FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

January 9, 2014

BOART LONGYEAR COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2012-248-RM
	:	Order No. 8605604; 10/25/2011
v.	:	
	:	Docket No. WEST 2012-249-RM
	:	Citation No. 8605605; 10/25/2011
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2012-250-RM
ADMINISTRATION (MSHA),	:	Order No. 8605606; 10/25/2011
Respondent	:	
	:	Docket No. WEST 2012-251-RM
	:	Citation No. 8605607; 10/25/2011
	:	
	:	Mine: Durkee Cement Plant
	:	Mine ID: 35-02970 Y12
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-422-M
Petitioner	:	A.C. No. 35-02970-275832 Y12
	:	
v.	:	Docket No. WEST 2012-891-M
	:	A.C. No. 35-02970-287135 Y12
BOART LONGYEAR COMPANY,	:	
Respondent	:	Mine: Durkee Cement Plant

AMENDED DECISION[1]

Appearances: Bryan Kaufman, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary

[1] This decision, originally dated December 17, 2013, has been amended to correct clerical errors. In the discussion of Order No. 8605606, the quote referencing 30 C.F.R. § 56.11001 will change "[s]are means of access" to "[s]afe means of access." In the paragraph immediately preceding my Order, the civil penalty I assessed for Order No. 8605606 is changed from 1330.00 to $13,300.00, and the subsequent violation is changed from Citation No. 8650607 to Citation No. 8605607. In my Order, Citation No. 8605607 will be characterized as a 104(a) citation rather than as a 104(d) citation. Moreover, in my Order, the total civil penalty that Boart must pay is changed from $33,900.00 to $45,600.00, and the subsequent phrase "in satisfaction of the four remaining citations" is changed to "in satisfaction of the four remaining violations."

Dana Svendsen, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of Boart Longyear Company

Before: Judge David F. Barbour

These proceedings are before me based upon four notices of contest and two petitions for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"). 30 U.S.C. § 815(d).

These matters concern the disposition of three orders and two citations issued by the Secretary of Labor ("the Secretary") against Boart Longyear Company ("Boart"), for which the Secretary seeks a total civil penalty of $200,984.00.

Order No. 8605604, contested in Docket No. WEST 2012-248-RM, was issued pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), which requires miners to be withdrawn from areas where imminent dangers exist. Civil Penalty Docket No. WEST 2012-891-M involves two alleged violations of the Secretary's mandatory safety standards for surface metal and nonmetal mines, as found in 30 C.F.R. §§ 56 *et al*. Citation No. 8605605 (contested in WEST 2012-249-RM) alleges a violation of section 56.15005, which requires that safety belts and lines be worn where there is a danger of falling. Order No. 8605606 (contested in WEST 2012-250-RM) alleges a violation of section 56.11001, which requires safe means of access to working places. Civil Penalty Docket No. WEST 2012-422-M also involves two alleged violations. Citation No. 8605607 (contested in WEST 2012-251-RM) alleges that a truck backup alarm was inoperative, in violation of section 56. 14132(a). Order No. 8605608 alleges a violation of the Secretary's mandatory training and retraining standards for miners employed at surface mines, as found in 30 C.F.R. §§ 46 *et al.* Specifically, the order charges that a newly hired experienced miner had not been provided with the training required by section 46.6(a).

A hearing on these matters was held on July 30-31, 2013, in Salt Lake City, Utah. The parties filed post-hearing briefs on September 20, 2013.

Background

Boart Longyear Company is an independent contractor drilling company with both a Mining and Energy Section (M&E) and an Environment and Infrastructure Section (E&I). The E&I section is further divided into a Rotary Division and a Drilling Division. Generally, M&E supports mineral exploration, obtaining core samples to determine the viability of new mine sites, while E&I does environmental work such as locating the source of ground contamination or checking the integrity of underground water systems. Tr. 344-45. However, the E&I division also occasionally drills for samples on mine sites. Tr. 358. In October 2011 Boart was hired by Ash Grove Cement West, Inc. ("Ash Grove") to explore for areas with low mercury content at Ash Grove's Durkee Cement Plant, a limestone quarry and processing center, in order to address the Environmental Protection Agency's concerns regarding the cement plant's mercury emissions. Tr. 29, 31.

Though Boart does not now contest that the drilling operation at the cement plant was subject to MSHA regulations, Tr. 197-98, at the time, Boart believed the project was scientific,

and therefore not subject to MSHA regulations. Tr. 165, 232. The project supervisors and the drill team for the cement plant project were members of Boart's E&I Section. Robert Stadeli, zone manager for the E&I Rotary Division, was involved in the proposal stage, then Kristian Thordarson, zone manager for the Drilling Division, took over as the project manager. Tr. 178. Thordarson allegedly was on site for the first few days, and about once a week thereafter. Tr. 234-35. Doug Tucker of the Drilling Division was the on-site driller for the project; he has been a driller since 2000, and started with Boart's E&I Section in December 2010. Tr. 224. Prior to the Durkee Cement Plant project, Tucker had no experience on mine sites. Tr. 231. Allen Headman, also of the Drilling Division, was the driller's assistant for the project. Tr. 327. The parties disagree as to whether Thordarson or Tucker was the senior on-site supervisor. Sec'y Br. at 11; Resp Br. at 20.

Tucker explained that in a typical drilling operation, two pieces of equipment are involved, a drill rig and a flatbed truck. First, the drill rig is moved into position and set up to drill. Then, the flatbed truck is backed toward the drill rig until the catwalk of the drill rig and the back of the truck provide "porch steps" for access to the flatbed of the truck and the drill rig. Tr. 241-244. When drilling is finished and the drill team is ready to move to a new on-site location, the drill rig (a largely self-contained mobile unit) is moved first, then the tools and drill steel (large pipes) are loaded and strapped onto the flatbed of the truck. Tr. 249-50. In order to load the drill steel, a member of the drill team will climb up onto the flatbed, pull each drill steel toward the cab and roll it toward the edge of the truck, then repeat, alternating between the left and right edge of the truck so that the person on the flatbed continues to have a flat working surface. Tr. 319-20. Once the truck is loaded, it is taken to the new location and backed up to the drill rig using a spotter. Tr. 250. For the Durkee Cement Plant project, the drill rig and truck were being relocated every one or two days. Tr. 327.

The bed of the truck in use at the cement plant was approximately five feet high and eight feet wide. Resp. Br. at 18-19. Boart's M&E trucks generally have some built-in fall protection, such as overhead cables with retractable lanyards, and built in ladders. Tr. 194. However, those features are not present on Boart's E&I trucks, including the one in use at the plant. Tr. 56. It is company policy to conduct a preoperational inspection of the trucks every day, Tr. 247, though according to Headman, the inspections are less thorough if the rig is already on site. Tr. 336-37.

On October 25, 2011, Boart had been on site for approximately 12-15 days. Sec'y Br. at 18. MSHA Inspector Scott Amos contends the drill was set up approximately 150 yards uphill from active drilling and blasting, Tr. 33, though Tucker recalls the distance as ¼ to ½ mile, Tr. 238. When Amos arrived, the drill rig and flatbed truck had been separated, and Tucker was on the flatbed moving materials on the flatbed so that they could be strapped down in preparation for driving the truck to a new location. Tr. 47-48. He was wearing a hard hat, but no fall protection. Tr. 47. Amos testified that he observed Tucker standing two to three feet from the edge of the truck's flatbed, on an uneven, slippery surface, surrounded by tripping hazards. Amos felt that Tucker was in imminent danger of tripping and falling off the flatbed and severely injuring himself; Amos therefore asked Tucker to come down from the flatbed, which he did. Tr. 36-41. Amos and Tucker then discussed Tucker's responsibilities at the mine site, and upon Tucker's representation that he was in charge of the on-site operation, the inspector issued a section 107(a) imminent danger order of withdrawal to Boart. Tr. 43-44, 37.

Amos and Tucker also discussed Tucker's method of climbing onto the flatbed, which involved using the door of a toolbox on the side of the truck as a step. Tr. 256. Amos then continued the inspection, and found that the truck's backup alarm was not in functional condition, Tr. 75, though Tucker testified that the alarm was working during that morning's preoperational inspection. Tr. 269. As a final matter, Amos made some calls after leaving the mine site to determine whether Tucker had received the required miner training, and confirmed with both Boart and Ash Grove officials that he had not. Tr. 135-38.

As a result of his observations during the inspection, his discussion with Tucker, and his calls regarding Tucker's training, Amos issued to Boart, in addition to the imminent danger order, the following enforcement actions: a section 104(d)(1) citation for Tucker's failure to wear a safety belt where there was a danger of falling; a section 104(d)(1) order for failing to provide Tucker with a safe means to access the truck's flatbed; a section 104(a) citation for the Truck's inoperative backup alarm; and a section 104(g)(1) order of withdrawal for failure to provide Tucker with the required training.

107(a) Order No. 8605604 (Docket No. WEST 2012-248-RM)

Order No. 8605604 alleges the following:

> The foreman was observed working on top of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP 281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order was issued to the foreman working on the bed of the truck at 11:45 PST this date. The bed of the Kenworth Truck #2268 is hereby ordered withdrawn from service.

Gov. Ex. 1.

Section 107(a) of the Act, 30 U.S.C. § 817(a), authorizes inspectors to order persons to be withdrawn from an area where an imminent danger exists. An imminent danger is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Although the Commission has cautioned against narrowly construing the term to only include immediate threats, the Commission has also recognized the obvious tenet that there must be some degree of imminence to support an imminent danger order; a hazard must be impending for immediate withdrawal to be required. *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). An inspector's finding of an imminent danger should be given strong consideration, but a judge "is not required to accept an inspector's subjective 'perception' that an imminent danger existed. Rather, the judge must evaluate whether, given the particular

circumstances, it was reasonable for the inspector to conclude that an imminent danger existed." *Id.* at 346 (finding the inspector's anticipation of ignition and explosion as a result of a methane accumulation 'speculative,' such that it was not reasonable to expect the accumulation to result in death or serious bodily harm).

Imminent danger orders have been upheld where there was danger of a person falling from a truck. In *Lime Mountain Co.*, 20 FMSHRC 1192, 1192-95 (Oct. 21, 1998) (ALJ), the judge affirmed the inspector's determination that there was an imminent danger of a fall resulting in serious injury where a miner was standing on an eleven foot high trailer coated in lime dust, using a compressed hair hose to clean the trailer with the hose coiled behind him, without wearing a safety line. In *Nelson Brothers Inc.*, 18 FMSHRC 618, 624 (April 12, 1996) (ALJ), the judge found an imminent danger where a driver was standing near the edge of a nine foot high tanker truck (i.e. a rounded surface) with no guard rails or safety line. Here, however, I do not find it reasonable for Amos to have concluded that there was an impending threat of a fall resulting in serious harm where Tucker was working five feet off the ground without a safety line, on a flatbed which was dry, level, and stationary, which contained some loose materials but allowed moderate room to maneuver, and which was parked on packed dirt.

The picture that Inspector Amos painted with his testimony was one in which the flatbed was covered in trip and fall hazards such that Tucker was likely to lose his footing at any minute. Amos testified that the flatbed contained loosely or totally unsecured drill steel (round, smooth pipes) which could shift or roll, that the drill steel and flatbed floor were covered in mud and bentonite (lubrication), and that 'garbage cans and some smaller items and hoses' were stacked against the truck cab. In Amos' opinion the flatbed floor presented a slippery, unstable, uneven surface without a clear path for movement. Tr. 37-48. Amos further testified that Tucker was moving two to three feet from the edge of the truck, standing on and climbing over the drill steel, and was doing these things while not wearing fall protection. *Id.*; Tr. 57. In the inspector's view, given these circumstances, it was highly likely that Tucker would fall off the truck if these work practices were allowed to continue. Tr. 86-87; Sec'y Br. at 14.

Inspector Amos also testified that such a fall could easily have been fatal. In this regard, Amos stated that MSHA has determined that falls from machinery are a major cause of fatalities in the nation's metal and non-metal mines. Tr. 38. Amos also noted that a 200 pound person who falls six feet will hit the ground with 5,000 pounds of force, Tr. 49, and commented that fatalities have occurred at heights lower than six feet, particularly where an individual fell backwards and hit his head. Tr. 50-51. Amos listed numerous scenarios in which Tucker could have been fatally injured if he were to fall: Tucker could have landed on a rock; he could have landed on one of the two sideboards;[2] he could have landed on the sharp edge of the toolbox and broken his neck. Tr. 55. In sum, the imminent danger order is premised on a determination that Tucker could have fallen off the side of the truck and landed on his head or neck with fatal force,

[2] In this context, sideboards are metal rectangles which are placed along the edge of a flatbed to prevent pipes from rolling off the truck. The cited truck appears to have had two sideboards, approximately eight inches high by two inches deep by two inches wide, near the front right edge of the flatbed. Tr. 53; Gov. Ex. 7; Resp. Ex. A (circled in green).

Sec'y Br. at 13, and that given the frequency and history of that type of falling injury, Amos wanted Tucker off the truck before a similar accident occurred. Tr. 41.

Boart presents a much less dramatic, and ultimately more convincing, picture. With regard to the impending threat of a fall, Boart contends that the drill steel was largely tied down and orderly, no mud or bentonite was present, and Tucker was standing on a wide, flat, dry, secure surface. Resp. Br. at 18. Tucker testified that the weather was dry, and the drilling process in use at the time did not involve drilling mud because the company was drilling reverse rotary air holes.[3] Tr. 259-60. Significantly, a photograph taken at the time of the citation supports this version of the conditions; though there are some odds and ends piled near the cab, as well as two or three unsecured sections of pipe and some loose straps, there is clear space for movement, and no sign of mud, either for drilling purposes or due to the weather. Gov. Ex. 7; Resp. Ex. A. Furthermore, Tucker testified that strapping materials down on the flatbed takes about fifteen minutes, and he had already been doing so for about five minutes when Amos arrived, thus limiting the time within which he was most likely to trip. Tr. 280. While it is certainly conceivable that a person could trip on one of the objects on the flatbed and fall to the ground below, or take a misstep and fall off the side of the flatbed, such an event on the flatbed as it then existed – level, clear of mud, with room for Tucker to position himself – within the few remaining minutes that Tucker would have been up on the truck, would have been rare rather than likely.

Boart further contends that, assuming a fall was to occur, serious injury was theoretically possible, but highly unlikely. Boart argues that the circumstances required for serious injury to occur, specifically that Tucker would fall backwards, be unable to catch himself, lose his hard hat (which Amos admits he was wearing), and land on his head or something sharp, are simply too speculative. Resp. Br. at 18. Boart adds that the Secretary has not provided any evidence that serious injury commonly results from a five foot fall. Resp. Br. at 20.

Again, I find Boart's argument persuasive. Most of Inspector Amos' testimony is indeed speculative; Tucker could land on a rock (although the evidence does not indicate any large rocks close to the truck), he could trip in just the right spot to land on a sideboard or toolbox, or in just the right way to land on his head, and fatalities have occurred at lower heights. Tr. 55. Amos references MSHA's 'Rules to Live By' report, Tr. 38, which indicates that falls from elevation accounted for 23 of the 589 mining fatalities between 2000 and 2008. Rules to Live By Program Priority 24 Standards Report, http://www.msha.gov/focuson/RulestoLiveBy/Reports/priority24.asp. However, such generalized information does not support a finding that the specific conditions at issue here constitute an imminent danger. For these reasons, I conclude that while Inspector Amos' testimony indicates that a fatal fall from the truck in issue is possible,

[3] Drilling mud is a fluid that commonly consists of bentonite and polymers. Mud Rotary Drilling uses drilling mud to cool the drill bit, remove cuttings, and stabilize the borehole. Reverse Circulation Rotary Drilling, on the other hand, uses air flow rather than drilling mud to collect cuttings. Boart Longyear, Rotary Drilling Services page, http://www.boartlongyear.com/drilling-services/surface/rotary/ (last visited Dec. 3, 2013).

the Secretary has not established that it is likely.

An imminent danger order requires something more than a generalized danger, it requires a reasonable determination that a given condition creates an impending threat of serious harm. *See, Island Creek Coal Co.*, 15 FMSHRC at 345-46. I find that the inspector's determination regarding the condition at issue was not reasonable. First, the photographic evidence does not support the inspector's determination that Tucker was in imminent danger of tripping and falling, as the surface of the flatbed at that time was dry, flat, and relatively unencumbered. Secondly, the inspector's determination that a fall would be fatal was overly speculative given the relatively low height of the flatbed, the very small amount of surface area presented by the sideboards, and the absence of rocks of any notable size on the ground below. Tucker falling *and* seriously injuring himself in the few minutes it would take to finish his work would simply be too much of a fluke to consider the risk imminent. Accordingly, the imminent danger order will be vacated.

104(d) Citation No. 8605605 (WEST 2012-249-RM, WEST 2012-891M)

104(d) Citation No. 8605605 alleges the following:

> The foreman was observed working on top of the bed of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, foreman engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of fall protection but actively chose not to use it.

Gov Ex. 2. Inspector Amos found the cited condition was a significant and substantial contribution to a mine safety hazard (an S&S violation), was highly likely to result in a fatality to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure to comply with the standard. For the reasons discussed below, I find that the cited condition was only reasonably likely to result in lost workdays or restricted duty, rather than being highly likely to result in a fatality, but I otherwise affirm the citation. [4]

[4] An S&S finding is not inconsistent with vacating an imminent danger order. The finding of no imminent danger is primarily based on the fact that Tucker was not likely to fall in the next few minutes, the time it would have taken him to finish his work. Unlike an imminent danger order, which accounts for conditions as they will exist only until the hazardous condition can be abated, an S&S determination allows for normal changes over time, such as weather and truck location.

Fact of the Violation

Section 56.15005 requires that safety belts and lines be worn when persons work where there is a danger of falling.[5] Boart in effect concedes that Tucker was not wearing a safety belt or line. Therefore the determination as to whether Boart violated the standard rests on whether there was a danger of falling. As indicated in the text of the citation, Citation No. 8605605 was issued as a result of the same conditions as Order No. 8605604, *supra*. However, the Secretary's burden is lower. While I do not credit inspector Amos' interpretation of the cited condition as resulting in an imminent danger, I find that the uncontested facts reflect that there was a danger of falling, and consequently that Amos properly cited the company for a violation.

Boart does not contest that the flatbed was approximately five feet high, or that there were some loose materials on the flatbed; rather, Boart contends that working at an elevation of five feet, on a dry, flat, surface, does not create a danger of falling. Resp. Br. at 19. Respondent looks for support to a Program Policy Letter issued by MSHA giving weight to a determination by OSHA that a danger of falling begins at elevations of six feet. Tr. 20; Resp. Ex. H; PPL No. P12-IV-01. However, the policy letter was issued after Citation No. 8605605, and more important, it leaves room for site specific evaluation. P12-IV-01 at 1. In other words, a five foot elevation is neither inherently safe nor inherently unsafe; site specific conditions must be taken into account. While the danger of falling was not as extreme as Amos' testimony indicated, the photographic evidence supports the inspector's observations insofar as confirming that some trip hazards were present. It is also telling that Boart's Mining and Energy trucks, also with five feet of elevation, have built in fall protection; it is reasonable to assume that this would not be the case unless, as the Secretary notes, a reasonable person would recognize that there is at least some danger of falling while standing on a flat, five foot high surface. Sec'y Br. at 15. Accordingly, I conclude the Secretary has proved the violation.

S&S and Gravity

As a general proposition, a violation is properly found to be S&S if there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 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 in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995)

[5] Specifically, section 56.15005 states that "safety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

(approving *Mathies* criteria). An S&S determination must be based on the particular facts surrounding the violation, and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The Secretary has established the fact of the violation, and the presence of a discrete safety hazard, namely a danger of falling, is inherent in that violation. As for the third and fourth factors, the Secretary contends, for the reasons discussed above in the context of the imminent danger order, *supra*, that the cited conditions were highly likely to result in a fatal injury. Relying on Inspector Amos' testimony, the Secretary notes that drillers have job related tasks that would likely compromise their balance, namely rolling drill steel toward the edges of the truck, that the flatbed did and would continue to contain obstacles and trip hazards, and that if a driller were to fall off the side of the truck, especially backward, the driller could land on his head or neck with thousands of pounds of force. Sec'y Br. at 16-17, *citing* Tr. 45-55, 319-20. The Secretary notes that miners have been killed falling from less than half the height of the flatbed. *Id.* Respondent contends that the Secretary has not provided any evidence that a serious injury resulting from a five foot fall is reasonable, rather than just possible. Resp. Br. at 19-20.

With regard to the likelihood of a fall, the Secretary's allegation that injury is highly likely to occur is largely theoretical; the Secretary has assumed the presence of significant slip and trip hazards, such as mud, rolling drill steel, and a lack of any clear pathway, which the photographic evidence does not support. Gov. Ex. 7. However, the presence of some trip hazards, such as some unsecured pipes, some loose straps, and a garbage can, have been established. Gov. Ex 7; Resp. Ex A. Furthermore, the inspector raised a valid concern that bad weather would create an increased risk of falling, Tr. 46, and it could also be reasonably expected that any unsecured pipes would roll if the truck were parked at an incline at any point during the project. Therefore, I find that a driller working on the flatbed could reasonably be expected to fall, given continued mining operations. With respect to the expected severity of any resulting injury, while I credit Amos' factual and anecdotal testimony regarding the ways in which a five foot fall *can* result in a fatal injury, I do not credit his conclusion that such a fall is *likely* to result in a fatality. However, Amos' testimony that a miner falling from five feet lands with thousands of pounds of force, Tr. 49, is sufficiently convincing to indicate that if Tucker were to fall from the flatbed, he could reasonably be expected to sustain injuries resulting in lost workdays or restricted duty, such as severe bruising or a twisted ankle.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of a violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The evidence supports a finding that the effect of a five foot fall from the flatbed was reasonably likely to result in lost workdays or restricted duty, and I conclude that the violation was serious. Accordingly, I affirm the significant and substantial designation, but reduce the gravity findings from highly likely to reasonably likely, and from fatal to lost workdays or restricted duty.

Unwarrantable Failure and Negligence

The Secretary has attributed the violative condition in Citation No. 8605605 to a high degree of negligence and an unwarrantable failure by the operator. The Commission has summarized the legal principles for determining whether a violative condition is the result of an unwarrantable failure:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by 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) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors 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 Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*") [further citations omitted]. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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).

Lopke Quarries, Inc., 23 FMSHRC 705, 711 (July 2001).

The parties do not contest the length, extent or obviousness of the violative condition, or the lack of pre-citation abatement. The points of contention are whether Tucker was a supervisor, and whether the operator was on notice and/or had knowledge of the existence of the violation.

With regard to the length of time the violation had existed, Tucker conceded that he did not wear fall protection for the entire time the truck was on-site, Tr. 262, a 12-15 day period. Tr. 90. With respect to the extent and obviousness of the condition, it is uncontested and obvious that no form of fall protection had been provided. Prior to Amos' inspection, Boart made no effort to abate the condition, despite the availability of Boart trucks and/or truck designs with built in fall protection. Sec'y Br. at 18; Tr. 194. Finally, the degree of danger has been established via the S&S and gravity determinations, above. These factors favor upholding the inspector's unwarrantable failure finding.

In further support of the unwarrantable failure finding, the Secretary argues that a supervisor, namely Tucker, was involved in the violation. The Mine Act defines an agent as a person "charged with responsibility for the operation of . . . or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802. Under Commission precedent, the negligence of an agent is imputable to the operator or contractor for the purposes of unwarrantable failure. *Whayne Supply Co.*, 19 FMSHRC 447, 453 (Mar. 1997); *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1463-64 (Aug. 1982). To distinguish between agents and rank-and-file miners, the Commission relies upon function rather than job title; an employee is an agent if the employee's function is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the Commission has found that a rank and file miner who is assigned by the operator to carry out required examination duties may be appropriately viewed as an agent of the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

Amos testified that in his experience inspecting Boart drilling operations, although there may be an occasional visit from midlevel management, the driller is the senior on-site representative, the individual responsible for filling out paperwork and arranging deliveries. Tr. 57-58. Specifically, Amos recalled asking Tucker if he was "the foreman, the guy in charge of the operation," to which Tucker said, "Yes, I am." Tr. 44. Amos also recalled Headman confirming that Tucker was the person on site who most represented the company. *Id.* Tucker's memory of his conversation with Amos is hazy, but he conceded that his promotion to driller gave him responsibilities, and that being the driller means if something goes wrong with the drill it "comes down on him." Tr. 306-07. Additionally, Rotary Division zone manager Robert Stadeli testified that pre-shift examinations and filling out forms were Tucker's responsibility, Tr. 219, and that driller's assistant Allen Headman received his day-to-day instructions from Tucker, Tr. 181. All of this supports finding that Tucker was a supervisor.

Boart contends that Drilling Division zone manager Kristian Thordarson, rather than Tucker, was the on-site supervisor. Resp. Br. at 20; Tr. 181, 224, 334. However, Tucker's testimony establishes that work on the project was taking place on a daily basis, Tr. 244-45, and yet, although Tucker spoke with Thordarson daily by phone, after the first few days of the project, Thordarson was only on site once a week. Tr. 234-35. This indicates that Thordarson was not the on-site supervisor. Respondent also notes that Tucker was an hourly rather than salaried employee, and had no authority to hire, fire, or discipline. Resp. Br. at 20; Tr. 182, 231.

However, as noted above, it is the supervisory function rather than the trappings of a position that are relevant. As the senior on-site Boart employee (of two!), Tucker carried out certain critical duties that could only be carried out on-site, such as conducting pre-shift examinations and directing the actions of the only other Boart employee present. Accordingly, I concur with the Secretary's finding that, as the individual trusted to handle the on-site aspects of the drilling operation, Tucker was the person "charged with responsibility" for the on-site drilling operation. Sec'y Br. at 11. Thordarson was Tucker's superior, but Tucker was the on-site supervisor. And as Tucker was also the individual working without fall protection, a supervisor was directly involved with the violative condition, supporting a finding of unwarrantable failure. Sec'y Br. at 19.

With regard to the remaining factors, Boart does not deny knowledge of the existence of the *condition*, but denies knowing the condition constituted a *violation*, thereby also claiming it had not been put on notice that greater efforts at compliance were required. Rather, Boart contends that it had a reasonable, good faith belief that the drillers on site at the Durkee Cement Plant were subject to OSHA, rather than MSHA, regulations, and therefore were not required to use fall protection for elevations under six feet. Resp. Br. at 21. I find that this belief, even if held in good faith, was not reasonable, and therefore Respondent's argument for a mitigating factor is ultimately unconvincing.

The Boart employees involved may indeed have had a good faith belief that MSHA regulations did not apply. Tucker and Stadeli's testimony that when the project started they believed it to be environmental is supported by the fact that the drill team was from Boart's E&I section and was drilling to test for mercury. Tr. 212, 232. Furthermore, Boart claims that Ash Grove's representatives told Boart's representatives at least twice that the drill team was not subject to MSHA regulations. Resp. Br. at 21. According to Stadeli, after Boart received the contract purchase order from Ash Grove, upon noticing that the general terms and conditions referenced MSHA or OSHA regulations "that might apply," Stadeli requested clarification from Ash Grove and was told the drill team would be working solely under OSHA regulations. Tr. 179. Then, at Stadeli's request, Thordarson confirmed with the Ash Grove "safety folks" that the drill team would be working under OSHA regulations. Tr. 180. Thordarson passed this answer to Tucker when Tucker asked if MSHA training was required since they were at a mine site. Tr. 300-01. Although he ultimately characterized all of this as a "breakdown of communication," Ash Grove plant manager Terry Kirby confirmed to Amos that Boart was under the initial impression that its employees were not covered by MSHA regulations. Tr. 165.

However, assuming the project team believed that MSHA regulations did not apply, Boart was negligent in failing to ensure that its E&I employees had the correct information regarding MSHA applicability while working on mine sites. First, the M&E Section was aware of the requirements of section 56.15005: M&E trucks were fitted with fall protection, Tr. 56, the M&E Section would have been aware of MSHA's 'Rules to Live By' Report, and had been recently cited for similar violations. Sec'y Br. at 18. Second, by the very fact that the question

was asked, it is clear that those involved in the project suspected that MSHA regulations might be relevant. Contact between the M&E and E&I sections was clearly feasible, given that abatement of the citation consisted of modifying the truck at issue to match M&E truck designs. Tr. 194. And yet, Boart management did not inform the project team that MSHA jurisdiction applied, and the project team did not follow through on their apprehensions by contacting the M&E Section. Boart should have known that the condition was a violation, and been on notice that greater efforts were necessary to comply.

In sum, I find that Boart violated section 56.15005, that the violation was S&S, that the violation was reasonably likely to result in injuries causing lost workdays or restricted duty, that the supervisory involvement of Tucker, the length of time he violated the standard, and the degree of danger posed to Tucker by the violation support affirming the inspector's unwarrantable failure finding, and that Boart was highly negligent.

104(d) Order No. 8605606 (WEST 2012-250-RM, WEST 2012-891M)

Order No. 8605606 states the following:

> The foreman was observed working on top of the bed of truck #2268. The foreman was provided with but did not utilize safe access. The foreman stated he climbed up the side of the truck, standing on the toolbox door, then stepping onto the elevated area. No handholds or handrails were provided. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, [the] foreman[,] engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of safe access but actively chose not to use it. The bed of the truck #2268 is hereby ordered out of service until it is provided with safe access and a representative of MSHA has verified a safe means of accessing the truck is implemented by the contractor.

Gov. Ex. 3. The order alleges that the cited condition violated 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places." The inspector found the alleged violative condition was S&S, was highly likely to result in a fatal injury to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure. As discussed below, the fact of the violation, S&S determination, negligence, and unwarrantable failure findings will be affirmed, however the gravity will be modified to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

Further Findings of Fact

With regard to Tucker's actual method of access during the Durkee Cement Plant project, it is uncontested that Tucker regularly began his ascent onto the flatbed by stepping onto the horizontal open door of a toolbox attached to the side of the flatbed truck.[6] Tr. 62, 252. Tucker testified that he would then have placed his left foot on the flatbed, taken hold of either the post or the D-ring above his head with both hands, and pulled himself up into a standing position on the flatbed. Tr. 252, 294-95; Resp. Ex. A (toolbox door and post circled in red). Tucker conceded he probably would have pushed some materials out of the way with his foot to create a space to place his foot. Tr. 299. The Secretary does not credit Tucker's testimony, claiming that a soft drink on the toolbox door, and drill steel and garbage near the truck's edge, would have made it too difficult to step onto the flatbed, use the post as a handhold, and pull himself up. Sec'y Br. at 21-22. The Secretary instead suggests that after stepping on the toolbox door, Tucker pulled himself up onto the truck without using a handhold, and then crawled on his hands and knees over loose pipes until he found a clear space to rise to his feet, also without using a handhold. Sec'y Br. at 21-22. This theory is based on Amos' testimony regarding his conversation with Tucker; Amos did not see Tucker climb onto the flatbed. Tr. 62.

With regard to alternate means of access, Amos testified that he saw a ladder on the flatbed,[7] and when he asked Tucker why he had not used the ladder, Tucker replied he hadn't used it because it was already loaded onto the truck. Tr. 70-71. Tucker testified that he did not recall whether or not a ladder was present. Tr. 283. Amos also testified that using the step at

[6] Rather than a lid which opens upwards, the toolbox attached to the side of the truck had a front panel 'door' which opened downwards and was supported by chains, such that when the toolbox was open, the front panel was parallel to the ground. Gov. Ex. 7; Resp. Ex. A (circled in red).

[7] Amos testified that the ladder was visible, though difficult to discern, in the photograph taken of the truck. Tr. 70; Gov. Ex. 7 (circled in blue). I agree that the ladder is difficult to identify, but credit the inspector's testimony that the object circled in the photograph is a ladder.

the rear of the truck would have been marginally safer than the toolbox door, because it was at a more appropriate height.[8] Tr. 73. Tucker noted that he used the back step when the flatbed was backed up to the drill rig. Tr. 243-44.

Fact of the Violation

Section 56.11001 requires that a safe means of access be both provided and maintained. Inspector Amos conceded that Boart *provided* safe access in the form of the ladder that was located in the flatbed. Tr. 71. Therefore, the existence of a violation turns on whether Boart properly *maintained* a safe means of access. The Commission has interpreted an operator's duty to "maintain" safe access as "an on-going responsibility . . . to ensure that a means of safe access is utilized." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (quoting *Lopke Quarries*, 23 FMSHRC at 708). The Commission has further elucidated that the duty to maintain a means of safe access "at a minimum . . . mandates that management officials utilize that access, and require other miners to do so." 23 FMSHRC at 709. Tucker conceded that he regularly accessed the flatbed via the toolbox door rather than the ladder, and Tucker himself was a supervisor (*see* page 11, *supra*), therefore I conclude that Boart made no significant efforts to ensure the ladder, an obviously safe means of access, was utilized. Accordingly, the key factual dispute is whether the toolbox door also constituted a safe means of access.[9]

The Secretary contends that the ladder was the only safe means of access, so by failing to ensure that Tucker used the ladder, Boart failed to maintain a safe means of access. Sec'y Br. at 20. The Secretary asserts that using the toolbox door for access was unsafe because the chain holding the door could snap, Tucker could get his foot caught in the door and trip, he could encounter any number of fall hazards while pulling himself up onto the flatbed, and even if he pulled himself up using the posts for handholds, he could lose his grip. Sec'y Br. at 21-22. Amos noted that the toolbox door did not meet the height and depth requirements for steps or ladders, and theorized that the door was not strong enough to bear Tucker's weight. Tr. 63, 66. Respondent contends that the toolbox door was a safe means of access, therefore allowing Tucker to use that method of access does not constitute a violation. Resp Br. at 22. Respondent

[8] The back step is a metal grating spanning the width of the rear of the truck. Resp. Ex. A (circled in blue).

[9] Tucker also accessed the flatbed via the step on the back of the truck. However, whether the back step was a safe means of access is not outcome-determinative, given that Tucker testified that the toolbox door was his usual means of access when the drill rig and flatbed truck were not parked back to back. Even assuming the back step was a safe means of access, which Amos contests, Tr. 73, and even if Tucker used the back step and the toolbox door in equal measure, Boart still allowed Tucker to access the flatbed via the toolbox door as a matter of course. Therefore, if the toolbox door was unsafe, Boart failed to ensure that its on-site supervisor used only safe methods of access.

calls the Secretary's assertion that the chains could snap mere speculation. Resp. Br. at 22. Furthermore, Tucker testified that he would feel safer standing on the toolbox door than a wobbly ladder, Tr. 283, and Stadeli pointed out that by using handholds, Tucker maintained three points of contact. Tr. 200.

While Respondent's arguments may be relevant for determining the likelihood or severity of expected injury, I find that the Secretary has presented sufficient evidence of a trip/fall hazard to deem Tucker's method of access unsafe, especially given Tucker's testimony that he had to push material out of the way to place his foot on the flatbed, Tr. 299, and the fact that a number of Boart trucks have built in ladders.[10] Tr. 194. Because Respondent did not ensure that Tucker used a safe means of access, I find a violation of section 56.11001.

S&S and Gravity

The Secretary alleges that the cited condition was S&S. The Secretary has established a violation which contributes to a fall hazard. With regard to the third and fourth *Mathies* factors, as will be discussed in more detail below, Inspector Amos testified that the dangers presented by Tucker's unsafe method of access as described in Order No. 8605606 were essentially the same as those presented by Tucker's lack of fall protection as described in Citation No. 8605605, Tr. 106, and accordingly, he found that the condition was highly likely to result in an injury that could reasonably be expected to be fatal. I agree that the two cited conditions present very similar dangers, and therefore find that, as with Citation No. 8605605, the cited condition in Order No. 8605606 was reasonably likely to result in an injury that could reasonably be expected to result in lost workdays or restricted duty.

The Secretary's allegation that injury is highly likely to occur is again largely speculative, particularly the notion that the chain holding the toolbox door level could snap under Tucker's weight. Sec'y Br. at 21-22. However, as Tucker's means of access involved stepping onto the flatbed, then the same unsecured pipes and loose straps which posed a moderate trip hazard once on the flatbed also presented a trip hazard while stepping onto the flatbed; Tucker admitted that he regularly had to push material out of the way to make space for his foot when stepping onto the flatbed from the toolbox door. Tr. 299. Respondent counters that injury was unlikely because Tucker maintained three points of contact by gripping the post above his head or the edge of the flatbed while pulling himself up. Tr. 200. However, given continued mining operations, a situation would almost certainly arise which could cause Tucker to lose his grip; for example, just as bad weather would increase the chance of falling once Tucker was on the flatbed, Tr. 46, ice or water on the handholds would increase Tucker's risk of falling while

[10] As for Tucker's assertion that he felt safer using the toolbox than a "wobbly ladder," Tr. 283, if the ladder was indeed wobbly, the proper solution would have been to request a sturdier ladder, rather than to use an alternate but still unsafe method of access. "It was the lesser of two evils" is not a proper defense to a violation.

pulling himself onto the flatbed. Accordingly, I find it reasonably likely that, given continued mining operations, the cited condition would result in a fall injury.[11]

With regard to the expected severity of the injury, Amos stated that he designated Order No. 8605606 as likely to result in a fatal injury for the same reasons that he designated Citation No. 8605605 as likely to result in a fatal injury. Tr. 106. The finding is therefore again rejected on the basis that Amos' testimony only established that a fatality *could* occur. Based on Amos' testimony regarding the force with which a miner falling from five feet would land, as well as a common sense understanding of the dangers involved with a fall of between three to five feet,[12] I find that, like Citation No. 8605605, any injury resulting from a fall while accessing the flatbed would reasonably be expected to result in lost workdays or restricted duty. Accordingly, I affirm the S&S designation, but reduce the gravity findings to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

Unwarrantable Failure and Negligence

The Secretary contends that Boart's failure to ensure that its on-site supervisor and other personnel utilized a safe means of access, particularly in light of the fact that the company owned trucks with built in ladders and guardrails, constitutes aggravated conduct sufficient to establish an unwarrantable failure. Sec'y Br. at 22. I find that the evidence supports the Secretary's unwarrantable failure determination.

The strongest elements in favor of an unwarrantable failure finding are the involvement of a supervisor, and length of time for which the condition existed. Because Tucker was the individual cited as utilizing an unsafe means of access, and Tucker is a supervisor (*see* pg. 11, *supra*), a supervisor was directly involved in causing the violation. This is even more significant because compliance with the cited regulation in essence mandates that supervisors ensure that other miners use safe access by setting a good example; Tucker did the opposite. Additionally, the condition existed for a significant length of time, given that Tucker testified that the toolbox door was a common method of access. Tr. 252.

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[11] Respondent also contends that injury was unlikely because Tucker had "probably climbed the truck like that a thousand times" without incident. Tr. 206. However, it has long been recognized that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010) (citation omitted).

[12] It could be argued that injuries sustained from a fall while accessing the flatbed would be less severe than those sustained once on the flatbed, because the miner would be falling from a lower height (the toolbox door). However, the fall could just as easily occur in the final stages of access, once the miner was already at the height of the flatbed.

Boart again claims there was no knowledge of the violative condition or notice that greater efforts were required, because there was a good faith belief that MSHA regulations did not apply. Resp. Br. at 25. For the reasons discussed above in the context of fall protection, I find that Boart should have known that the condition was violative, and been on notice, because the Durkee Cement Plant project team could have consulted with the M&E Division, which was on notice given that there were M&E trucks with built-in ladders. *See* pg. 12, *supra*. [13]

In Respondent's favor, I do note that the condition did not pose an exceedingly high degree of danger. I also find that the condition was potentially non-obvious; Tucker's own willingness to use the toolbox door as a convenient step to access the flatbed, and his lack of any mishaps using the toolbox door, indicate that a person could conclude that it provided a sufficiently safe means of access. However, the balance of factors still falls in favor of an unwarrantable failure determination, particularly given the involvement of a supervisor in a violation.

104(a) Citation No. 8605607 (WEST 2012-251-RM, WEST 2012-422M)

Citation No. 8605607 states the following:

> The Kenworth #2268 (Ser# 1FUYYSYBAGP281935) was provided with an automatically activated reverse signal alarm which was not maintained in functional condition. The truck is used on narrow roads where backing occurs as needed for supplying drill steel to the drill rig. The truck has a large blind spot to the rear. Two miners typically work at the drill pad: one driving the truck, and one on foot. The truck is used intermittently as needed. Should the truck back up and a miner on foot be struck, it would likely cause serious or fatal crushing injuries.

Gov. Ex. 4. The citation alleges a violation of 30 C.F.R. § 56.14132(a), which requires that audible warning devices on mobile equipment be maintained in functional condition. The inspector determined that the alleged violation as S&S, reasonably likely to result in a fatal injury to one person, and attributable to a moderate degree of negligence. Respondent admits the fact of the violation, Resp. Br. at 25, but challenges the gravity and negligence findings on grounds that the drill team used spotters when reversing the trucks, and the alarm had been functioning during the pre-operational inspection. For the reasons below, I find that the cited condition was not reasonably likely to result in injury.

[13] Amos suggested more direct knowledge and notice, testifying that Tucker told Amos he "was trained in safe access but chose to ignore it." Tr. 108-09. However, Amos later admitted to paraphrasing what he was told by Tucker. Tr. 166. I therefore choose not to rely on Amos' testimony.

S&S and Gravity

The discrete safety hazard contributed to by a malfunctioning backup alarm is inherent in the concept of an audible reverse alarm, namely the hazard of a miner being struck by the reversing vehicle. Boart does not contest that a fatality could be expected if a miner were to be struck by the subject vehicle. Accordingly, the only contested element of the S&S criteria is whether there was a reasonable likelihood of a miner being struck as a result of the nonfunctioning backup alarm. The Secretary contends that, because the normal operation of the flatbed truck involves backing up toward a drill rig with a miner standing on the back, it is reasonably likely that the lack of an audible backup alarm would result in injury. Sec'y Br. at 24. Respondent contends that injury is unlikely because it is company policy to use a spotter when backing the truck into place. Resp. Br. at 26.

The relevant normal mining operations are as follows. The trucks on site were moved approximately every one or two days, and moving the trucks necessarily involves backing one truck up to the other at the new location. Tr. 241-50, 327. The Secretary suggests that the flatbed truck would also occasionally back up to the drill rig with supplies while the drill rig was in operation, such that the driller would be standing at the back of the rig in the truck's blind spot. Sec'y Br. at 23-24; Tr. 80, 114. Respondent counters that the truck would never be reversed into place while the drill was in operation, in part because it would be dangerous, and in part because with a two person drill team, one would be driving and the other would be acting as a spotter, leaving no one to operate the drill. Tr. 248; Resp. Br. at 26. Tucker and Headman both testified that it was company policy to use a spotter, and described the procedure as follows: Headman would get into the cab, honk three times, make eye contact with Tucker through the mirror, and Tucker would guide Headman into the new location via agreed upon hand signals. Tr. 227, 246, 328. Amos testified that Headman told him a spotter had not been used the last time the flatbed was backed into place, Tr. 76, though Headman claimed he did not discuss spotters with Amos, Tr. 329.

In *Qmax Co.*, Administrative Law Judge Michael Zielinski found that where a company had a written policy requiring the use of a spotter, and the miners using the cited truck were in compliance with that policy, the company's failure to maintain a backup alarm in violation of section 56.14132(a) was a purely technical violation that was unlikely to result in injury. 28 FMSHRC 848, 857-58 (Sept. 29, 2006) (ALJ). The decision noted that the spotter policy was consistent with the intent of the violated standard, which provides that a back-up alarm is not required where there is an "observer to signal when it is safe to back up." *Id.*, *citing* 30 C.F.R. § 56.14132(b)(1)(iv). The finding in *Qmax Co.* is applicable and persuasive. Although Boart did not have a written policy requiring the use of spotters, I credit Tucker and Headman's testimony that it was company policy to use a spotter, especially given the particularity and similarity of their descriptions. With a spotter in place, injury would be unlikely to occur while the flatbed truck was reversing, despite the absence of a back-up alarm. Accordingly, I find that the cited condition is non S&S. However, I find the cited violation

to be serious, given that if injury were to occur, it could easily be fatal.

Moderate Negligence

The Secretary has designated this condition as attributable to a moderate degree of negligence. Moderate negligence is attributable where an operator "knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Tucker testified that when he conducted a preoperational check of the truck around 6:45 a.m. on the morning of the citation, the backup alarm was functional. Tr. 304-05. Although the Secretary seems to question the adequacy of the examination because of Headman's testimony that examinations are less thorough if a truck is already on site, Tr. 337, Tucker's contention that the alarm was functional is somewhat supported by a statement made to Amos by Ash Grove's safety director that the equipment was functional before the truck first came on site. Tr. 77-78. In light of the evidence suggesting that the condition may not have existed for any significant length of time, I find the Secretary's determination of moderate negligence appropriate.

104(g)(1) Order No. 8605608 (WEST 2012-422M)

Finally, Order No. 8605608 states the following:

> Doug Tucker, foreman[,] had not received any training as required for newly hired experienced miners pursuant to 46.6. The foreman had zero months mining experience but had conducted similar job tasks before working on the mine site. The foreman stated he had worked 15 days at the mine without receiving part 46 mandatory training. The contractor Boart Longyear was aware of the requirements. Doug Tucker, foreman[,] is hereby ordered withdrawn from the mine until he receives the required mandatory training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Gov. Ex. 5. The order alleges a violation of 30 C.F.R. § 46.6(a), which requires that newly hired experienced miners be provided with training as specified in sections 46.6(b) and (c). The order was issued pursuant to section 104(g)(1) of the Mine Act, which states that an inspector who finds "a miner who has not received the requisite safety training . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from . . . the mine, and be prohibited from entering such mine until . . . such miner has received the training." 30 U.S.C. § 814. The Secretary alleges that the cited condition is S&S, reasonably likely to result in a fatal injury to one person, and attributable to a high degree of negligence. For the reasons below, I affirm the citation with regard to fact of the violation, gravity, and the S&S designation, and reduce the degree of negligence attributable to Respondent from high to moderate.

Fact of the Violation

A newly hired experienced miner is simply an experienced miner who is "beginning employment with a production-operator or independent contractor." 30 C.F.R. § 46.2(j).[14] Alternately, a new miner is one who is "beginning employment as a miner . . . and who is not an experienced miner." §46.2(i). The Secretary issued the above citation on grounds that Tucker was an experienced miner because he had been a driller for over ten years, and had not received the training required for new hires. Sec'y Br. at 26-27. Respondent admits that Tucker had not received the required MSHA training, Tr. 301, and concedes that per MSHA regulations, Tucker was a miner and training was required. Tr. 197-987. However, Respondent contends that because Tucker had never worked on mine sites previous to his work at the Durkee Cement Plant, he was not an experienced miner, and therefore the citation was improperly issued. Resp. Br. at 28.

Given that the Durkee Cement Plant project was Tucker's first experience as a driller on a mine site, Tr. 231, at first glance Tucker may appear to be an individual who was "beginning employment as a miner." However, Inspector Amos' rationale for designating Tucker as an experienced miner is sound; Tucker had over ten years of experience with the same drilling skills he was now employing as a miner. Tr. 62. As an experienced driller (now jurisdictionally a miner) beginning employment with a new operator, Tucker was required to go through the training required by section 46.6.

S&S and Gravity

By requiring an untrained miner to be immediately withdrawn on grounds that the miner constitutes "a hazard to himself and to others," section 104(g) of the Act essentially defines the failure to properly train a miner as a significant and substantial violation; the untrained miner constitutes a hazard sufficiently likely to contribute to a serious injury to himself or others as to require his immediate removal. Respondent contends that the gravity should be reduced, because Tucker had received OSHA training, had significant experience as a driller, and had received specific on-site training, such that all potential dangers were largely addressed. Resp. Br. at 29-30; Tr. 225, 236, 303. However, as the Secretary notes, familiarity with MSHA regulatory standards, as well as training on Miners Rights, are a crucial component in ensuring a safe working environment, and would likely not have been covered by Tucker's non-MSHA

[14] Section 46.2(j) also notes that "Experienced miners who move from one mine to another, such as drillers and blasters, but who remain employed by the same production-operator or independent contractor are not considered newly hired experienced miners." While one could argue that Tucker was not newly hired because he was a long-term employee of Boart, Tucker was beginning a contract with Ash Grove. Accordingly, his long term employment with Boart does not prohibit Tucker from being considered a new hire.

training.[15] Sec'y Br. at 28. The best way to ensure that accidents resulting from insufficient training do not occur is to ensure that all new hires receive the MSHA-required training. Accordingly, the gravity findings and S&S designation for the citation are affirmed.

Negligence

An operator's conduct constitutes high negligence where the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The Secretary suggests that Respondent knew MSHA Part 46 training was required for Tucker, noting that Headman had received that training. Sec'y Br. at 29; Tr. 132. However, it is unclear when and why Headman received the training (it could have been the result of a previous contract through Boart's Mining and Energy Division), therefore actual knowledge cannot be implied. On the other hand, as discussed above, Boart should have known that MSHA regulations applied. *See* pg. 12, *supra.* Respondent's belief that Tucker was a scientific worker and therefore immune from training requirements was not reasonable.

And yet, I conclude there are a number of mitigating circumstances which, when viewed together, are sufficient to reduce the degree of negligence attributable to Respondent. If Amos' conversations with management personnel subsequent to his inspection are any indication, Tucker received very mixed messages from Ash Grove management regarding the necessity of MSHA Part 46 training; Terry Kirby stated that MSHA training was not required for Boart employees, while Chris Hughes stated all contractors are generally told to follow MSHA requirements. Tr. 135-36. Furthermore, as discussed above, Tucker had received OSHA training, and had over ten years of experience and on-the-job training as a driller. Tucker even recalled receiving on-site training on the proper procedure to follow when blasting was taking place. Tr. 303. It is also worth noting that proper Part 46 training is provided to Boart's M&E division employees, and even to E&I employees when the drilling is clearly related to mining. Tr. 358. In other words, Tucker's training was omitted because of a mistaken premise that it was not required for a driller who was on site to test mercury levels, rather than reckless disregard of MSHA requirements, and the lack of training did not drastically increase the level of danger in this particular instance.

Cumulatively, these factors raise strong doubts that Respondent's behavior in not providing Tucker with Part 46 training was highly negligent; it is conceivable that a reasonable person in this situation would believe it had met its duty of care. Accordingly, the negligence attributable to Respondent for the violative condition in Order No. 8605608 shall be reduced from high to moderate.

[15] To provide a relevant example, if Tucker had been provided with MSHA required training, he would likely have been aware that there was no minimum elevation required for a danger of falling to be present.

Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority 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 "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) and 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 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

The parties have stipulated to Respondent's good faith in attempting to achieve rapid compliance, and that the assessed penalties would not affect Respondent's ability to continue in business. Jt. Ex. 1, Stips. 7, 8. However, the parties disagree as to the relevant history of violations and size of Respondent's business. The Secretary, relying on Boart's I.D. page on MSHA's data retrieval site, designated Boart as a large contractor with a very high history of past violations. Sec'y Br. at 29-30. Respondent counters that Boart's M&E and E&I sections had separate identification numbers until 2010, and that by looking to the post-2010 combined statistics, the annual work hours and past history of violations have been unfairly inflated such

that they do not represent the true safety record of the E&I Section. Resp. Br. at 30; Tr. 349-51, 355. While it is true that the combined statistics do not accurately reflect the safety record of the E&I Section alone, it seems only fair that if a contract at a mine site is assigned to the E&I Section, it should expect to be treated as a mining division for purposes of violations incurred at that mine site. Accordingly, I find the Secretary to be justified in calculating the past history and size of Respondent based on the combined record.

Although judges have the authority to assess penalties *de novo*, the penalty calculation tables provided in 30 C.F.R. § 100.3 provide a useful guide. In this respect, I find the following reductions in penalty to be justifiable based on reductions in the gravity of the violative condition and/or the negligence attributable to Respondent, as discussed above: The civil penalty for Citation No. 8605605 shall be reduced from $70,000.00 to $13,300.00; the civil penalty for Order No. 8605606 shall be reduced from $70,000.00 to $13,300.00; the civil penalty for Citation No. 8605607 shall be reduced from $13,268.00 to $6,000.00; and the civil penalty for Order No. 8605608 shall be reduced from $47,716.00 to $13,000.00.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 107(a) Order No. 8605604 in Docket No. WEST 2012-248-RM **IS VACATED**.

IT IS FURTHER ORDERED that 104(d) Citation No. 8605605 in Docket Nos. WEST 2012-249-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of $13,300.00 shall be assessed for Citation No. 8605605.

IT IS FURTHER ORDERED that 104(d) Order No. 8605606 in Docket Nos. WEST 2012-250-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of $13,300.00 shall be assessed for Order No. 8605606.

IT IS FURTHER ORDERED that 104(a) Citation No. 8605607 in Docket Nos. WEST 2012-251-RM and WEST 2012-422M **IS MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely, and to delete the significant and substantial designation. Accordingly, **IT IS ORDERED** that a civil penalty of $6,000.00 shall be assessed for Citation No. 8605607.

IT IS FURTHER ORDERED that 104(g) Order No. 8605608 in Docket No. WEST 2012-422M **IS MODIFIED** to reduce the degree of negligence attributable to Boart Longyear from high to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of $13,000.00 shall be assessed for Order No. 8605608.

IT IS FURTHER ORDERED that Boart Longyear pay, within 40 days of the date of this decision, a total civil penalty of $45,600.00 in satisfaction of the four remaining violations at issue in these proceedings. Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED.**

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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