

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 21, 2014

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

v.

REMINGTON LLC,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2009-1498  
A.C. No. 46-09230-185272

Mine: Winchester Mine

**DECISION AND ORDER**

Appearances: Joseph L. Gordon, Esq., U.S. Department of Labor, Office of the Solicitor,  
Philadelphia, PA, for Petitioner

Jonathan R. Ellis, Esq., Steptoe & Johnson, PLLC, Charleston, WV, for  
Respondent

Before: Judge L. Zane Gill

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This case involves one citation issued under 30 U.S.C. § 814(d) (1) and one order issued under 30 U.S.C. § 814(d) (1).

The Secretary seeks civil penalties of \$25,163.00 for Citation No. 8072231 and \$5,645.00 for Citation No. 8072232, requesting that they be affirmed as issued or modified to reflect increased severity of injury designations. Remington concedes the fact of a violation for Citation No. 8072231, but contests the Significant and Substantial (“S&S”), negligence, and unwarrantable failure designations and seeks to reduce the citation to a 104(a), non-S&S citation. With regard to Order No. 8072232, Remington argues that there was no violation and seeks to have the order vacated.

For the reasons listed below, I find that the violation for which Citation No. 8072231 was issued is S&S and constitutes an unwarrantable failure to comply with a mandatory standard. I uphold the violation cited in Order No. 8072232, and also find that the violation is S&S and unwarrantable. Finally, I find that a total penalty of \$30,808.00 is appropriate.

## I. Procedural History

### History

On March 24, 2009, MSHA Inspector Martin Carver issued Citation No. 8072231 and Order No. 8072232 at Remington's Winchester Mine, an underground coal mine located in Kanawha County, West Virginia. The Secretary of Labor filed a petition for the assessment of a civil penalty on July 15, 2009, and the operator, Remington LLC, filed an answer contesting the penalties on August 10, 2009. A hearing was held in Charleston, West Virginia on December 6, 2011.

### Pretrial Motions

As a preliminary matter, I will memorialize my rulings on two pretrial motions. Both motions dealt with the Secretary's proffered expert, Dr. Sandin Phillipson, an MSHA geologist who was called to testify about the likelihood of a roof fall in one of the cited areas. I heard oral arguments on each motion before deciding these issues.

First, Remington moved to compel production of email communications between the Secretary and Dr. Phillipson or, alternately, a detailed privilege log. Remington argued that it was entitled to these messages because they contained factual information that the expert relied on in forming his opinion. The operator claimed that without this information, it would be prejudiced in its ability to cross-examine Dr. Phillipson. The Secretary contended that the emails were privileged, and that no privilege log was required under Rule 26 of the Federal Rules of Civil Procedure.<sup>1</sup> After reviewing Dr. Phillipson's pre-trial deposition and the parties' motions, I found that no information was missing the lack of which would prejudice Remington's ability to proceed effectively in this case. Remington's motion to compel was therefore **DENIED**.

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<sup>1</sup> The Commission Procedural Rules do not address this issue, but Fed. R. Civ. P. 26(b) (4) (C) provides useful guidance. The rule reads as follows:

*(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:*

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

Second, Remington moved to exclude Dr. Phillipson as a witness. Remington argued that Phillipson's use of illustrative rather than actual values in his mathematical models made his testimony irrelevant because it provided only relative assessments of the likelihood of a roof fall where an absolute assessment was needed. The operator further argued that Dr. Phillipson's testimony was ultimately lay testimony that stated common sense information, which cannot assist the trier of fact. Because Dr. Phillipson had never visited the Winchester Mine, Remington contended that his lay testimony was not based on his own perceptions and was therefore inadmissible. In response, the Secretary argued that Dr. Phillipson's expert opinions would present complex testimony that discussed the scientific reasons why the area in question was unique and at a higher risk of roof falls. Dr. Phillipson would also discuss how the unsupported roof's configuration increased the likelihood of a roof fall in the cited area. The Secretary contended that Phillipson's testimony would present scientific information that would be helpful to the trier of fact.

Commission Rule 63(a) sets the parameters for admissible evidence in Commission proceedings. 29 C.F.R. § 2700.63(a). The rule states that "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Commission is not required to apply them, the Federal Rules of Evidence have value by analogy. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1136 n.6 (May 1984). The Commission discussed the qualification of expert witnesses in *In re: Contests of Respirable Dust Sample Alteration Citations*, stating that

"[W]e are guided by principles established under Rule 702 of the Federal Rules of Evidence: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.' Fed. R. Evid. § 702."

17 FMSHRC 1819, 1843 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (emphasis added). The Commission further stated that

"Expert witnesses testify to offer their scientific opinions on technical matters to the trier of fact." *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 372 (March 1993), quoting *Asarco, Inc.*, 14 FMSHRC 941, 949 (June 1992). "Unlike an ordinary witness,... an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 482 (1993).

*Id.*

Dr. Phillipson holds a Ph.D. in Geology from the Colorado School of Mines, and his CV reflects extensive knowledge of roof control and geological hazards in mines. (Ex. S-21) He has 11 years of experience in the Roof Control Division of MSHA's Technical Support Branch. (Ex. S-21) After reviewing the motions and exhibits submitted by the parties, which included Dr. Phillipson's expert report and curriculum vitae as well as the transcript of his deposition, I determined that his background in geology and mine roof control qualify him as an expert in those areas. As such, he is not required to base his opinions on firsthand observation. Moreover, in keeping with my duty to admit only reliable scientific evidence<sup>2</sup>, the expert report and the vigorous cross-examination during Dr. Phillipson's deposition convinced me that the scientific evidence Dr. Phillipson would present was reliable. Based on the expert's report submitted by the parties, I found that Dr. Phillipson's testimony would help me understand the evidence, and that it could therefore be presented at the hearing. Remington's motion to exclude Dr. Phillipson was **DENIED**. These preliminary rulings are affirmed here.

## II. Findings of Fact<sup>3</sup>

### a. Stipulations

#### 1. Stipulation as to Jurisdiction

Respondent acknowledges jurisdiction under section 3(d) of the Mine Safety & Health Act, 30 U.S.C. § 802(d) ("the Act"). Respondent also acknowledges that the products of the Winchester Mine ("the Mine") entered the stream of commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. § 803.

#### 2. Fact Stipulations

a) Remington, LLC ("Remington") is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended ("Act"), 30 U.S.C. § 803(d), at the Mine at which the citations were issued.

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<sup>2</sup> *Respirable Dust Cases*, 17 FMSHRC at 1843 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

<sup>3</sup> The findings of fact are based on the record as a whole, including my careful observation of the witnesses during their testimony. In resolving conflicts of testimony, I have taken into consideration the interests of the witnesses, corroboration or lack thereof, and consistencies or inconsistencies in each witness's testimony and among the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (noting that an administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

- b) The operations of Remington at the Mine are subject to the jurisdiction of the Act.
- c) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act.
- d) The individuals whose signatures appear in Block 22 of the citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor, at the time that the citations at issue in this proceeding were issued.
- e) True copies of the citations at issue in this proceeding were served on Remington as required by the Act.
- f) Remington demonstrated good faith in the abatement of the citations at issue in this proceeding.

b. The Story

Remington, LLC's Winchester Mine is an underground coal mine located in Kanawha County, West Virginia. The mine operates around the clock in three shifts: a day shift that starts at 6:30 AM and ends between 3:30 and 4:00 PM; an evening shift that begins between 3:30 PM and 4:00 PM and ends at 1:30 AM; and a midnight shift that lasts from 11:00 PM to 7:00 AM. (Tr. 45:5-46:2) Pre-shift reports are conducted before the beginning of each shift and identify hazards that need to be corrected before anyone enters the mine for the eight-hour shift. (Tr. 54:6-55:7). On-shift reports are conducted during the shift by the supervisor or examiner. (Tr. 54:6-55:7) These reports identify hazards encountered during the shift and note whether they have been corrected. (Tr. 54:6-55:7)

Toward the end of the evening shift on March 23, 2009, while on his way to call his pre-shift report out to the surface, Foreman Frank Chambers encountered Continuous Miner Operator J.C. Rhodes in the 7 right cross-cut ("7 right"). (Tr. 310:22-311:12, 311:19-22) Seven right was the last cross-cut in by the face. (Ex. S-13) Rhodes was in the process of making the last cut of the night, a punch-through cut that would drive the 7 right cross-cut into the 8 entry. (Tr. 278:6-15, 281:21-282:3; Ex. S-13) At the Winchester Mine, it is fairly common for a cut to be made at the end of a shift and bolted the next day. (Tr. 272:20-273:6) Because the cut Rhodes was making was the last cut of the night and would remain unbolted until the March 24 day shift, Chambers asked Rhodes to hang reflectors around the unbolted area. (Tr. 310:16-21) Federal law requires the use of reflectors to warn miners of unbolted areas (Tr. 82:8-15), and the Winchester Mine's roof control plan required Remington to hang two or more reflectors to mark the second-to-last row of roof supports. (Tr. 86:24-87:22; Ex. S-23 at 6) Miners are trained that these reflectors signal hazards and rely on them to identify and avoid dangerous areas. (Tr. 117:16-118:10) It is common for continuous miner and roof-bolter operators to hang reflectors in punch-through cuts at Remington (Tr. 314:22-315:11), and Rhodes had put up reflectors in the past. (Tr.

318:7-9) Chambers called out the pre-shift report, which noted only that 7 right “needs cleaned and dusted,” at 10:44 PM on March 23. (Ex. S-7)

The cut left an unbolted area approximately 30 feet in length. (Tr. 97:2-20; Ex. S-24) The unbolted area started in 7 right, and it extended seven to eight feet into the 8 entry because three bolts in the first row of bolts in the intersection had been sheared off during the cutting process. (Tr. 92:11-15, 97:10-20; Ex. S-13, Ex. S-21 at 3) Because the unbolted area could have been approached from either 7 right or the 8 entry, reflectors should have been hung in both of those areas to prevent miners from inadvertently walking under unsupported roof. (Tr. 82:8-18; Ex. S-23 at 6) Rhodes, who had between six months and one year of mining experience (Tr. 317:9-19), only hung a single reflector after he finished the cut. (Tr. 316:6-12) This reflector was hung in 7 right, at the last row of bolts before the unbolted area. (Tr. 82:3-7) Rhodes later explained that he only hung one reflector because he only had one reflector with him at the time. (Tr. 311:13-18, 316:6-12) There were other reflectors available that Rhodes could have gone and gotten. (Tr. 316:13-18)

The area was left in this condition for the duration of the March 23 midnight shift, which is a non-production maintenance shift. (Tr. 299:2-7) Roof bolting is considered production, and therefore not performed on the midnight shift. (Tr. 273:7-16) Miners on the midnight shift may occasionally have reason to travel to the face, but most of the midnight shift work is performed outby the faces. (Tr. 299:23-300:9, 321:13-322:14) The midnight shift foreman, however, is required to take methane readings at each face every two hours during his shift. (Tr. 55:14-56:10; Ex. S-10) He also conducts a pre-shift inspection of the area where miners on the day shift will be working. Both of these tasks required traveling across the section and taking methane readings at each of the faces, and the pre-shift examination requires the foreman to travel throughout the working section. (Tr. 54:6-23) Midnight Shift Foreman Brian Lester’s Date, Time and Initials (“DTIs”) were found at all faces, including the 8 face, after the area was bolted. (Tr. 138:5-16) DTIs are the date, time, and initials left by an examiner to show he has been at a face. (Tr. 116:5-21) Remington’s records reflect that Lester conducted gas checks from midnight to 1:00 AM, from 2:00 AM to 3:00 AM, from 4:00 AM to 5:00 AM, and from 6:00 AM to 7:00 AM (Ex. S-10)

These records also show that Lester performed a pre-shift examination from 4:00 AM to 4:45 A.M, while he was doing his 4:00 AM methane readings. (Tr. 136:17-23; Ex. S-5) On Lester’s pre-shift report, he marked that 7 right was part bolted and listed “Ref.,” or “reflector,” as the action taken. (Ex. S-5) There was also an unbolted area near the 7 Face, which was noted on the pre-shift inspection as well. (Tr. 69:11, 78:18-22; Ex. S-5) This area had been properly marked with reflectors. (Tr. 78:18-22) The 8 entry, along with the 1, 2, 3, 4, 5, 6, and 9 entries and the 5 left cross-cut, was listed as having no hazards observed, although the pre-shift report indicates that Lester hung a reflector somewhere in one of those areas. (Ex. S-5)

On the morning of March 24, Inspectors Martin Carver and Edgar Hendrick inspected the Bays Mains 003/004 section of the Winchester Mine. (Tr. 58:3-59:6) Before going underground, the inspectors reviewed the mine map and the pre-shift and on-shift reports for the previous three shifts. (Tr. 47:6-48:7, 55:7-56:10) Carver and Hendrick inspected separate parts of the section. (Tr. 59:2-10)

Carver began his inspection with an imminent danger sweep across the faces, traveling through the last cross-cut in by the faces. (Tr. 58:18-22) Remington Foreman Tommy Hess accompanied Carver on his inspection. (Tr. 142:21-143:8) Hess conducted his daily on-shift inspection and took methane readings while Carver inspected the mine. (Tr. 58:18-22) In the cross-cut between the 6 and 7 entry, Carver encountered three men working near an energized roof bolter. (Tr. 59:7-60:2, 60:18-22, Ex. S-13) The roof bolter, which was in the last cross-cut in by the face, had been energized before the Foreman completed a required gas checks. (Tr. 60:17-22, 61:17-62:5, 63:7-16; Ex. S-12 at 2, 3) Unbeknownst to Carver, these men were working 20 to 30 feet away from the unmarked, unsupported roof. (Tr. 128:2-8) Carver spoke to them, then issued a citation to Hess for having energized equipment near the face before gas checks had been completed. (Ex. S-14) Remington did not contest the citation, and it is not one of the citations at issue in this case. (Tr. 66:18-20; Ex. S-22 at 2)

In the next cross-cut, between the 7 and 8 entry, Carver and Hess found two rows of bolts, followed by the unsupported roof. (Tr. 93:16-20; Ex. S-13, Ex. S-12 at 4) Carver and Hess observed that only a single reflector had been hung in the 7 right cross-cut. (Tr. 82:3-7) Carver nearly walked under the unsupported roof because reflectors were not hung in a way that indicated a hazard (Tr. 79:16-80:6, 82:1-18, 87:8-12; Ex. 12 at 12) At this point, around 7:30 AM, Carver issued Citation No. 8072231 for the missing reflector. (Tr. 88:8-12; Ex. S-11) To complete the imminent danger sweep and on-shift examination without traveling under unsupported roof, Carver and Hess traveled out-by to the next cross-cut, crossed over to the 8 entry, and proceeded in-by toward the unbolted 7-right cross-cut. (Tr. 88:4-12; Ex. S-13.) After arriving at the intersection, they observed that three roof bolts in the first row of bolts outside of the cross-cut had been sheared off. (Tr. 89:19-91:17.) No reflectors had been hung in the 8 entry. (Tr. 88:13-89:3.) Carver added this to citation No. 8072231. (Tr. 91:7-13) The citation was issued as an unwarrantable failure because the high degree of danger posed by unsupported roof and the minimal effort required to hang the reflectors showed a reckless disregard for miners' safety. (Tr. 120:4-13)

Carver confirmed that the 7 right cross-cut was not bolted by standing under the last row of bolts and looking down the 7 right cross-cut. (Tr. 89:4-90:10; Ex. S-13) Although it was impossible to see the entire length of the unbolted roof with the head lamps Hess and Carver wore (Tr. 98:7-14, 163:11-164:5), Hess testified that what he could see looked like good roof. (Tr. 271:9-15) Carver observed gob and loose coal in the middle of the 8 entry, and both sides of the intersection had loose coal and rock along their entire length. (Tr. 99:21-100: 15; Ex. S-13 3) This would have to be cleaned by a scoop operator as part of the mining process. (Tr. 100:19-23) The debris came from the push-through cleanup run, in which the continuous miner operator pushes coal that can't be loaded into the intersection. (Tr. 100:2-9) Carver also testified that roof can collapse at any time, even if it looks perfectly good. (Tr. 109:19-110:11)

Cross-cuts and entries at Remington are approximately 18 to 20 feet wide (Tr. 302:13-19; Ex. S-23 at 1), and unsupported area is measured from roof bolt to roof bolt. (Tr. 97:2-14) The distance from the last bolt in the cross-cut to the first bolt in the intersection was 30 feet. (Tr. 96:16-98:4; Ex. S-13, Ex. S-24) When roof falls occur, however, the falling area typically goes into the second row of bolts. (Tr. 81:1-8) I credit Carver's testimony that roof fall victims are not

always killed outright, but roof fall survivors tend to have serious injuries that require amputations. (Tr. 111:2-16)

During the inspection, Inspector Hendrick issued citations for two violations, neither of which are at issue in this case. (Tr. 131:18-23, 260:4-261:4) The first citation was a grounding violation issued because the power sled was missing a ground strap. (Tr. 260:23-261:4) The citation was assessed as “unlikely” to cause injury or illness, but any injury that occurred would be “fatal” because a miner would be electrocuted by 12,470 volts of electricity if he came into contact with the ungrounded sled. (Tr. 260:23-261:4; Ex. S-17) The second citation was a guarding violation, issued because a section of high-voltage cable was unguarded. (Tr. 260:16-19; Ex. S-16) Like the first citation, this was assessed as “unlikely” to cause injury or illness, but any injury that occurred due to the hazard would be “fatal.” (Ex. S-16) Remington did not contest these citations. (Tr. 262:5-263:3) Because these two violations were found during the inspection, in addition to the unsupported roof, Carver issued Order No. 8072232, which cited Remington for an inadequate pre-shift examination. (Tr. 131:11-23; Ex. S-15) Carver designated the order S&S because of the high degree of danger and the severity of the injuries that could occur because of the hazards that were not recorded on the pre-shift inspection. (Tr. 140:13-19) He issued the order as an unwarrantable failure to comply with a mandatory standard because he felt that the foreman who conducted the pre-shift examination was not really looking for hazards, but simply going through the pre-shift routine. (Tr. 140:20-141:11)

Remington investigated the failure to hang reflectors. (Tr. 309:8-13) Robert Hill, Remington’s Safety Manager (Tr. 307:18-22), interviewed Chambers, Rhodes, and Lester. (Tr. 309:14-18) He spoke to Chambers and Rhodes about the failure to hang reflectors. (Tr. 309:16-21) Chambers explained to Hill that he was on his way to call out an examination toward the end of the shift when he told Rhodes to hang the reflectors (Tr. 310:22-311:7), and Rhodes confirmed what Chambers said when Hill spoke to him. (Tr. 311:13-18) Neither Rhodes nor Chambers testified at the hearing. Chambers is no longer with the company, having been let go as part of an employee cut-back because he was “not a very good supervisor.” (Tr. 313:12-18) Rhodes has worked for Remington on and off between the time the citation was issued and the hearing date. (Tr. 316:19-23) There is no evidence that either Rhodes or Chambers was disciplined for the failure to hang reflectors on March 23, 2009. Hill further stated that a result of the investigation, he determined that the foremen were not looking as hard as they should have been on their pre-shift inspections. (Tr. 309:19-310:7) There is no evidence that Lester was disciplined by the company for the way he conducted his inspections.

Hess testified at hearing that although he did not find out about the missing bolts in the 8 entry until he made his on-shift examination (Tr. 288:19-22), he would have known to carefully check the intersection of 7 right and the 8 entry for hazards. He explained that taken together, the updated mine map he reviewed before going underground and the pre-shift report noting that 7 right was only partially bolted would have alerted him that a punch-through cut had been made. (Tr. 289:10-290:2) Although there were two unbolted areas in the Bays Mains section, Hess testified that the area in 7 right is the first thing he would address on the day shift. (Tr. 69:11, Tr. 274:16-23; Ex. S-5)



Dr. Sandin Phillipson, the Secretary's expert, testified at hearing with regard to the roof's stability over time. Phillipson has not visited the mine site, but he testified credibly that a visit to the mine site would not have been feasible, nor would it be necessary for his report and testimony. (Tr. 223:5-12, 224:9-16) He explained that the unsupported area's location at an intersection dramatically increased the likelihood of a roof fall in the area. Specifically, he testified that the removal of the 3 bolts in the cross-cut more than doubled the likelihood of a roof fall (Tr. 233:16-234:15, 237:16-238:15), and that a roof fall was most likely in the part of the unsupported area that extended into the intersection. (Tr. 227:18-228:3) Phillipson also discussed two roof falls that occurred in the Bays Mains section between the issuance of the citation and the hearing. A roof fall on July 25, 2011, was about 400 feet from the cited area, and a roof fall on August 7, 2009, was about 1,100 feet away from the cited area. (Tr. 240:19-241:8) Phillipson explained that having two roof falls in the vicinity of the unbolted area suggests that the roof quality in the unbolted area was poor. (Tr. 241:9-15)

### III. Legal Principles

The citation and order at issue in this case were issued under section 104(d) (1) of the Mine Act, 30 U.S.C. § 814(d) (1).<sup>4</sup> In order to uphold a citation issued under section 104(d) (1), the Secretary must prove that the violation would significantly and substantially contribute to the cause and effect of a safety or health hazard. The Secretary must also prove that the citation is an unwarrantable failure to comply with a mandatory standard.

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<sup>4</sup> Section 104 (d) (1) of the Mine Act, 30 U.S.C. § 814(d) (1), reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Commission has established a four-part test to determine whether a violation is S&S. To designate a violation S&S, judge must find “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The third and fourth factors will, as a practical matter, often be combined in a single showing. *Id.* at 4. To show a reasonable likelihood that the hazard will result in an injury, the Secretary is not required to prove that it is more likely than not that the hazard will result in an injury. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865-66 (June 1996). The S&S analysis must be made in the context of continuing mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Unwarrantable failure “refers to more serious conduct by an operator in connection with a violation,” *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 264-66 (May 2006), and the Commission has defined unwarrantable failure as “aggravated conduct, constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987), *Buck Creek Coal v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Emery Mining*, 9 FMSHRC at 2003; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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. These factors often include (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See Io Coal*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813(Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors are viewed in the context of the facts and circumstances of a particular case, and some factors may be irrelevant to the scenario at hand. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, I must examine all of the relevant facts and circumstances of each case to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *Io Coal*, 31 FMSHRC at 1351.

## V. Analysis and Conclusions of Law

### **Citation No. 8072231**

Citation No. 8072231 was assessed as highly likely to cause permanently disabling injury or illness, and designated as S&S. (Ex. S-11) The inspector assessed the negligence as high. (Ex. S-11) The condition cited states that

[t]he operator failed to comply with the approved roof control plan on Bays Mains 003/004 mmu section. There was only one reflector hung in the #7 to #8 crosscut and no reflectors were in the #8 out-by the holed crosscut as required. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S-11) The citation was issued for a violation of 30 C.F.R. § 75.220(a) (1), which requires that

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

Remington does not contest that a violation occurred, but contests the S&S, negligence, and unwarrantable failure designations.

### **Gravity and Significant and Substantial**

To uphold a citation, the Secretary must prove the gravity designations set out in the citation and prove that the citation is S&S. Under *Mathies*, these showings are closely linked in that as long as a violation of a mandatory standard and a discrete safety hazard are proved, proof that a violation is highly likely, or even reasonably likely, to result in a serious injury would necessitate an S&S designation. As a result, it is appropriate to address the gravity and S&S determinations together.

The Secretary argues that the gravity and S&S designations should be upheld. According to the Secretary, Remington's failure to hang the reflectors exposed miners on the evening, midnight and day shifts to dangerous, unsupported roof because miners on all three shifts could have traveled in the unsupported area. He further argues that the failure to hang the reflectors contributed to the hazard by falsely signaling that it was safe to travel through the unbolted area. The roof was highly likely to fall because of the length of time the area remained unbolted and the fact that the unbolted area extended out into an intersection. The Winchester Mine's history of roof falls near the unbolted area further supports the conclusion that a roof fall was highly likely. If it occurred, a roof fall would result in a permanently disabling or fatal injury. For these reasons, the Secretary contends that Remington's failure to hang the reflectors was highly likely to result in at least a permanently disabling injury, justifying an S&S designation for this citation.

Remington argues that the facts show that the violation was not reasonably likely to result in an injury, making an S&S designation inappropriate for this citation. With regard to the likelihood of injury, Remington argues that the Secretary's evidence does not show that a miner was likely to be in the unbolted area, and that any miner traveling in that area would be alerted that the area was unbolted because the coal gob present in the area would indicate that the area had not been bolted or cleaned. Additionally, no one in 7 right or the 8 entry saw adverse roof conditions and the expert witness's testimony did not address how likely the roof in 7 right or the

8 entry was to fall. Finally, Remington points out that the inspector changed the citation from “reasonably likely” to cause injury to “highly likely” to cause injury after leaving the mine and changed his notes after changing the citation, arguing that the change constitutes evidence that the cited condition was not highly likely to result in an injury.<sup>5</sup>

Remington does not contest that only one reflector was hung before the beginning of the unsupported roof in 7 right, nor does it contest that no reflectors were hung around the sheared-off bolts in the 8 entry. This is a violation of Remington’s roof control plan, which requires that two or more reflectors be hung at the next-to-last full row of roof bolts before an unsupported area. (Ex. S-23 at 6) Roof control plan provisions are enforceable as mandatory standards. *Martin Cnty. Coal*, 28 FMSHRC at 254-255. The violation therefore meets the first of the four *Mathies* criteria, the violation of a mandatory safety standard. The failure to hang reflectors contributes to a discrete safety hazard. Miners in the Winchester Mine are trained to rely on reflectors in order to recognize and avoid unsafe conditions. (Tr. 117:11-118:10) Failure to hang reflectors exposes miners to the hazard of unsupported roof because without these visual indicators, a miner could unknowingly enter the unsupported area.

The third element of the *Mathies* test requires the Court to consider whether the identified hazard—in this case, walking under unsupported roof—would result in an injury. *Mathies*, 6 FMSHRC at 3, 4. This prong of *Mathies* focuses on whether the safety hazard contributed to by the violation is likely to cause injury, not whether the violation itself will cause injury. *Musser Eng’g., Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

The Secretary’s expert testified that because the unbolted area extended into the intersection, the likelihood of a roof fall in the unbolted area more than doubled. (Tr. 233:11-234:15, 237:16-238:15) He was unable to assign a specific, actual value to the likelihood of injury, but the crux of his testimony was the dramatic increase in likelihood.<sup>6</sup> Unsupported roof can fall at any time, and if a miner were under it, he would be injured. Moreover, because roof falls usually come into the second row of bolts (Tr. 80:18-81:8), a miner could be injured by a roof fall without walking directly underneath the unsupported area. This is particularly problematic for miners traveling in the 8 entry toward the face. The first row of bolts was 7 feet into the 8 entry, putting the second row of bolts 11 to 12 feet into the 8 entry based on the four-foot spacing requirements in the Winchester Mine’s roof support plan. (Tr. 162:16-23; Ex. S-23) In an 18 to 20-foot wide entry, this dramatically increases the likelihood that a miner traveling in

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<sup>5</sup> I do not find Remington’s argument about the changes to Carver’s notes and penalty assessment persuasive. Carter convincingly explained his reasoning for making the changes at hearing, testifying that he most likely marked the citation “reasonably likely” while performing the inspection, then modified it after further consideration. Carver had the discretion to do this. Moreover, this change is analogous to an amendment to a citation, which is to be freely granted prior to hearing unless the operator can show prejudice. No such showing has been made here.

<sup>6</sup> Remington stresses Phillipson’s inability to state exactly how likely the roof was to fall, pointing out in its reply brief that if the likelihood of a roof fall is zero, if the likelihood doubles it will still be zero. (Resp. Reply Br. at 2-3) Due to the multiple roof falls that occurred not far from the unbolted area between the violation and the hearing, I am not persuaded that the likelihood of a roof fall in the area was zero or close to it.

the 8 entry would be exposed to the hazard, especially if he or she were operating a large piece of machinery such as a scoop.

The cut that created the unbolted area was made toward the end of the shift, around 11:00 PM (Tr. 310:22-311:7; Ex. S-7; Resp. Br. 13), and the inspector issued a citation for the hazard during the on-shift inspection for the day shift the next day around 7:30 AM. (Ex. S-11) The area then remained unbolted for a period of eight and a half hours. During this period, at least five miners were exposed to the hazard. Lester, the midnight shift foreman, was exposed to the condition as he traveled throughout the section taking methane readings at each of the faces (Tr. 116:6-117:1) and conducting the pre-shift examination for the oncoming day shift. Lester would have had no reason to know to avoid the unbolted area until he found it on his pre-shift inspection, which was conducted during his third run across the faces, because the pre-shift report for the midnight shift does not mention the unbolted area in 7 right. (Ex. S-6) Second, Carver encountered three miners on the section who were working 20 to 30 feet away from the unbolted area. These men could easily have walked under the unsupported roof without reflectors to warn them away from it. Finally, Hess (along with Carver) was exposed to the hazard when he conducted his on-shift examination and nearly walked under the roof. Evening shift miners, who would have been working all over the section, were also likely exposed to the hazard at the end of their shift as they traveled back to the mantrips to exit the mine.

Carver testified credibly that he observed coal debris in the form of loose coal and rock in the middle of the intersection (Tr. 99:21-100:1, 100:10-15; Ex. S-13), which would have to be cleaned by a scoop operator as part of the mining process. (Tr. 100:19-23) In the course of continued normal mining operations, a scoop operator cleaning up the gob in the intersection would most likely have been exposed to the hazard.

Although gob and loose coal was found in the intersection, I am not persuaded that the gob alone would have alerted miners to the unsupported condition of the roof and prevented them from being exposed to the hazard. Carver testified credibly that loose gob indicates that an area has been mined and has not been cleaned yet, but not necessarily that that the area is unsupported. (Tr. 165:13-22) Moreover, Foreman Lester's DTIs at the 8 face belie the effectiveness of the gob and loose coal as a deterrent to travel in the area.

The injury sustained from a roof fall would most likely be serious. Roof falls are a leading cause of underground mining fatalities, and miners who survive roof falls often receive crushing injuries that result in amputations. (Tr. 111:2-20) In light of all the circumstances surrounding the violation, I find that third and fourth elements of the *Mathies* test are satisfied because the unsupported roof is highly likely to contribute to an injury, and the injury would be serious. I therefore affirm the citation's gravity and S&S designations as issued.

### **Negligence and Unwarrantable Failure**

As discussed above, unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC at 2004; *Buck Creek Coal*, 52 F.3d at 136. Because making a negligence determination is an integral part of deciding whether the

operator's conduct constitutes more than ordinary negligence, I will discuss my negligence and unwarrantable failure findings together.

The Secretary argues that Remington's negligence is best categorized as "high." First, although the continuous miner operator was asked to hang the reflectors after making the punch-through cut, it was ultimately the evening shift foreman's responsibility to ensure that reflectors were hung. Additionally, the Secretary argues that the midnight shift foreman was negligent in failing to detect the missing reflectors. Finally, Remington was allegedly negligent for entrusting foremen that it had little confidence in with important safety functions.<sup>7</sup> The Secretary argues that Citation No. 8072231 involves aggravated conduct based on three aggravating factors, the first of which was the lengthy duration of the violation. The condition existed for parts of three shifts, during which multiple foremen had opportunities to abate the violation and multiple miners were exposed to the unsupported roof because of the missing reflectors. Second, the Secretary argues that the violation was extensive because only one of the four required reflectors was hung. Third, the missing reflectors exposed miners to extremely dangerous unsupported roof because neither of the two approaches to the unbolted area were effectively quarantined off.

Remington argues that the level of negligence is best described as low because it was not negligent to ask the miner operator to hang reflectors. Remington also argues that no one would be working in 7 right or the 8 entry during the midnight shift, making it unnecessary for the evening shift foreman to check the area for hazards. Remington therefore contends that a designation of "no negligence" or "low negligence" would be more appropriate for this citation. Remington further argues that the violation does not involve aggravated conduct constituting more than ordinary negligence, making the citation ineligible for an unwarrantable failure designation. In addition to its arguments about negligence and likelihood of injury, Remington stresses that the violation lasted for only one hour of production time, followed by a non-production shift in which no miners were in the area, and the condition was discovered before production started on the next production shift. The operator claims that it did not know of the existence of the violation because the foreman tasked the continuous miner operator, whose actions cannot be imputed to the operator, with hanging reflectors and expected those directions to be followed. Additionally, the evening shift foreman and the day-shift foreman were aware that 7 right needed to be bolted, and therefore aware of the hazard. Remington also contends that the one reflector that was hung is a mitigating factor because it would have provided some warning to miners traveling the section. Finally, Remington argues that the Secretary presented no evidence that Remington was on notice that greater compliance efforts were necessary for hanging reflectors.

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(i). Each mandatory standard carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the

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<sup>7</sup> I have considered this argument, but in light of all of the testimony presented it does not affect my decision with regard to the operator's negligence level for this citation.

safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.* This violation involved negligent omissions by two foremen. A foreman’s negligent acts are imputable to the operator. I find that taken together, their actions constitute high negligence.

I find that Chambers, the evening shift foreman, was negligent because he did not ensure that reflectors were hung in accordance with Remington’s roof control plan. Chambers told his continuous miner operator to hang the reflectors, something the miner operator was trained to do and had done in the past. (Tr. 314:22-315:11, 318:7-9) He then proceeded on his way to call out the pre-shift inspection for the oncoming midnight shift. Rhodes had one reflector with him and hung it up, but did not go get more reflectors and complete the job. (Tr. 316:6-18) “[W]here a rank-and-file employee has violated the Act, the operator’s supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *S. Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (Aug. 1982) (citing *Nacco Mining*, 3 FMSHRC 848, 850-851 (Apr. 1981)). While Rhodes’ training may have been adequate, his supervision and discipline were not. There is no evidence that Rhodes was disciplined for his actions, and the foreman negligently failed to supervise him.

I do not consider assigning a task to a rank-and-file miner to be mitigating evidence. Foremen are held to a heightened duty of care and are ultimately responsible for complying with MSHA’s safety regulations. “[C]onsideration of a foreman’s negligence is proper in assessing a penalty against an operator.” *Nacco Mining Co.*, 3 FMSHRC at 850. Where a foreman’s negligence is at issue, the Commission looks to whether the foreman acted with the care required by all of the circumstances surrounding the violation. *S. Ohio Coal Co.*, 4 FMSHRC at 1461. There is no evidence that Chambers followed up with Rhodes or took any further steps to ensure that the reflectors were hung in front of the unbolted area, even though Rhodes had been working as a miner for less than a year. (Tr. 317:9-13) The cut was the last cut of the night, and the operator intended to bolt the roof on the next production shift. The intervening midnight shift was a non-production shift and miners were unlikely to be working at the faces. As a foreman, however, Chambers was undoubtedly aware that methane readings still had to be taken at the faces every two hours. This would require the midnight shift foreman to travel across the faces several times before the roof could be bolted on the day shift. Seven right was the last cross-cut inby the face, making it the logical route of travel for a foreman coming across the faces. Because he filled in and called out the pre-shift inspection form, Chambers would also know that the unbolted area was not marked on the pre-shift inspection, giving the midnight shift foreman no indication that he should avoid the 7 right cross-cut. I also credit Inspector Carver’s testimony that miners would have been working all over the section at the end of a production shift, and

would have needed to travel across the section to perform final tasks, gather their things and return to the surface. (Tr. 168:20-169:6) Additionally, Foreman Hess admitted on cross-examination that it was possible that miners on the midnight shift could have traveled to the faces. (Tr. 299:23-300:9) In light of the circumstances, Foreman Chambers' failure to ensure that the reflectors were hung is highly negligent.

The record in this case reflects that between the end of the evening shift and the beginning of the day shift, multiple gas checks were performed at the faces and a pre-shift inspection was conducted. During the gas checks, it would have been possible for a foreman traveling alone and focused on taking his readings to walk through the unbolted areas in 7 right and past the missing bolts in the intersection without noticing them. Seven Right was the last cross-cut in by the faces, and neither of the two ways to approach the area was appropriately marked to signal a hazard. Lester performed a pre-shift inspection, however, in which he noted that part of 7 right was not bolted. He did not bother to hang reflectors in 7 right or the 8 entry, even though he observed the unbolted area and listed "Ref" as the action taken. The pre-shift report proves that Lester observed the unbolted area and knew the actions needed to abate the roof control violation, but negligently failed to perform them.

Because of their status as foremen, both Lester's and Chambers' negligence is imputed to Remington. Both of these men knew or should have been aware of the missing reflectors—and Lester almost certainly was—but no effort was made to abate the problem in spite of the high degree of danger it posed. I find that Remington "knew or should have known about the violative condition or practice, and there are no mitigating circumstances." Thus, the Secretary's assessment of "high" negligence is appropriate.

Several aggravating factors are present with regard to the failure to hang reflectors, the first of which is the extent of the condition. The unbolted area was a large area, approximately 30 feet long (Tr. 97:2-20; Ex. S-24) and 18 to 20 feet wide (Tr. 228:17-21, 302:13-19; Ex. S-23 at 1), and could be accessed two ways: by entering the 7 right cross-cut and proceeding toward the 8 entry, and from the intersection of 7 right and the 8 entry. Only one of these areas had any kind of visual indicator that a hazard was present. The single reflector hung in 7 right was insufficient under the operator's roof control plan, which requires two reflectors. As previously discussed, roof falls usually come into the second row of bolts (Tr. 80:18-81:8), and the "unsupported area" is considered to extend to the next-to-last bolt before the unbolted area. This further increases the extent of the hazard.

The missing reflectors posed a high degree of danger. Anyone traveling through the 7 right cross cut would have to walk under unsupported roof, which would cause fatal or permanently disabling injuries if it fell. The unbolted area extended into an intersection, which doubled the likelihood of a roof fall and made the unbolted area even more dangerous.

The duration of the condition is another aggravating factor. Remington stresses that the condition only existed for a brief period of production time, but this measurement does not accurately reflect the duration of the violation or the increased risks and exposure that resulted. Although the condition only existed for brief periods during the day and evening production shifts, the cut was completed sometime around 11:00 PM, and reflectors were not hung until



after 7:30 AM the next morning. This increases the overall level of danger because an unbolted roof grows more unstable and more likely to fall as time passes. (Tr. 103:2-11, 235:15-19) The intervening midnight shift exposed at least one additional miner to the hazard. During this period a pre-shift inspection was conducted and methane measurements were taken three times in each working face. (Ex. S-5, S-10). To do this, the foreman was required to travel to each of the faces several times and inspected the entire section for safety hazards once.

In spite of multiple passes across the faces and a pre-shift inspection that specifically noted that 7 right was “part bolted,” no efforts were made to abate the condition before it was pointed out by Inspector Carver.<sup>8</sup> This is especially egregious in light of the fact that the only action required to abate the condition would have been to get reflectors, which were available underground (Tr. 316:13-18), and hang them up. This would have taken only a few minutes. (Tr. 120:14-24)

The missing reflectors were obvious. The pre-shift inspection for the midnight shift noted that there was unbolted area in 7 right, showing that the hazard itself was observed. The roof control plan requires that each approach to the unsupported roof be marked with reflectors. Their absence would be conspicuous to a foreman conducting a pre-shift inspection, whose duty it was to note and correct hazards for the oncoming shift.

The evening and day shift foremen’s knowledge that the area needed to be bolted is not mitigating. It is not reasonable to infer awareness of the unbolted roof in the 8 entry based on a notation that 7 right needed to be bolted. The foremen would not necessarily have known about the sheared-off bolts just by seeing that notation, even in combination with the mine map showing that the cut had been punched through. The most that they could have done is exercise caution, and a miner’s exercise of caution is not mitigating. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). Similarly, the fact that one reflector had been hung is not mitigating. Carver almost walked under unsupported roof in spite of the presence of the reflector, which belies its effectiveness as a warning device.

There is no evidence, however, that the operator was on notice that greater efforts were necessary for compliance with this part of the roof control plan. Although Remington had received multiple citations for roof control violations in the past 12 months, the roof control plan is extensive and there is no evidence about the reasons that the previous citations were issued. This is neither an aggravating nor a mitigating factor.

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<sup>8</sup> It is not mitigating that the men found with the powered-up equipment near the face were working at a roof bolting machine. A finding that this evidence is mitigating would require inferring that the men at the machine were preparing to bolt 7 Right, which is not appropriate under these facts. At the beginning of the day shift, both the 7 face and the 7 Right cross-cut were unbolted. (Tr. 69:2-15) Reflectors were hung in the 7 face according to the roof control plan’s requirements, but reflectors were not hung properly in 7 Right. (Ex. S-13) Both of these areas were in close proximity to the powered-up equipment. Additionally, according to Hess, these men should have been waiting for him at the power center when Carver encountered them. (Tr. 274:3-15, 293:20-294:21) Because these men were found before Hess met with his crew and gave out work assignments, there is nothing in the record to suggest which area the miners intended to bolt, or that they were even aware that 7 Right needed to be bolted.

After considering all of the aggravating and mitigating factors, I find that Remington's conduct was highly negligent, and that the Secretary has proved aggravated conduct on the part of the operator that constitutes an unwarrantable failure to comply with a mandatory standard. The negligence and unwarrantable failure determinations in Citation No. 8072231 are therefore affirmed as issued.

## **Penalty**

The factors to be considered in assessing a civil monetary penalty are set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). I am required to consider six factors: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. Commission case law requires that I explain substantial deviations from the Secretary's proposed penalties using these factors. *Mize Granite Quarries*, 34 FMSHRC 1760, 1763 (Aug. 2012) While "exhaustive findings" are unnecessary, I must discuss how the 110(i) factors contributed to my penalty assessments. *Id.* (citing *Cantera Green*, 22 FMSHRC 616, 622 (May 2000)).

The parties stipulated that Remington demonstrated good faith in the abatement of the citations at issue in this proceeding, and gravity and negligence have been discussed above. As to the remaining factors, I find that in the operator's history of previous violations does not merit an increase or decrease in penalty, and that the Secretary's proposed penalty is appropriate to the size of Remington's business and will not affect the operator's ability to continue in business. In light of all of these factors, I find that the Secretary's proposed penalty of \$25,163.00 is appropriate for this citation.

## **Order No. 8072232**

Order No. 8072232 was issued under 30 U.S.C. § 814(d) (1). (Ex. S-15) The order was designated as reasonably likely to cause permanently disabling injury or illness, and the negligence was assessed as high. (Ex. S-15) The citation was designated as S&S. (Ex. S-15) The condition cited states that

The inspection of Bays Mains has revealed several hazardous conditions not listed on the pre-shift examination conducted for the day shift this date. No reflectors were observed in #8 entry out-by an unsupported cross-cut and in the #7 to #8 cross-cut only 1 reflector was provided. The 12470 high-voltage cable was not provided with a guard where persons regularly travel at the section power center. The high-voltage sled was not provided with a ground strap.

This order was issued for an alleged violation of 30 C.F.R. § 75.360(a) (1), which requires that

...a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

With regard to Citation No. 8072232, the Secretary argues that Remington violated Section 75.360(a) (1) because the inspection that was performed was inadequate. The operator failed to correct or adequately advise the oncoming foreman of three hazards on the pre-shift inspection. The evening shift foreman did not document the areas of unsupported roof in the 8 entry. Although he noted that 7 right was part bolted, he did not hang the reflectors required by the roof control plan in either area in spite of his notation to the contrary on the pre-shift report. The evening shift foreman also failed to detect and document that the highest-voltage cable in the mine was not properly guarded, and that there was no ground strap between the power center and a high voltage sled. The Secretary also points out that the mere fact that an examination report was generated does not mean that the foreman actually conducted the required area-by-area inspection. If it was in fact conducted, the inspection was inadequate because the foreman not only failed to detect and properly record three hazards, but also failed to correct them or adequately advise the oncoming foreman about them.

Remington contends that the Secretary has not established a violation of the cited regulation. The operator argues that the regulation can only be violated if the Secretary proves one of three things: 1) no pre-shift examination occurred, 2) the person who conducted the examination was not properly certified, or 3) the examination was not conducted within three hours of the beginning of the shift. According to Remington, no violation occurred because it is undisputed that a pre-shift examination was completed by a certified person within three hours of the beginning of the day shift. Moreover, the inspection form was filled out in a way that would have warned the day shift foreman about the hazard in the 8 entry at the same time he corrected the hazard in 7 right. Remington further argues that the law only requires that hazards be recorded, not remedied, and the foreman noted the unbolted roof, which was the biggest risk to miners.

A violation of 29 C.F.R. § 75.360(a) can be upheld if the inspector finds hazards that were present when the pre-shift inspection was conducted, but were not noted on the pre-shift inspection. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-16 (Jan. 1997). When interpreting this statute, Commission Judges have rejected the argument that there was no examination violation because a pre-shift examination was conducted. *Consolidation Coal Co.*, 33 FMSHRC 283, 290 (Jan. 2011) (ALJ).

The pre-shift report for the March 24, 2009 day shift indicates that the 7 entry was not bolted, that 7 right was part bolted, and that the examiner hung reflectors around those hazards.

(Ex. G-5) It also notes that no hazards were observed in the 8 entry, but that reflectors were hung somewhere in the 1, 2, 3, 4, 5, 5 left, 6, 8 or 9 entries during the pre-shift examination. (Ex. G-5) It is undisputed that when the inspector arrived at the scene, only one reflector was hung in 7 right. It is also undisputed that no reflectors were hung where 7 right had been punched through to the 8 entry, and that reflectors should have been hung there because the unsupported area extended out into the intersection. The degree of danger inherent in this condition has already been discussed at length. The pre-shift inspection not only failed to note the hazard of unbolted roof in the 8 entry, but misrepresented the state of the area by indicating no hazards existed in the 8 entry and the area was safe for travel. After evaluating all of the testimony presented, I am not persuaded that the pre-shift effectively warned Hess of the unbolted roof in the 8 entry.

Two other hazardous conditions were encountered during the MSHA inspection on March 24, 2009. The MSHA inspector issued citations for both conditions, and Remington did not contest these violations. (Tr. 262:8-18) The first such violation was a guarding violation. A segment of the mine's high-voltage cable was unguarded and hanging below the minimum required six and one-half foot height, and miners were seen walking under the unguarded cable. (Ex. S-16) The second violation was a grounding violation: there was no ground strap between the section power center and the high voltage sled. (Ex. S-17) Both citations were issued as "unlikely" to result in injury or illness but, in the event that an injury occurred, the injury would most likely be "fatal." (Ex. S-16, S-17) The Secretary put on evidence that the guarding violation could have been seen from 20 feet away, and that both of these violations were obvious and would have been seen by a pre-shift examiner.

The Secretary has proved that several violations were not noted on the pre-shift inspection. In light of this finding, Remington's argument that the law only requires violations to be recorded, not remedied, is irrelevant. It is undisputed that each of these conditions was present when the pre-shift examination was conducted. This is sufficient to uphold a violation of 29 C.F.R. § 75.360(a).

### **Gravity and Significant and Substantial**

The Secretary contends that the violation is properly classified as S&S, arguing that the foreman's failure to detect these hazards can only be explained by concluding that he did not inspect the areas where they were found, in violation of Section 75.360(a) (1). This exposed miners to discrete safety hazards in the form of electrocution and unsupported roof, and the balance of probabilities of injury from the guarding violation, the missing ground strap, and the unbolted roof make it reasonably likely that the hazards that the inadequate examination contributed to would have resulted in a permanently disabling injury. The Secretary further argues that increasing the designation from "permanently disabling" to "fatal" would be appropriate.

Remington argues that the alleged violation would not be reasonably likely to result in an injury, making an S&S designation inappropriate. The operator argues that none of the three conditions that caused the inspector to conclude that the pre-shift inspection was inadequate were likely to cause an injury.

The *Mathies* criteria set out previously apply here as well. The Secretary has established a violation of 29 C.F.R. § 75.360(a), which is a mandatory standard. Pre-shift inspections are meant to prevent hazardous conditions from developing. *Enlow Fork*, 19 FMSHRC at 15. The pre-shift examination conducted on the midnight shift had the opposite effect. It not only inaccurately represented that the unbolted roof in the 7 right cross-cut had been marked with reflectors, but also failed to alert anyone in the oncoming shift to the existence of three other dangers: unsupported roof in the 8 entry, an un-guarded, low-hanging high voltage cable, and another high-voltage cable that was missing a ground strap. In doing so, the inadequate pre-shift examination contributed to several discrete safety hazards. This satisfies the second *Mathies* requirement.

For a violation to be S&S, the hazards must be reasonably likely to result in an accident or injury. Although the guarding and grounding violations were designated as unlikely to lead to an injury, the unbolted roof was highly likely to lead to an injury. Because these hazards were not corrected or even noted, the day shift foreman and crew came onto the section with a false impression that only two hazards existed on the section, both of which had been marked with reflectors. As a result, Foreman Hess was exposed to the hazards of unsupported roof and possible electrocution as he performed his on-shift inspection. Inspectors Carver and Hendrick, who had reviewed the inadequate pre-shift report before going underground, were also exposed to the unsupported roof, as were the three day shift miners who roamed the section and powered up equipment before Hess completed his gas checks. This exposure elevates the likelihood of injury. I find that it is reasonably likely that taken together, the unguarded cable, the ungrounded sled, and the unmarked, unsupported roof would contribute to an accident or injury. Roof falls cause permanently disabling, if not fatal, injuries where miners are in the area, which was more likely to happen because the unbolted area in the 8 entry was not noted and the reflectors that miners rely on to avoid hazardous conditions were not in place. Additionally, the high voltage cables and sled, if contacted, can cause fatal electrocution. I therefore find the hazards contributed to by the inadequate pre-shift are reasonably likely to result in an accident or injury, and that serious injuries would result if an accident occurred.

I am required to evaluate whether this violation is significant and substantial in the context of continued normal mining operations. Remington argues that the cited conditions would have been corrected before any miners were exposed because the mining crew waits at the power section while the foreman checks for hazards during his on-shift inspection. I find this argument unpersuasive because men were found on the section before the on-shift inspection was completed. This indicates that on a typical shift, men would not have been waiting at the power center, but instead would have been moving around the section, exposed to the unknown and uncorrected hazards. Second, even if the entire day shift crew had been waiting at the power center, foreman Hess would still have been exposed to the hazards before they were corrected. Hess, like Carver, walked right up to the last row of bolts before noticing the unbolted area, and could easily have walked under it. (Tr. 78:18-79:3) In light of this evidence, I find that the inadequate pre-shift violation is S&S.

## **Negligence and Unwarrantable Failure**

The Secretary argues that the negligence is appropriately designated as “high” because the hazards involved were physically large and visually obvious, and the failure to detect them indicates that the foreman was not looking for hazards at all. The Secretary further argues that the inspection involved high negligence, and that the violation itself amounts to an unwarrantable failure to comply with a mandatory standard. To justify the unwarrantable failure designation, the Secretary lists two other aggravating factors in addition to the high negligence. First, the violation was extensive, exposing the miners to three major hazards. Second, the hazards posed a high degree of danger, as they were likely to lead to permanently disabling or fatal injuries. For these reasons, the Secretary argues that the citation should be designated as an unwarrantable failure to comply with a mandatory standard.

Remington argues that the negligence should not be designated as “high” because the midnight shift foreman reasonably believed that no one would be exposed to the hazard until the roof was bolted on the day shift, and he noted the hazards in the order that the foreman on the next shift would address them. The day shift foreman understood from the inspection notes that 7 right was only partially bolted. Based on these notes, the day shift foreman would have made bolting 7 right the first task and would have addressed the missing bolts in the 8 entry as part of the bolting process. Thus, according to Remington, both areas would be bolted before anyone went into the 8 entry and it was not necessary to note the unbolted area in the 8 entry on the pre-shift report. Additionally, Remington argues that the violation is not an unwarrantable failure. It was not obvious because no one could have known that the inspection was incomplete until the first inspection on the day shift, and Remington argues that the day shift inspection is a mitigating factor. Remington was not on notice that greater compliance efforts were necessary because it had received only one prior citation for a violation of Section 75.360(a) (1). Because there was no evidence that the conditions observed were likely to cause harm, Remington contends that the violation does not involve the “more than ordinary negligence” required for an unwarrantable failure designation.

The regulation I use as guidance in my negligence determinations is discussed in my findings for Citation No. 8072231, as are factors to be considered in determining whether a violation is an unwarrantable failure to comply with a mandatory standard. To uphold the Secretary’s assessment of “high” negligence, I must find that Remington “knew or should have known about the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). Upholding the unwarrantable failure designation will require me to find that the balance of the aggravating and mitigating factors merit a finding of aggravated conduct.

The pre-shift examination notes only the largest and most obvious hazard found by the inspectors: the portion of the unbolted area in 7 right. (Ex. S-5) Additionally, by marking “Ref.” as the action taken, Lester’s pre-shift report suggests that the hazard has been abated, when in fact there was still only one reflector hanging near the unbolted area in 7 right. (Ex. S-5) Lester knew or should have known about the missing reflector on the 7 entry side of the unbolted area and, at the very least, noted it in his pre-shift report.

Moreover, because he marked on the pre-shift report that 7 right was unbolted, Lester either knew or should have known about the hazard in the 8 entry. Seven right was punched through into the 8 entry. I infer that Lester was aware of this aspect of the mine's layout because his on-shift report shows that he traveled across the faces to take gas readings twice before beginning his pre-shift examination, once at midnight and once at 2:00 AM. (Ex. S-10) Because the cut had been punched through, there were two ways to approach the unbolted area. The 8 entry is a separate travelway from 7 right. Miners who were approaching the cross-cut from the 8 entry, or simply traveling down it to reach the 8 face, would be exposed to the unbolted roof. Upon observing an unbolted area in a cross-cut, a pre-shift inspector should have checked both approaches for hazards. Had Lester done this, he would have noticed the missing bolts in the intersection of 7 right and the 8 entry.

In addition to the unbolted roof in the 8 entry, two guarding violations were used as a basis for the inadequate pre-shift inspection violation. Although both of the guarding violations were assessed as "unlikely" to cause injury, Inspector Carver testified persuasively that the missing cable guard would have been readily visible if the pre-shift inspector was within 20 feet of the condition. This indicates that the foreman would have found this hazard if he had been looking for it. As such, the overlooked guarding citation is another indication that the pre-shift examination was perfunctory and inadequate.

Remington's argument that the unbolted roof in 7 right and the 8 entry would be bolted before anyone entered the area is not persuasive. Although Hess testified that 7 right is the first area he would have bolted on the day shift, a foreman is required by law to do a gas check at each of the faces in a working section before mining equipment can even be powered up. (Ex. S-14) This would require the foreman to travel down the 8 entry. Additionally, the oncoming shift foreman would have to conduct his on-shift inspection in order to find the hazards in the first place, necessitating the foreman's exposure to the unbolted roof, grounding violation, and guarding violation before any of the hazards could be corrected.<sup>9</sup> Thus, I find that the way that Lester noted the hazard is not mitigating. Moreover, a Commission ALJ has persuasively rejected the argument that an employee does not need to record a condition that he believes it will be taken care of at a later time. *Emerald Coal Res. LP*, 33 FMSHRC 489, 499 (Feb. 2011) (ALJ).

In light of all of the evidence, I find that Lester, and therefore Remington, knew or should have known about the hazards, and that there are no mitigating circumstances. The level of negligence involved in this violation is, therefore, appropriately described as "high."

In addition to the high degree of negligence, I find that several aggravating factors are present for this violation. The violative condition was extensive in that the failure to conduct an adequate pre-shift examination affected the entire section and missed three safety violations for which Remington was later cited. The hazards themselves varied from a two-foot stretch of unguarded cable to a thirty-foot long unbolted area that extended into the intersection of the 8 entry and 7 right.

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<sup>9</sup> As previously discussed, I am not persuaded that Hess was aware of the missing bolts in the 8 entry when he went underground.

This violation posed a high degree of danger. The failure to perform an adequate pre-shift examination meant that an entire crew of miners was sent into the mines with no warning about three major hazards that awaited them. All three undetected safety hazards could have caused serious injuries if they were not detected and corrected, and the unsupported roof was particularly dangerous. The failure to perform an adequate pre-shift examination was not obvious to anyone who reviewed the pre-shift paperwork. In this case, however, the fact that the violation was not obvious cuts in favor of a finding of aggravated conduct. The pre-shift paperwork, upon which the oncoming foreman and crew rely, completely failed to warn the oncoming shift of three serious hazards in the mine and misrepresented the state of one hazard that it did identify. The purpose of a pre-shift inspection is to warn the oncoming shift of hazards waiting for it, but Lester's pre-shift inspection report required the day shift foreman to find and correct the hazards himself.

The level of obviousness of the hazardous conditions themselves varied. Regardless of their varied size, however, all of the hazards should have been obvious to someone tasked with inspecting a mine section for hazards. Hendrick testified that the operator would have been able to see the missing cover if he had come within 20 feet of the guarding violation. The unbolted area was thirty feet long and extended from the 7 right cross-cut into the 8 entry, creating dangerous conditions in both 7 right and the 8 entry. The lack of reflectors near the unsupported roof was obvious and extremely dangerous. Unsupported roof is something that anyone performing an examination should look for. Failure to note or correct this condition shows a serious lack of care by the operator, especially in light of the fact that miners rely on the reflectors as signals that an area is hazardous and should not be entered. Remington took the problem one step further, however, by falsely noting on the pre-shift inspection that reflectors had been hung around the hazard as a corrective action. (Ex. S-5) It is undisputed that the midnight shift foreman did not hang any reflectors during his pre-shift examination. This misrepresents the state of the hazardous condition, suggesting that it has been properly marked to warn miners away from the hazard when it in fact has not. The failure to note the sheared-off bolts in the 8 entry compounds the problem. The misrepresentation of the state of the 8 entry alone should be enough to justify a finding that the violation underlying Order No. 8072232 amounted to aggravated conduct constituting more than ordinary negligence.

The operator was aware of this violation. The pre-shift inspection was conducted by a foreman, and the negligent acts of a foreman are imputed to the operator. Additionally, Hess indicated that during his on-shift inspection, he tended to look more closely in certain areas if he noticed certain things on the pre-shift reports. He testified that after reviewing the pre-shift report stating that 7 right was unbolted, in combination with a review of the mine map showing that 7 right had been punched through into the 8 entry, he knew that he should look carefully at that intersection to check for hazards. Hess's use of common sense does not mitigate Lester's negligence in failing to so much as note the full extent of the unbolted area on the pre-shift report, however. If anything, it is evidence that the operator knew that greater efforts were necessary for compliance with the pre-shift requirement. Although Remington had only been cited for a violation of this standard once before, Hess's testimony suggested that Remington had some idea that Lester's pre-shift reports were not completely reliable.



After the citation was issued, Remington conducted an investigation into the violation and determined that the foreman was not doing a good job on his pre-shift inspections. When considering the operator's abatement efforts for purposes of an unwarrantable failure analysis, Commission case law requires me to focus on efforts made before the citation or order was issued. *Io Coal*, 31 FMSHRC at 1356. There is no evidence of any abatement efforts prior to the violation's discovery by the inspector.

In terms of being an aggravating or mitigating factor, I find that the length of time that the violative condition existed is not relevant to this violation.

After weighing all of the aggravating and mitigating factors, I find that this violation constitutes an unwarrantable failure to comply with a mandatory standard. The foreman's failure to note several obvious violations suggests that he was not actually looking for hazards during his pre-shift inspection, which defeats the purpose performing a pre-shift inspection at all. The false information in the pre-shift report, which suggests that one of the two safety hazards that the foreman actually identified had been correctly marked with reflectors, actively misrepresents the status of the section. Taken together, these factors and tip the scales toward a finding of unwarrantable failure.

### **Penalty**

The six penalty factors listed in the penalty discussion for Citation No. 8072231, above, apply to this order as well. As previously stated, the parties stipulated that Remington demonstrated good faith in the abatement of the citations at issue in this proceeding, and gravity and negligence have been discussed above in the S&S, Negligence, and Unwarrantable Failure analysis for this order. I find that in the operator's history of previous violations does not merit an increase or decrease in penalty, and that the Secretary's proposed penalty is appropriate to the size of Remington's business and will not affect Remington's ability to continue in business. In light of all of these factors, I find that the Secretary's proposed penalty of \$5,645.00 is an appropriate penalty amount for this order.

### **VII: ORDER**

It is **ORDERED** that Citation No. 8072231 is **AFFIRMED** as issued.

It is further **ORDERED** that Order No. 8072232 is **AFFIRMED** as issued.

It is further **ORDERED** that the Respondent pay a total penalty of \$30,808.00 within 30 days of the date of this decision.<sup>10</sup>

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

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<sup>10</sup> Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O., BOX 790390, ST. LOUIS, MO 63179-0390