G-2). The order states that the inspector found combustible material in several places upon a large front-end loader, called a "hauler" by the parties, and that these accumulations created a fire hazard. Specifically, loose coal, coal fines, bug dust,[2] and other combustible materials including oil mixed with loose coal/dust were permitted to accumulate upon a hauler that was in use in an active mining section.

The order lists four locations where the inspector discovered combustible material. First, the inspector found accumulations up to 1 and 1 ½ inches deep that were saturated with oil in the belly pan under the engine that was about 4 feet wide by 7 feet long. Engine oil was pooled upon the coal mix in the belly pan. There was also an empty 32 ounce plastic drinking bottle on the operator's side of the engine compartment. Second, the inspector found similar

[2] "Bug dust" refers to coal-based material that is slightly larger than coal fines.

accumulations in the belly pan of the transmission compartment. Third, the inspector found a thin coating of float coal dust and oil upon the bottom side of the engine compartment covers and upon the engine valve cover. Finally, he found a hydraulic oil and coal dust mixture in the cab of the hauler in the compartment for the joy stick and park brake actuation valve.

In the order, the inspector stated that these accumulations "provided substantial fuel to propagate a mine fire or explosion should one occur and such propagation would be reasonably likely to result in death or serious injury." (Ex. G-2). He further stated that the hauler was used during the shift and the engine was "hot to touch." *Id.*

Inspector Allen determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, that the operator's negligence was high, that seven persons would be affected, and that the violation constituted an unwarrantable failure to comply with a mandatory safety standard. Section 75.400 of the Secretary's regulations requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400. The Secretary proposed a penalty of $52,500.00 for this order under his special assessment regulation. 30 C.F.R. § 100.5.

1. <u>Violation of Section 75.400</u>

I find that the evidence establishes that Bowie violated section 75.400. I credit the testimony of the inspector that engine oil and coal fines were in the belly pan, some hydraulic fluid or other material was in the operator's compartment, and combustible material was upon the bottom of the engine compartment cover. Bowie argues that all of these accumulations existed because the operator drove the hauler through a deep mud hole about 20 minutes before MSHA inspected it. It contends that muck from the mine floor splashed onto the hauler and washed into the belly pan. This muck contained the wet material, including coal, coal dust, and bug dust, that Inspector Allen observed. Upon reviewing the evidence, I agree that much of the material upon the hauler came from the mud hole, but I find that some of the material had been present before the start of the shift. The Secretary established a violation.

I reach this conclusion based upon my review of the evidence presented by the parties at the hearing.[3] Nate Gaston, a downshift employee of Bowie, testified that he was the operator of

[3] The evidence presented by Bowie with respect to this order differed significantly from the evidence presented by the Secretary. As a consequence, I was required to make a number of credibility determinations when analyzing the evidence with respect to this order. Credibility determinations involve not only weighing the trustworthiness of a witness, but also determining whether a particular witness has the knowledge necessary to give weight to his testimony. The witness may be competent to testify about the conditions at a mine, but he may not have a complete understanding of factors such as the sequence of events that transpired, the hazard presented by a cited condition, and the length of time that the condition existed. Thus, a witness's experience in the mining industry, his experience evaluating mine safety issues, and his knowledge of the mine at issue can be crucial to evaluate credibility.

the hauler the day of the inspection and performed the preoperational check upon the cited equipment. (Tr. 120). The hauler is a large, powerful, front-end loader that is principally used during longwall moves to transport the longwall shields and other equipment. Following his examination, Gaston determined that the hauler was safe to operate and he washed it before traveling to the area where he intended to operate it. He wrote the following upon the preoperational checklist in the comments section: "Washed and serviced, oil under motor, washed out, checking to see where it's coming from." (Tr. 118-20; Ex. R-7). Gaston testified that after he washed the engine compartment including the belly pan, the hauler was clean. (Tr. 121, 123). During this time he could not find the source of the oil. Using the dipstick, Gaston measured the oil level twice over a period of time to see if the engine was losing oil, but the oil level remained the same. (Tr. 121-22). He intended to watch the oil level as the shift progressed and he contacted a mechanic to try to find the source of the oil during the shift. (Tr. 134-35). Gaston said that there was only a little oil in the belly pan and it did not create a hazard. (Tr. 121, 136-37).

Gaston further testified that after he washed the hauler, he traveled through a muddy, dirty water hole that was about 2 feet deep. (Tr. 117, 123). He went through this water hole to get a tub to move power cables and again when he returned to the work area. After Gaston operated the hauler for about 20 minutes, Inspector Allen inspected it. Gaston believes that the material the inspector saw in the belly pan and elsewhere upon the hauler was muck from the mud hole. (Tr. 125, 137).

Keith Trujillo, Gaston's supervisor, testified that the water hole was in entry No. 2 at crosscut No. 32 and it was a constant problem because it was a low spot where water and muck accumulated. (Tr. 146, 159). Bowie installed a pump to try to control it. He described it as soupy and dirty. (Tr, 147). Trujillo also testified that the hauler is typically washed at the start of every shift because it gets dirty; spraying the engine compartment with a hose flushes out any accumulations through holes at the bottom of the belly pan. (Tr. 148, 152, 161). He testified that Bowie requires equipment operators to wash equipment because accumulations can create a fire hazard. (Tr. 153-54). He stated that the presence of oil in the belly pan does not necessarily mean that engine oil is leaking because a miner can easily spill oil while servicing the hauler. (Tr. 157). After Bowie moved the cited hauler to the surface, it was determined that a seal was leaking a small amount of oil. (Tr. 164).

Ray Turner, a safety technician for Bowie, believed that the material upon the machine came from the water holes. (Tr. 186-87). He said that these water holes had coal fines and chunks of coal suspended in the water. (Tr. 186-87, 204). The hauler needed to return to the surface to see if any engine oil or hydraulic leaks could be found. Turner did not believe that the conditions found by Inspector Allen created a fire hazard because the hauler was permissible and did not provide an ignition source. (Tr. 195-96).

I credit Gaston's testimony that he washed the hauler, but I find that some combustible material remained. The plastic water bottle had not been removed and it was unlikely that muck had splashed as high as the bottom of the engine compartment covers, for example. I find that the Secretary established a violation by a preponderance of the evidence. *See, e.g.*, *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Dec. 2010) ("[t]he burden of showing

something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal citations and quotations omitted).

2. <u>Significant and Substantial and Gravity</u>

I find that the Secretary did not establish that the violation was S&S. The Secretary established the fact of violation and that accumulations create a discrete safety hazard. Both parties agree that accumulations on equipment in underground coal mines can create a serious hazard. The Secretary did not, however, establish that the conditions were reasonably likely to contribute to a fire or other injury causing event. I reach this conclusion for a number of reasons. First, Bowie's employees were aware of the presence of some oil in the belly pan. Nate Gaston saw the oil as he cleaned the belly pan with a hose, noted it in his preoperational check list, washed it out with a hose, and tried to find the source of the oil. The parties dispute the amount of oil that was present. I find that the oil leak was small and there was less oil present than the inspector believed; the amount was closer to that asserted by Gaston and Bowie's other witnesses. Second, Gaston removed out most of the coal-related accumulations before he operated the hauler; most of the material cited by the inspector was deposited upon the hauler when Gaston drove through mud holes about 20 minutes earlier. Finally, no likely ignition source existed because, as a permissible piece of equipment, the hauler would not become hot enough to ignite the wet accumulations. As summarized below, I find that Bowie's witnesses were in a better position to have this information than the inspector because these witnesses observed, disassembled, and repaired the hauler after the order was issued, as discussed below.

Joshua Bailey, a maintenance worker, was called to see if he could find an oil leak after Inspector Allen issued the order. He testified that the hauler appeared to be in good condition and that he did not find any leaks. (Tr. 172-73). He was surprised that the hauler was cited by MSHA because he saw Gaston washing the hauler, including the engine compartment, at the beginning of the shift. (Tr. 171). He did not find any hydraulic fluid leaking. (Tr. 174). He also noted that the mine floor in the area had many holes and water puddles. (Tr. 173). Bailey believed that the accumulation in the operator's cab resulted from driving the hauler through muddy, water-filled holes and that the material in the belly pan also came from the mud holes. (Tr. 174-75).

Jake Wadley, a shop mechanic, performed weekly permissibility checks upon underground equipment. He testified that the cited hauler was washed frequently because it was used in dirty areas of the mine. (Tr. 212). As a consequence, when mechanics in the shop performed weekly permissibility checks, they frequently noted that the hauler required washing due to accumulations. (Tr. 211-12; Ex. R-6). He looked at the subject hauler after Inspector Allen issued the order to look for oil leaks. (Tr. 214). During his examination, he noted that the hauler was very wet and muddy. *Id.* He removed the belly pan and found rocks, coal, and mud within the belly pan. (Tr. 215). He then used a mirror to look under the hauler to try to find an oil leak. Wadley determined that any leak probably originated at the front main seal. *Id.* The condition was not obvious and could not be detected without using a mirror. (Tr. 216). He asked that the hauler be moved to the surface shop. Once it was in the surface shop, he determined that there was an "occasional drip" of oil from the seal and from the super charger

mounted upon the left side of the motor. (Tr. 218). Because the hauler was certified as a permissible piece of equipment, the operating temperature was around 185 to 200 degrees and it could not exceed about 400 degrees Fahrenheit. (Tr. 219-20). The hauler was equipped with an automatic fire suppression system which would shut it down if the temperature exceeded 210 degrees. (Tr. 221).

I credit the testimony of Bowie's witnesses as summarized above. Gaston washed the hauler before he operated it, he monitored the oil level, and he called a mechanic to come to examine it. Most of the other material upon the hauler was muck that splashed upon it and into the belly pan when it traveled through the mud hole at crosscut 32. Holes in the bottom of the belly pan would allow the "soupy" mixture to get inside. The material in the belly pan was wet. I find that operating the hauler in that condition did not create a serious hazard as long as the equipment operator took steps to discover the source of the oil in the belly pan.

Inspector Allen erroneously believed that the hauler was not maintained as a permissible piece of equipment and that the engine and super charger could get extremely hot. (Tr. 23-24). Bowie established that his assumptions were not correct. Bowie maintained the hauler in permissible condition and the engine's operating temperature was about 200 degrees Fahrenheit. It is unlikely that the engine or the super charger attached to the engine would have gotten hot enough to ignite the oil or the coal accumulations. No other ignition sources were identified by the inspector. Assuming continued mining operations, a mechanic would have arrived, detected the leak, and washed and repaired the hauler or taken it out of service. The hauler automatic fire suppression system of the hauler also reduced the likelihood of an injury as a result of a fire.

I considered Inspector Allen's testimony in reaching this conclusion. He determined that the risk of injury resulting from the violation was reasonably likely because the equipment was in use, there were substantial accumulations, the engine was hot to touch, and the mine was gassy. (Tr. 34-35). Additionally, the equipment had a super charger, which is a source of extreme heat. (Tr. 37). The inspector also determined that fatal injuries could reasonably be expected to result from an ignition of the combustible materials. (Tr. 38-40, 43). I find that, although a fire was possible, it was not likely considering continued mining operations. The violation was moderately serious.

3. Negligence and Unwarrantable Failure

I find that the Secretary did not establish that the violation was the result of Bowie's high negligence or its unwarrantable failure to comply with the safety standard. Whether conduct is the result of an operator's unwarrantable failure is determined by considering all the facts and circumstances of a case. Some factors may be irrelevant in a particular case. *Consolidation Coal Co.*, 22 FMSHRC at 353. All the relevant facts and circumstances must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal Co*, 31 FMSHRC 1346, 1351 (Dec. 2009).[4]

[4] Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir.

The Secretary argues, based upon the testimony of Inspector Allen, that Bowie's high negligence and unwarrantable failure caused the violation. Inspector Allen testified that the condition of the machine was obvious, open, and extensive; the hauler operator showed the preoperational checklist to a supervisor. (Tr. 43). Therefore, a supervisor was aware that a machine with an oil leak was operating in that section. *Id*. In addition, Inspector Allen testified that the mine was cited 39 times for violations of section 75.400 in the two-year period leading up to the issuance of this order and that, about a month before, he gave notice to Bowie that it needed to take greater efforts to comply with the safety standard. (Tr. 44-45). For the reasons set forth below, I find that the evidence does not support an unwarrantable failure finding.

As to the extent of the violative condition, although there were accumulations in several places upon the vehicle, most of the accumulations found in the belly came from the mud holes below, rather than from a deficiency in the hauler itself or the failure of Gaston to clean it at the start of the shift. Much of the other material, including material in the transmission compartment, likely came from the large mud hole. Upon investigation, it is clear that the motor oil accumulations came from leaks in the vehicle, but I find that these accumulations were not as extensive as the inspector believed.

The length of time that the violative condition existed is unclear; the Secretary did not present evidence upon this issue. Accumulations existed at the beginning of Gaston's shift, but he used a hose to clean them. Most of the accumulations upon the hauler at the time of the inspection had been present for 20 to 30 minutes.

As to the obviousness of the condition, the accumulations were obvious to Gaston when he was told to operate the hauler. I credit the testimony of Gaston that he used a hose to clean the hauler for a considerable amount of time. (Tr. 119). The hauler contained muddy material and accumulations at the time of Inspector Allen's inspection and, although they were obvious, the source of the accumulations was disputed at the hearing. As stated above, I find that most of the accumulations were wet muck from the bottom. It was only after Bowie removed the belly pan that it discovered the oil leak. The Secretary did not establish that the leak should have been obvious to the operator during the preoperational check.

The inspector testified that he put the operator on notice that greater efforts were necessary for compliance with section 75.400 approximately one month before the instant inspection and that the operator was cited under the safety standard about 39 times during the

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1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

previous two years. The fact that 39 citations were issued to Bowie over the previous two years is not particularly significant. While the fact that Inspector Allen put Bowie on notice is significant, I find that Nate Gaston took his responsibility to remove accumulations from the hauler seriously. He washed the hauler, monitored the oil level, and contacted a mechanic to identify the problem. I find that Gaston's actions and the actions of other Bowie employees indicate that Bowie took its responsibilities under section 75.400 seriously.

I have considered Inspector Allen's testimony that Bowie's compliance with section 75.400 had fallen off since his previous inspection of the No. 2 Mine. I note that section 75.400 covers a wide variety of hazards and I conclude that Nate Gaston was taking affirmative steps to keep equipment clean and free of accumulations. I credit the testimony of Trujillo that Gaston diligently serviced his equipment. (Tr. 148). I also recognize, as does Bowie, that it is extremely important to keep equipment free of accumulations, including oil, to prevent the hazards associated with fire and smoke.

For the reasons set forth above, Order No. 8141442 is **MODIFIED** to a section 104(a) citation with moderate negligence. The S&S determination is removed. The gravity was serious. A penalty of $15,000.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Bowie's history of previous violations is set forth in Exhibit G-1. During the period between 8/18/2010 and 8/17/2011, Bowie had a history of 250 paid violations at the mine of which 55 were S&S violations. For the period 7/13/2010 through 10/12/2011 the numbers were 211 and 34. At all pertinent times, Bowie was a large operator. The violations were abated in good faith. There was no proof that the penalties assessed in this decision will have an adverse effect on Bowie's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 2012-351		
8141233	75.403	$1,000.00
8473704	75.1909(j)(2)	100.00
WEST 2012-827		
8141442	75.400	15,000.00
TOTAL PENALTY		$16,100.00

For the reasons set forth above, the citation and order are **MODIFIED** as set forth above. Bowie Resources, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of $16,100.00 within 40 days of the date of this decision.[5]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM

[5] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.