FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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November 13, 2013

LUDWIG EXPLOSIVES, INC., Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2011-530-RM
v.	:	Citation No. 6555529; 02/23/2011
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	Docket No. LAKE 2011-531-RM
	:	Order No. 6555528; 02/23/2011
	:	Mine: Tuscola Stone Company
	:	Mine ID 11-01657 B1N
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 2012-56-M
	:	A.C. No. 11-01657-267325 B1N
v.	:	
	:	
LUDWIG EXPLOSIVES, INC., Respondent.	:	Mine: Tuscola Stone Company
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 2012-25-M
	:	A.C. No. 11-01657-267815
v.	:	
	:	
TUSCOLA STONE COMPANY, Respondent.	:	Mine: Tuscola Stone Company
	:	

DECISION

Appearances: Nadia A. Hafeez, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor.

Daniel Foltyniewicz, *pro se* (non-attorney), Wheaton, Illinois, for Ludwig Explosives, Inc.

Alan R. Shoemaker, *pro se* (non-attorney), Tuscola, Illinois, for Tuscola Stone Company.

Before: Judge Lewis

STATEMENT OF THE CASE

These civil penalty proceedings are pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act" or "Mine Act"). This matter concerns Citation No. 6555522 issued against Respondent, Tuscola Stone Co., and Citation No. 6555529 issued against Respondent, Ludwig Explosives, pursuant to Section 104(d) of the Mine Act. A hearing was held in Springfield, Illinois, on May 6, 2013. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

ISSUES

The issues to be determined are: whether the 107(a) imminent danger order was validly issued; whether the Respondents violated 30 C.F.R. § 56.3200; whether the violations were significant and substantial in nature; and whether the violations constituted unwarrantable failures.

STIPULATIONS

The parties submitted the following joint stipulations at hearing:

1) Respondent, Tuscola Stone ("Tuscola") was, at all relevant times, the operator of the Tuscola Stone Company Mine; Mine ID: 11-01657.

2) Respondent, Ludwig Explosives ("Ludwig") was, at all relevant times, a contractor (Contractor ID B1N) performing blasting activities at the Tuscola Stone Company Mine; Mine ID: 11-01657.

3) The mine listed above is a mine, as defined in the Mine Act.

4) Tuscola and Ludwig are engaged in mining operations in the United States, and their mining operations affect interstate commerce.

5) Tuscola and Ludwig are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.

6) The Federal Mine Safety and Health Review Commission has jurisdiction over these matters under the Mine Act.

7) The citations at issue in this matter were issued on the dates indicated on each.

8) Inspector Peter Ackley, whose signature appears in block 22 of citations at issue, was acting in his official capacity and acting as an authorized representative of the United States Secretary of Labor.

9) The Secretary proposed penalties for each citation as listed on Exhibit A to each of the petitions for penalty assessment filed in these matters and those amounts are incorporated by reference herein.

10) The proposed penalties will not affect Tuscola's or Ludwig's ability to continue in business.

11) Tuscola and Ludwig demonstrated good faith in abating the violations.

12) The exhibits to be offered by the parties are stipulated to be authentic but no stipulation is made as to their relevance or as to the truth of the matters asserted therein.

SUMMARY OF THE TESTIMONY

1. Peter Ackley

Peter Ackley ("Ackley") appeared and testified on behalf of the Secretary.

Ackley had worked for three and a half years as a safety and health inspector for the Department of Labor, Mine Safety and Health Administration ("MSHA") in the metal and nonmetal division. Tr. 11.[1]

Prior to working for MSHA, Ackley had worked for a cement plant for approximately 15 years, and before that he had worked as a heavy equipment operator for 15 years. Tr. 12. At the cement plant, Ackley did not examine the highwalls of the facility's pits. Tr. 58. Ackley served in the Navy as an operating engineer with the Seabees and he had some community college credits. Tr. 12, 54. He had formal training with the Mine Academy for 26 weeks for entry level inspections. He also had journeyman training; going out with journeymen inspectors when they performed inspections. Tr. 12. His normal duties as an inspector included performing regular

[1] The hearing transcript will hereinafter be referred to as "Tr." followed by page number.

inspections, doing hazardous condition complaints, filing reports, going out to mine sites and visiting and verifying compliance with 30 C.F.R. Tr. 12.

Ackley usually inspects approximately 70 mines per year, most of which are limestone, sand, and gravel pits. Tr. 12-13.

Ackley was familiar with Respondent's mine, having performed inspections in February, 2011. He characterized the mine as "mid-range" in size. Tr. 13. As compared to many mines that had two to three employees, Tuscola Stone employed 12 employees. Tr. 14. The mine used a multiple bench methodology for mining and crushing limestone products.[2] Tr. 14.

When he performed his inspection in February, 2011, Ackley followed his normal inspection procedures: driving to the scale house or office; informing the highest ranking official that he intended to perform an inspection; going through some standard questions; and traveling through the mine with the mine operator or representative of the mine operator, and possibly miner's representatives. Tr. 14. On February 23, 2011, Ackley was accompanied by members of the management team, including Rodney Hatten, Alan Shoemaker, and foreman Jay Carter. Tr. 15. There was no miner's representative.[3] Kevin LeGrand, Ackley's field office supervisor, also accompanied him. Tr. 15, 55-56.

As a result of his inspection, Ackley issued Citation No. 6555522 to Tuscola Stone Co. on February 23, 2011, at 12:48. Tr. 15; SX-4.[4]

Ackley had issued the citation because miners were working at the base of a high wall that had loose unconsolidated material, which had not been removed before the commencement of work. Tr. 16. The rock was fractured and broken vertically and horizontally, and there were sections that were gapped from the highwall and overhanging. Tr. 16-17.

Ackley used his camera to photograph the highwall. Tr. 16. He stated that the photograph admitted as SX-5 depicted the blasters at the base of the highwall, where there was loose, unconsolidated material above them.[5] Tr. 18. Two miners, a blaster and

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[2] Multiple Bench methodology is a "method of quarrying a rock ledge in a series of successive benches or steps." Dictionary of Mining, Mineral, and Related Terms (2nd Edition).

[3] As noted *infra*, Shoemaker was not present during the entire inspection. At hearing Hatten also identified himself as a miner's representative. Tr. 230.

[4] Secretary's exhibits will hereinafter be referred to as "SX" followed by the exhibit number. Respondent, Tuscola Stone's, exhibits will hereinafter be referred to as "TSX" followed by the exhibit number. Respondent, Ludwig Explosives', exhibits will hereinafter be referred to as "LX" followed by the exhibit number.

[5] This photograph was actually taken by LeGrand in the presence of Ackley. Tr. 18.

blaster's helper, were loading shots at the base of the high wall.[6] Tr. 19. They were close enough to touch the highwall, which was located above them and had cracked vertically and horizontally and had overhang material. Tr. 19-20.

If material fell, it could kill or injure the miners standing below. Tr. 20. Ackley marked the gravity as "highly likely" because of the presence of two miners who were exposed to falling material during a time when material had actually fallen. Tr. 22. While he had not actually observed the material fall, Ackley had been advised of such by individuals at the scene, including Robert McAdam, Justin Coner, and Michael Schafer. Tr. 22.

The photograph at SX-6 accurately depicted conditions at Tuscola Stone that Ackley had observed. This included an atypical amount of coarse material laying about at the bottom of the wall. Tr. 23-24.

Ackley would not have expected to see so much material on the ground. He further would have expected to have seen the wall scaled. The materials should not have been gapped and unconsolidated. Tr. 25.

Other than a quick visual inspection, Respondent Tuscola Stone had failed to do anything to correct the conditions of the wall. Tr. 25. Given the height of the wall and the material, Respondent should have performed a thorough visual inspection and removed unsafe materials. Tr. 26. Ackley could not take actual measurements of the unconsolidated material due to safety concerns, but made estimates of such, as reported in his citation. Tr. 26; SX-4.

Ackley estimated that the highwall was approximately 40 feet in height. Tr. 28. The photograph at SX-7 depicted the whole height of the wall, the bench that miners were working on, and the ditch dug in front of the blast area. Tr. 28. Because of the ditch's location, Ackley had a concern regarding the blaster's ability to leave the area safely if material did fall. Tr. 30. He reviewed the photograph at SX-7, which depicted loose overhanging material, some of which appeared to have already fallen. The photograph also showed where miners would have been working and where tools were located, which would later need to be retrieved. Tr. 30-32.

In determining that the hazardous condition could reasonably be expected to result in fatal injuries Ackley considered the size of the rock that was loose and unconsolidated, the height of the highwall, and that there had been fatal impact injuries associated with highwalls every year in the past. Tr. 34-35.

Referring to MSHA's Rules to Live By III, "Preventing Common Mining Deaths," Ackley noted that MSHA had placed special emphasis on certain safety standard violations that needed to be avoided because of the fatalities associated with such. Tr. 35; SX-8, p. 2. MSHA had gathered statistics regarding the Rules to Live By,

[6] In quarry mining, a shot is an explosive charge in place for detonation.

and made the results available to mine operators through its website, discussions during inspections, and the circulation of brochures. Tr. 36.

Two people would have been affected by the violation because both the blaster and blaster's helper were working under the highwall, and could have been fatally injured by falling rock. Tr. 37. Ackley further explained that once material begins to loosen and fall, more than one falling rock is usually involved in an incident. Tr. 37.

The violation was the result of highly negligent conduct because Respondent, Tuscola Stone, had reason to know about the hazardous condition of the highwall. Tr. 37.

Respondent's personnel traveled in the area as part of normal mining activities and used the haul road. Tr. 37. On Monday meetings with the blasters, Respondent had been informed that the highwall was unsafe. Tr. 37-38. Despite being informed of such, the mine operator failed to take any actions to correct the hazardous highwall conditions. Tr. 37-38. Ackley concluded that the unsafe conditions had existed for "a couple of weeks, maybe longer." Tr. 38.

Ackley issued a 104(d)(1) citation because the violation was of a mandatory safety standard that was highly likely to cause serious injuries. The operator had reason to know of the condition and had failed to take corrective actions. Tr. 38-39.

Because blasters had informed the operator's foreman, Rodney Hatten, on Monday that the wall was unsafe, the operator should have conducted a thorough examination and taken corrective actions before miners would have been permitted to work underneath the highwall again. Tr. 39.

Three Ludwig employees were working in the affected area: two by the base of the highwall and one by the explosives truck. Tr. 39-40. Any miners who would be going down to the pit would have observed the condition of the highwall. Also, the person who dug the trench would have been able to see the condition. Tr. 40. Those individuals, however, would not have been exposed to the same hazard as the two blasters because they would not have been as close to the highwall. Tr. 40.

Ackley had spoken to both Shoemaker and foreman Hatten regarding the condition. Shoemaker reportedly informed Ackley that "it was common during [that] time of year during thaw and freeze cycles for material to move off the wall." Tr. 41.

Based upon "the extent of the gap and breaks in the walls, overhanging material and experience of the miners that work at Tuscola," management should have recognized the cited conditions before the date of inspection. Tr. 41. Due to the high degree of danger posed by the condition, Ackley issued a verbal imminent danger order to Hatten as he and Hatten were driving down to the blast area to observe the blasters. Tr. 42.

In order to terminate the citation, the operator scaled back the highwall, using a crane and excavator.[7] Tr. 42. In order to retrieve a hose, some boosters and blasters that had been left behind, Respondent used an unsparking shovel and a pole with a manlift to scoop the boosters and caps and take them out of the area. Tr. 43-44; SX-9.

Ackley indicated that Citation No. 6555529, which was issued to Respondent, Ludwig Explosives, was essentially identical to Citation No. 6555522 issued to Respondent, Tuscola Stone. Tr. 47.

Pursuant to MSHA's procedure handbook for writing citations under the dual compliance guide, Ackley had issued two citations, one to each Respondent, for violating §56.3200. When a cited violation involves both a mine operator and contractor, both may be cited for the unsafe condition. Tr. 47.

One of the factors considered in issuing a citation is who has responsibility for the abatement of the citation. Because Tuscola Stone knew (or should have known) of the hazardous condition and because Ludwig employed two blasters who were in the affected area and exposed to the hazardous conditions, both Respondents were cited. Tr. 47.

Under strict liability standards, Tuscola Stone had the responsibility to ensure that its mine site was safe and that any hazardous highwall condition be corrected. Even as an independent contractor, Ludwig still had the duty to ensure that its employees not be exposed to hazards. Tr. 48.

For the same reasons that he outlined in his testimony against Tuscola Stone, Ackley had marked Ludwig's violation as highly likely to result in a fatal injury. Tr. 49.

Ludwig's lead blaster also had the responsibility to examine the highwall and to make certain conditions were safe for the blasters. When doing a workplace examination he was an agent of the operator. The person in charge at the mine for the blasters, Ludwig's employee, was aware of the fact that rock had fallen from the hole. However, rather than immediately moving everybody out of the danger area, he continued loading the hole they were working on. Tr. 49-50.

During an interview with Ackley after he had been withdrawn from the area, McAdam had reported that he heard a rock fall but, nonetheless, decided to finish loading the last hole before withdrawing from the area. Tr. 50.

Ackley opined that the blasters, upon hearing a rock fall, should have immediately backed away from the situation and reevaluated it to determine a safe procedure. They should not have finished loading the hole or moving the tools or explosives out of the

[7] See also abatement description at Tr. 53: "[T]hey did a mechanical scaling of the high wall with a backhoe for the section that wasn't as tall, and for the taller sections they used a crane and they drug a track up and down, knocking loose material down from the high wall."

way once they heard something fall. Tr. 51. Without taking the time to back off and observe the wall, the blasters would not have known whether it was just one rock falling or the start of continuing material falling. Tr. 51.

Ackley had issued the imminent danger order to Hatten of Tuscola Stone because he was at the scene. Tr. 51. Ackley noted that he could have issued additional citations on the date of his inspection, including one for failure to properly examine the highwall. However, he was involved with other concerns, such as withdrawing all affected miners from the highwall and dealing with explosives left at the base of the wall. Tr. 52-53.

The same actions to abate Citation No. 6555522 were taken to abate Citation No. 6555529. Tr. 53.

Ackley reaffirmed that the lead blaster had informed him that loose rock had fallen on February 21 and 22, 2011. Tr. 61-65. Ackley had not personally witnessed the falls. Nor did he see any of the deposited material, depicted in the photograph at SX-4, fall to the ground. Tr. 65-66.

Ackley spoke with all three of Ludwig's blasters—Robert McAdam, Justin Coner, and Mike Payton—who asserted that they heard material fall on February 23, 2011. Payton heard it fall from the truck he was standing next to. The blaster and driller heard material hitting mud close to where they were working. Tr. 66.

The ditch in front of the highwall was reportedly present on Monday and was dug sometime between Monday, February 21, 2011, and the Wednesday, February 23, 2011, inspection. Tr. 67.

When working near highwalls, miners should maintain a distance from the base of the highwall of one third of its height. Such a distance, while not a specific MSHA regulation, was a "rule of thumb" recognized in the industry. Based upon the subject highwall's estimated 40-foot height, a miner would therefore need to keep a distance of approximately 15 feet. Tr. 68-69. Ackley, however, saw miners next to the highwall, with one actually touching it. Tr. 70.

The mine operator and blasters came up with a plan to safely remove materials, including explosives, at the base of the wall by using a JLG manlift. Tr. 74-76. It was safer to use an extension over a ditch with a tagged out JLG manlift to remove explosives than to allow miners to approach and remove blasting material on foot.[8] Tr. 80-81. Ackley agreed that whether individuals were using a JLG or approaching the affected

[8] *See* discussion of decision to utilize this piece of equipment at Tr. 78-80, 89, 101; *See also* McAdam written statement at SX-15, describing use of manlift with plastic shovel taped to a long pipe.

area on foot, if they determined that conditions were unsafe, they could both withdraw from the area.[9] Tr. 82.

Ackley confirmed that MSHA had a rule that a loaded hole should not be left for an extended period of time without being shot. Tr. 77.

Ackley conceded that Rules to Live By III may not have been available when the citation was issued. SX-8; Tr. 86.

On redirect examination, Ackley testified that he understood that on February 21, 2011 Ludwig had left the site of the highwall because it was unsafe to blast that day. Tr. 87. He further received no indication that measures had been taken to abate the unsafe conditions before work was begun on February 23, 2011. Tr. 88.

Before he was able to get the miners' attention, they were approximately five feet from the highwall. Tr. 91; SX-11.

Other than taking corrective actions such as scaling the highwall and removing blasting caps, MSHA rules would not have permitted any other work to continue in the affected area. Tr. 92-93; SX-12.

Ackley denied that he had utilized Rules to Live By in order to justify his negligence finding. Tr. 94. He had referred to the Rules only to show that highwalls had been a known problem in the industry and had involved fatalities in the past. Tr. 94.

On recross, Ackley confirmed that he had cited the JLG manlift for an auxiliary violation, but had not ordered such taken out of service. Tr. 95.

On cross examination by Shoemaker, Respondent Tuscola Stone's representative, Ackley confirmed that he had not physically given Tuscola Stone a copy of Citation No. 6555522 on the date of issuance. Tr. 97-98; SX-4.

Ackley did not think it necessary to note in the body of the citation that the blasters working at the highwall were control blasters, or that the lead blaster, Robert McAdam, had informed him that loose rock had fallen on February 21, 2011. Tr. 98-99.

Ackley was told that the men had left the shot on Monday, February 21, 2011, because "of heavy rain and the high wall was unsafe." Tr. 100.

[9] As discussed *infra*, the pertinent point is not that a miner using a JLG or a miner on foot could, if they perceived the condition to be unsafe, both reasonably withdraw from the affected area. The critical question, given this case's particular circumstances, is whether blasters standing close to the base of a highwall with a ditch near them could withdraw as quickly and safely as individuals who already had been evacuated from the immediate area beyond the ditch or as an individual in a manlift extending over the ditch.

Even though the JLG manlift had been cited and tagged, it was a "good" decision on the part of Tuscola Stone to have taken it out of service in taking corrective actions. Tr. 101.

Ackley agreed it was a "judgment call" that the highwall he cited contained loose material. Tr. 107. He observed Tuscola Stone employees use a bucket of an excavator to scale the highwall area that wasn't as tall and a crane with dozer track to scale taller areas. A track attached to a wrecking ball helped to remove some of the material. Tr. 108-109.

Ackley further agreed that Shoemaker had offered to scale the entire highwall as a safety measure. Tr. 111.

Shoemaker and Hatten were the two individuals from Tuscola Stone that he had interviewed during his investigation. Tr. 114. Ackley did not request that the Respondent test the affected area or prove there was no loose material before issuing his citation. Tr. 112-113. Tuscola Stone had been cited because it was responsible for the highwall and issued an unwarrantable failure because it was aware that the affected area had hazardous conditions that remained uncorrected when the blasters returned to work. Tr. 117.

On redirect examination, Ackley stated that Tuscola Stone, as owner/operator of the mine, owed the same degree of care to its employees and contractor employees to ensure their safety while they were working at the mine. Tr. 118.

Referring to his general field notes, Ackley stated that he was told that rock or rock material was seen coming off the wall on Monday, February 21, 2011.[10] Tr. 118.

Tuscola Stone had not, in fact, asked for the opportunity to demonstrate the highwall was sound. Tr. 120.

Referring to his close out conference summary at SX-13, Ackley indicated that Shoemaker had reportedly asserted that blasters are trained to recognize highwall standards and should inform him of any hazardous conditions. It was not his responsibility to check on the highwalls. Tr. 121-122.

As discussed *infra*, the factual issue of whether any of the employees of either Respondent had informed Ackley that rock had been seen falling on February 21, 2011 was hotly disputed. Ackley's field notes indicate that McAdam had reportedly informed Hatten on February 21, 2011 that "rock was falling from heavy rains on Monday." See also, LX-1, p. 18.

[10] At hearing, Shoemaker objected, on behalf of Tuscola Stone, to the admission of SX-13 on the grounds that he had, in fact, not denied his responsibility to check the walls. As noted *infra*, however Shoemaker ultimately chose not to take the witness stand under oath.

2. Michael Schafer

At hearing, Michael Schafer appeared and testified on behalf of Respondent, Ludwig Explosives.

Schafer testified that he had gone to the subject mine on February 21, 2011 to be on the shot. Tr. 125-126. However, he was telephoned by blaster, Gary Lideras, that "a waterfall [was] coming off of the top of the highwall," and that Lideras was not going to load the shot. Tr. 125-126. Schafer heard no mention of "stone, rock, mud, anything else…" Tr. 127. Schafer felt that the blasters needed to wait for water to stop draining before continuing with the shot. Tr. 127. After the water stopped draining, they would have to go back in and re-examine the holes. If they were going to shoot, they would need to do another workplace examination, check everything out, make certain that the area was safe and stable, go back in and reload the shot. Tr. 127-128.

Schafer stated that on the morning of February 23, 2011, he telephoned Hatten and was told that the water had stopped coming off the face and that it would be "okay to go." Tr. 128-129.

On cross examination, Schafer testified that water coming off a wall would not be a hazard in and of itself.[11] Tr. 129.

Schafer had not been present at Tuscola Stone on February 21 or 23, 2013, and had therefore not observed any of the cited conditions firsthand. Tr. 129-130.

On cross examination by Tuscola Stone's representative, Schafer described various other reasons why Ludwig's blasters had waited for two hours without doing a shot. These included: the need to fill the trucks' water tanks, the need to wait for trucks to clear the ramp, and the need for chips to be delivered. Tr. 131.

Schafer stated that Ludwig blasters had reported to Hatten that they wanted to reschedule the shot because of the water washing off the highwall. There was no mention of rock running off the highwall or overhangs or loose unconsolidated material. Tr. 132.

3. Robert McAdam

At hearing, Robert McAdam ("McAdam") appeared and testified on behalf of Respondent, Ludwig Explosives.

On February 21, 2011, McAdam was working as the bulk truck operator at Tuscola Stone. Gary Lideras was the lead blaster. Tr. 134. McAdam stated it was

[11] Schafer's testimony on this point was somewhat contradictory. He also stated that water cascading off the top of a highwall "could be" a hazard if workers were directly under it. Tr. 129. A "gushing wave of water coming over the face" might also prevent a shot. Tr. 131.

raining "pretty heavily" on February 21, 2011, which led Lideras and McAdam to decide to delay blasting. Tr. 134.

On February 23, 2011, the weather had changed. McAdam returned to the mine site, this time working on the lead blaster. He conducted a workplace examination. Also present were Justin Conder and Mike Payton. Tr. 134-135. A perimeter was established preventing entry into the blasting zone by unauthorized individuals. Tr. 135.

A ditch had been dug in front of the wall since February 11, 2011. Tr. 137. McAdam wore a harness to avoid falling into such if he stumbled. Tr. 138.

While loading for the shot, McAdam heard "a noise like something had fallen." Tr. 138. He had "no idea what that was," but told Conder that they were going to stop loading the shot and vacate the area.[12] They proceeded to the cab of the truck in order to notify supervisor, Mike Schafer. Tr. 140. While they were in the process of removing equipment, including a hose and detonating caps, MSHA had arrived on the scene.[13] Tr. 140.

They were "trying to probably roll it back up and get it out of the hole." Tr. 141. If the hose remained in place, it might have shot or explosive material, all of which could be destroyed, causing a waste of assets. Tr. 141. There were approximately 10 loaded holes. Tr. 141.

McAdam could not recall whether MSHA had instructed him to withdraw from the site. He informed MSHA that the hose had to be moved and the unused explosive materials had to be picked up from the remainder of the shot. Tr. 142. MSHA wanted Respondent to come up with a different plan rather than re-entering the affected area on foot. Tr. 142.

Eventually it was decided to create something to pick the materials up and bring them out of the area. Tr. 142. McAdam did not know whose idea it was. Tr. 143.

Tuscola Stone brought down a manlift and used improvised equipment to scoop up the cast primers and the detonating caps. Tr. 143.

McAdam stood in the manlift, which was extended over the ditch. Tr. 143-144. He had some concern for his own safety in utilizing such a procedure, but was not 100% certain that he expressed his concern to MSHA. Tr. 144; SX-7.

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[12] As discussed *infra*, McAdam's assertion on this point appears directly contradicted by the reported statement of Conder on June 8, 2011. Conder indicated that on February 23, 2011 he was standing two feet from the highwall, and McAdam was four to five feet from him when a chunk of rock fell between them. If Conder's written statement was an accurate depiction of events, McAdam's failure to recollect such a traumatic event strains credulity. See also SX-6.

[13] Detonating caps initiate the firing of the explosive material in the hole. Tr. 141.

After removing the supplies, McAdam, as lead blaster, still had to hook up the explosive caps. The detonators had to be hooked up so they would detonate properly. At that time they were just sitting in the hole. McAdam did not believe that MSHA had advised him of the need to shoot the holes. Tr. 145. After making sure that all was safe, McAdam fired the shot. Tr. 146.

On cross examination, McAdam indicated that he had performed a workplace examination, but not a ground control examination. Tr. 147-148.

After hearing something fall and calling Schafer about such, McAdam left the area where the hole was located and the noise was heard. Tr. 148. He remained in front of the high wall. Tr. 148. McAdam did not recall his conversation with inspector Ackley on February 23, 2011. Tr. 149.

Regarding a prior written statement that he had given on June 22, 2011, McAdam stated that he had felt unsafe on February 21, 2011, stating: "that it was raining and just the weather itself wasn't great and I'm not 100% sure, but I believe there was a waterfall coming over the top down." Tr. 150. The water in and of itself could have made conditions unsafe, creating such hazards as mud slides and debris falling off the wall.[14] Tr. 150.

Regarding his prior written statement contained at SX-15, p. 3, McAdam stated that he was excited on February 23, 2011 because he heard a noise. He did not know how close it was, but it was close enough to have frightened him. Tr. 151-152; *see also* Conder statement at SX-6.

McAdam characterized the decision to use the manlift to retrieve the blast caps as a "collective [one] between all involved parties." Tr. 152. MSHA did not require that a manlift be used. Tr. 152.

McAdam could not recall telling Inspector Ackley that he had informed Hatten on February 21, 2011 that rock had been falling due to heavy rain. Tr. 153. By "withdrawing from the area," McAdam meant to indicate getting off the shot and getting material out of the way, not moving away from the highwall. Tr. 154-155.

Upon questioning from the undersigned, McAdam stated that if the area were immediately evacuated, the following would have been abandoned: "a hose full of explosive material," unused cast primers and detonating caps, and "ten holes loaded with explosives." McAdam testified that such abandonment of explosive materials was dangerous because rock falls or thunderstorms might cause an explosion. Tr. 155-156.

[14] As discussed *infra*, if McAdam had notice on February 21, 2011, that the volume of water cascading over the highwall may have loosened material, he should not have proceeded with the shot on February 23, 2011 before making certain that Tuscola Stone had tested and scaled the wall.

Although the hose containing explosive material might also be retrieved by detaching such from the truck and pulling it back like a garden hose, this would have been a very strenuous task and, in the act of pulling, material might squirt out of the hose onto the ground. Tr. 157.

On cross examination by Tuscola Stone's representative, McAdam stated that water coming over the highwall was in itself a hazardous condition. However, he did not see any rock falls or cracking or loose rock or unconsolidated material or overhangs on February 21, 2011. Tr. 160.

Stating the corrective action by Ludwig was to leave the area on Monday and come back on Wednesday, McAdam also noted no overhangs or loose material on Wednesday. Tr. 162. He did not notify anybody at Tuscola after he heard the noise on February 23, 2011 and stopped the shot. Tr. 162-164.

On recross examination, McAdam stated that he "probably" would not have worked loading shots beneath the area of highwall depicted in the photograph in SX-5; but, from his vantage point he had not seen the cracks depicted in the photograph. Tr. 165.

4. Michael Payton

At hearing, Michael Payton appeared and testified on behalf of Respondent, Ludwig Explosives.

Payton was a member of the blasting team on February 23, 2011. Although he was not present during the attempted shot on February 21, 2011, he was aware that it had been cancelled. Tr. 172.

On February 23, 2011, a workplace exam was conducted involving the shot, the highwall, and the face immediately in front of the blast team. It was concluded that the workplace was safe. Tr. 174.

McAdam put on a safety harness and proceeded to go onto the shot; Payton went to the opposite side behind the truck. Tr. 174. Payton's duties included spotting the highwall for any dangers and being in control of the truck. Tr. 174-175.

Payton witnessed a rock off to his left, to the west.[15] Tr. 175. As soon as this happened, Payton warned Conder and Hatten of the danger, and that was when the shot was called off. Tr. 175.

[15] The undersigned again notes the differing descriptions of the rock fall between McAdam, Conder, and Payton, which, among other interpretations, raises the possibility that there were multiple rock falls on February 23, 2011. This confirms the high degree of danger that was posed by the unscaled highwall.

Payton found it difficult to determine the distance the rock fell from the blasting because of his position. Tr. 176. The blasting team spoke among themselves and decided to call the shot off. Tr. 176.

Payton asserted that federal and state regulations required that the team not leave a loaded shot. The team planned to clean up the site and detonate. They placed cones up to warn individuals not to enter the blast zone. Tr. 177-178. Hatten and the two MSHA inspectors, however, went beyond the cones. When they approached, they were told that the shot had already been called and the team was trying to formulate an action plan to get material off of the shot and to get the shot detonated. Tr. 179. The inspectors indicated that they had seen a rock fall, but Payton was uncertain if this was the same rock he had seen falling. Tr. 179.

McAdam and Conder came down off the shot, McAdam first having to get his harness. Tr. 179-180. McAdam explained to the MSHA inspectors that material had to be removed. Tr. 180. Payton believed it was Kevin LeGrand, Ackley's supervisor, who decided that a manlift should be used.[16] Tr. 181. LeGrand was aware that the machine had been cited and tagged out. Tr. 182. Payton heard McAdam commenting that he was uncomfortable using the manlift approach. Tr. 184-185.

On cross examination, Payton indicated that he had worked at Tuscola Mine "quite a few" times. Tr. 190. He had seen water come over the highwall previously but had not seen rocks fall off before the incident in question. Tr. 190.

As to his prior written statement at SX-17, Payton explained that he was actually talking about shots having been called off in the past due to *water* falling over the highwall, *not rocks*.[17] Tr. 192-193. Payton, however conceded that he had "probably" seen rock come off the highwall at Tuscola Stone.[18] Tr. 193-194.

Payton stated that it was "absolutely" not Ludwig's decision to use a manlift for retrieval of material, that Kevin LeGrand had decided this was the safest way. However, he was unsure whether McAdam had participated in the decision. Tr. 198.

On cross examination by Tuscola Stone's representative, Payton stated that he had been shooting at the mine site for four years. Tr. 202. Tuscola Stone had always been cooperative regarding operational or safety issues. Tr. 203.

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[16] Ackley noted, *infra*, that it was in fact Hatten who proposed use of the manlift.

[17] Payton wrote in his June 8, 2011 written statement: "While working at Tuscola Stone Company I have observed rock falling from the highwall. At that point we refused to load the shot and notified Rodney Hatten the foreman. *This has happened more than one time. I cannot give you the exact number.* SX-17, p.2 (emphasis added).

[18] Payton's equivocations on this point made him a less than fully credible historian.

On recross examination by the Secretary, Payton confirmed that Ludwig had signed into the mine at 11:00 a.m. on February 23, 2011, had performed a visual examination, and at 12:48, the citation had been issued. SX-4. During this time period there had been a change in conditions in that the rock had fallen; however, Payton could not determine what caused the rock to fall. He believed it was "an act of God." Tr. 205.

5. Justin Conder

At the hearing, Justin Conder appeared and testified on behalf of the Respondent, Ludwig Explosives.

Conder was not at Tuscola Stone on February 21, 2011. On February 23, 2011, he was part of the three-man blasting team, together with Michael Payton and Rob McAdam. Tr. 210.

After Payton stated that a rock had fallen, McAdam began to get the hose out of the hole. Conder waited for McAdam to get out of the way. Tr. 211. Referring to the photograph contained in SX-11, Conder stated that the picture depicted him and McAdam as they were trying to pull the hose out. McAdam, as lead blaster, determined that this was the proper corrective action. Tr. 212-213. Conder may have been bracing himself against the quarry wall so McAdam could get out of the way. Tr. 214.

On cross examination by the Secretary, Conder was asked about statements he had given in a June 8, 2011 interview. SX-19. In his written statement, Conder reported that he was about four to five feet from McAdam when a chunk fell off between them. SX-19, p.2.

Conder testified that he did not remember stating such. Tr. 217.

6. Rodney Hatten

At the hearing, Rodney Hatten appeared and testified on behalf of the Respondent, Tuscola Stone. Hatten had been a foreman at Tuscola Stone for two years and had worked at the mine for 22 years. Tr. 223.

As foreman, Hatten had responsibility for the pit and quarry, and Jay Carter had responsibility for the upper plant. Tr. 224.

On February 21, 2011, Hatten had been contacted by McAdam who informed him that the shot could not go forward due to water coming off the highwall. Tr. 225. Hatten denied that McAdam told him anything about rocks falling off at the face, loose unconsolidated material, cracks, or overhangs. Tr. 226.

On Tuesday, February 22, 2011, Hatten did not observe any hazardous conditions associated with the north face highwall. Tr. 228.

As a loader operator, Hatten had calculated the size of the loose rock described in the citations as being approximately 2.34 tons in weight and deemed it highly unlikely that a chunk that size would fall. Tr. 228-229.

Hatten had been called by Shoemaker on February 23, 2011, to accompany the MSHA inspectors during inspection. Hatten was acting both as a foreman and miner's representative. Tr. 229-230. Shoemaker had other appointments and was not present for the entire inspection. Tr. 230.

When Hatten first met the inspectors, he was not informed of any citation or imminent danger order. Tr. 233. Hatten overheard the inspectors talking to the blasters about loose rock and where the shot was going to be. Tr. 234. The inspectors did not want the blasters to go to where the shot would be because of consolidation. Tr. 235.

Hatten asked if he could bring a manlift, and inspector LeGrand stated that it could be an option.[19] Tr. 235-236. LeGrand did not demand such. Tr. 235-236.

Hatten thought that, given the ditch in front of the shot area, a manlift with a pole could be used to retrieve materials. Tr. 236. Despite the manlift having been tagged out, LeGrand permitted its usage. Tr. 236. Another Tuscola Stone Company employee named Jared actually operated the manlift while a Ludwig Explosives blaster used the pole. Tr. 236-237. Hatten still, at this point, had not been advised that a citation or imminent danger order were going to be issued. Tr. 238. Hatten had not received any reports about the highwall on Tuesday or Wednesday. Tr. 240.

On cross-examination by the Secretary, Hatten stated that he had not conducted a ground control examination on February 23, 2011. Tr. 242.

Referring to his prior June 11, 2011 written statement, Hatten agreed that he visually observed rock fall from the highwalls "during freezing and thawing times." Tr. 244; SX-20. He went on to explain that anytime in the wintertime in Illinois (including February) there could be freezing and thawing. Tr. 245.

Noting that a crane would be necessary to test a highwall 40 feet high for loose material, Hatten testified that the wall had not been tested for loose material prior to the citation issuance in 2011. Tr. 245.

Since Shoemaker had become assistant manager, various increased safety measures had been initiated, including the furnishing of safety vests, the erection of berms around highwalls, highwall warning signs, and the purchase of a manlift. Tr. 248.

[19] Again, Hatten's confirmation that it was his idea and not a collective decision or MSHA decision to utilize a manlift appears to contradict various other witnesses for Respondents.

7. Alan Shoemaker

After consideration, Shoemaker decided not to take the stand and testify on Tuscola Stone's behalf.[20] Tr. 252-253.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's 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)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Basic Legal Principles

The citations at issue in this case were both marked as "Highly Likely," "Fatal," "High" negligence, with 2 persons affected, Significant and Substantial (S&S), and "unwarrantable failure." S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an

[20] The undersigned draws no adverse inference from Shoemaker's decision not to testify.

injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). 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. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: "We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

Further, "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." and "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S" *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc*., 18 FMSHRC 853, 857 (June 1996)). The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

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 the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*. By definition, **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. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. §100.3(d). The categories and definitions of the negligence criterion are as follows:

> **No negligence** is where the operator exercised diligence and could not have known of the violative condition or practice;
> **Low negligence** is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;
> **Moderate negligence** is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;

> **High negligence** is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and **Reckless disregard** is where the operator displayed conduct which exhibits the absence of the slightest degree of care.
>
> 30 C.F.R. §100.3(d).

The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with…mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include 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 were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed 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); *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). 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.

a) <u>The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that §56.3200 was Violated as Cited in Citation No. 6555522</u>

On February 23, 2011, Inspector Peter Ackley issued Citation No. 6555522 against Respondent, Tuscola Stone Company, for a 104(d)(1) violation of 30 C.F.R. § 56.3200. This citation, in pertinent part, under Section 8, "Condition or Practice," states as follows:

> Two blasters were filling drill holes with explosives approximately two feet from the base of the north highwall. The highwall was about 40 feet high and composed of loose unconsolidated material. There was a section of rock (about 1.5 feet thick, 4 foot high, and 5 foot long) with an 8 inch gap from the highwall above where the blasters were working. Loose rock had fallen Monday (02/21/2011) when it was raining and while drill holes were being loaded today. This condition exposed the blaster to fatal impact or crushing injuries from falling rock. The Lead Blaster had informed the Foreman on Monday (02/21/2011) of the unsafe condition of the wall. The Foreman engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that the high wall

had unconsolidated material and failed to take any corrective action to correct the unsafe condition of the wall. This violation is an unwarrantable failure to comply with a mandatory standard. This violation is one of the factors cited in imminent danger order No. 6555521[21]dated 02/23/2011. Therefore, no abatement time was set.

SX-4.

Section 56.3200 provides as follows:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. §56.3200.

With respect to Citation No. 6555522, the Secretary presented sufficiently probative evidence of hazardous conditions associated with the north highwall at Respondent's Tuscola Stone Company's subject mine, that a violation of §56.3200 was clearly established.

At the hearing, Inspector Ackley testified that he had performed inspections of the subject mine in February, 2011. Tr. 13-14. On February 23, 2011, while performing a regular inspection, he observed two miners working at the base of a 40 foot highwall, directly beneath loose, unconsolidated rock. Tr. 16-21. Ackley credibly described the area above the miners as being fractured, broken vertically and horizontally, with overhanging material. Tr. 16-22, 32, 59-60; SX-5, 6, 7, 9, 11.

Given the obvious and extensive nature of the hazardous highwall conditions which reasonably could be expected to result in death or serious physical injury, Inspector Ackley issued a verbal 107(a) imminent danger order to mine foreman Rodney Hatten. Tr. 42, 51, 52; *see also* Order No. 6555528. This Court upholds the issuance of said order and specifically finds that a reasonably prudent person, who, like Inspector Ackley, was familiar with the mining industry and the protective purpose of §56.3200, would have been warranted in ordering immediate evaluation of the cited area.[22]

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[21] The records do not indicate that Tuscola initially contested imminent danger Order No. 6555521.

[22] Section 3(j) of the Mine Act defines "imminent danger" 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). To support a finding of imminent danger, an inspector must conclude that "the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co*., 13 FMSHRC 1617, 1622 (Oct.

It is undisputed that there had been no corrective measures undertaken to remove any loose rock prior to the initiation of the activities described herein. Given Inspector Ackley's own observations and the inculpatory statements of several of Respondent's witnesses, discussed further below, there is more than sufficient evidence to establish that §56.3200 had been violated. In reaching this conclusion, the undersigned has considered that an inspector's testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and, indeed, its S&S nature. *See Harland Cumberland Coal Co*., 20 FMSHRC 1275, 1278-1279 (Dec. 1998). The undersigned also further notes that the "preponderance" standard only requires that the trier-of-fact conclude the "existence of a fact is more probable that its non-existence." *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). The Secretary has convincingly carried its burden in the case *sub judice*.

b) Respondent, Tuscola Stone's, Violation of §56.3200 was Significant and Substantial in Nature

Taking into consideration the record *in toto* and applying pertinent case law, the undersigned finds that Tuscola Stone Company's violation of §56.3200 was Significant and Substantial in nature.

The first element of *Mathies*—the underlying violation of a mandatory safety standard—has been clearly established.

As to the second element of *Mathies*—a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation—has also been clearly established by the record. Loose material falling from a 40-foot highwall onto miners is inarguably a discrete safety hazard. Inspector Ackley's observations and the statements of Respondent's own witnesses that individuals were standing at the base of the north highwall and directly exposed to this hazard, established this second element.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is usually the most litigated prong. The Commission has made it clear that the "test under the third element is whether there is a

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1991). In reviewing an inspector's finding of imminent danger, the Commission must support the inspector's determination "unless there is evidence that he has abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) (quoting *Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App*., 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted)). The Commission has held that an "abuse of discretion" is found when "there is *no evidence* to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co*., 18 FMSHRC 565, 569 (Apr. 1996) (Citations omitted and emphasis added) (affirming the judge's determination that the inspector did not abuse his discretion when he issued an order extending abatement time).

reasonable likelihood that the hazard contributed to by the violation…will cause injury." *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); s*ee also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not "prove a reasonably likelihood that the violation itself will cause injury…" *Id*. Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id*. (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*,18 FMSHRC 853, 857 (June 1996)).

The undersigned is persuaded by the Secretary's argument that there was a reasonable likelihood that the hazard contributed to would result in injury. *See, inter alia,* Secretary's Brief at 16. The testimony presented at hearing established that there had been recent rainfalls, causing water to cascade over the highwall. Tr. 83, 85, 100, 149-150. It can be reasonably inferred that these large volumes of water had the potential to further loosen already displaced rock, increasing the probability of a rock fall. Although Inspector Ackley had not himself observe actual rock falls, he had been informed of such by Robert McAdam, Justin Conder, and Michael Schafer. Tr. 22; *see also* discussion of these witnesses' testimony and statement *infra*.

Ackley was also informed by Alan Shoemaker that it was common for freeze and thaw cycles during the time of year when Respondent was cited, during which material would move off the wall. Tr. 41.

The fact that a rock or rocks did in fact fall on February 23, 2011 near Ludwig employees convincingly establishes that there was a reasonable likelihood that the hazard contributed to would result in injury. Tr. 151, 210-212. Thus, the third element of *Mathies* is clearly satisfied.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there is a reasonably likelihood that the injury in question will be of a reasonably serious nature. Considering, *inter alia,* the 40-foot height of the north highwall and the size of some of the rock described in Citation No. 6555522—1.5 feet thick, 4 feet high, and 5 feet long—there was clearly a reasonably likelihood of fatal impact injury. Tr. 34-35, 37; see also SX-4.

In reaching these findings, the undersigned has also considered the testimony of Rodney Hatten. The undersigned found credible Hatten's testimony that he had visually inspected the highwall on February 23, 2011. However, for reasons discussed *infra*, the undersigned finds that such a visual inspection—without testing and scaling—was manifestly inadequate. The ALJ also noted Hatten's prior written statement that he had previously witnessed rock falls from highwalls during "freezing and thawing times" in the past. Such admission further supports that Tuscola Stone should have known of the existence of a hazardous condition. *See also* Tr. 244; SX-20.

Hatten's testimony that a crane would be necessary to test a 40-foot highwall for loose material and that no such testing had been performed prior to February 23, 2011 was also indicative that Respondent failed to take reasonable measures both in the past and instantly to ensure safe ground conditions. Tr. 244-245.

Likewise, the undersigned accepts that Hatten had himself decided to use a manlift in a good faith effort to protect Ludwig's employees in attempting to retrieve detonation materials. However, the undersigned again notes that Hatten's testimony raises questions about the accuracy of Ludwig's employees' recollections, again casting doubt on their overall credibility.

Although the undersigned found Shoemaker to be sincere in his belief that his company had fulfilled its §56.3200 duties, the undersigned had no actual in-court testimony to assess because of Shoemaker's decision not to take the witness stand. Tr. 252-253.

The undersigned therefore finds that Inspector Ackley's S&S designation was justified.

In reaching this finding the undersigned specifically rejects the argument advanced by Tuscola Stone's representative and general manager, Alan Shoemaker. In his *pro se* brief, Shoemaker suggests that the fact that Tuscola Stone's "employees were not directly involved at the time [that] the order and citations were issued," relieves Tuscola Stone of responsibility under the Mine Act. Resp. Brief at 1 . However, given Tuscola Stone's overall responsibility to reasonably ensure that its highwall was free of hazards, the fact that Tuscola Stone's employees were not present at the scene when the instant citation and orders were issued does not exculpate Tuscola Stone from its dereliction under §56.3200.[23]

Given, *inter alia*, reports of rock falls in the past, the fact that the shot had to be postponed on February 21, 2011, due to large volumes of water cascading over the highwall and the potential for a freeze and thaw cycle which could further loosen unconsolidated material, Tuscola Stone's duties under §56.3200 would have required thorough inspection, testing, and scaling of the highwall prior to the commencement of detonation activities on February 23, 2011, as Inspector Ackley properly opined. See, *inter alia*, Tr. 25-26, 39. Given the high degree of danger posed by loose overhang rock on a 40-foot highwall, a simple visual inspection of such was manifestly inadequate, falling far below the high standard of care demanded of Respondent.

The undersigned found Shoemaker to be a forthright individual who no doubt honestly believes that his company had taken adequate measures to ensure miners' safety at the highwall. However, mine operators under the Act are held strictly liable for cited conditions in activities from which they have supervisory responsibility. *Ames*

[23] See also the case law and arguments of Secretary, which are on point and the undersigned fully agrees with at Secretary's Brief, 8-9.

Construction, Inc., 33 FMSHRC 1807 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). Tuscola Stone Company had overall responsibility to ensure that any hazardous highwall conditions were discovered and corrected before work was permitted in the affected area. Regardless of Shoemaker's good-faith beliefs, Respondent was derelict in fulfilling this responsibility.

c) Tuscola Stone's Conduct was Highly Negligent in Nature and Constituted Unwarrantable Failure on Respondent's Part

In *Sec. of Labor v. Manalapan, Inc.*, 35 FMSHRC 289 (Feb. 2013), the Commission reviewed the factors to be evaluated in determining 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); *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, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Id. at 5.

Considering the *Manalapan* factors *seriatim*, the undersigned finds that the violative condition was obvious and extensive and had existed for a significant period of time.[24] The violation clearly posed a high degree of danger, justifying the issuance of an

[24] See also Ackley testimony at Tr. 38, estimating the violative condition had existed for "at least…a couple of weeks, maybe longer."

immediate 107(a) imminent danger order. The undersigned notes that the commission in *Manalapan* reaffirmed that the factor of dangerousness may be so severe that by itself it warrants a finding of unwarrantable failure. *Manalapan*, at 294.

Given the fatal nature of impact injuries by the hazardous conditions at Respondent's 40-foot highwall, the undersigned finds that this aggravating factor of dangerousness outweighs any mitigating circumstance. Further, as discussed *infra*, both Respondents knew *or should have known* of the existence of the conditions. The operator did make good faith efforts to abate the condition, which although not justifying a non-unwarrantable failure finding, does in part merit a reduction in the proposed civil penalty.

The undersigned therefore finds that Respondent's conduct did constitute an unwarrantable failure.

d) The 107(a) imminent danger order was validly issued; Respondent, Ludwig Explosives, Also Violated §56.3200; This Violation also was S&S in Nature and Constitute an Unwarrantable Failure

The undersigned incorporates the above rationale as to the violation, S&S nature, and unwarrantable conduct of Respondent, Tuscola Stone, in further finding the dual responsibility of Respondent, Ludwig Explosives. The undersigned further fully adopts the arguments advanced by the Secretary that Ludwig Explosives violated mandatory safety standard §56.3200, that said violation was significant and substantial and reasonably likely to cause fatal injuries to two persons, and that said conduct constituted an unwarrantable failure. Sec. Post-Hearing Brief, 18-20. Furthermore, the imminent danger order was validly issued.

In making the instant findings, the undersigned has carefully considered the testimony of all witnesses, including an assessment of their credibility.

The undersigned found the testimony of Secretary's witness, Inspector Ackley, to be honest and forthright, with no indication of animus or untoward motivation.

However, the undersigned found the testimony of Respondent, Tuscola Stone's, witnesses to be less than fully credible. Respondent's witnesses gave testimony which was often both inherently contradictory and also inconsistent with their past unwritten statements. The undersigned suspects that Respondent's witnesses were attempting to minimize the dangerous and unsafe character of the cited condition and their knowledge regarding such.[25]

Michael Payton's testimony exemplifies such. On cross examination, Payton painfully equivocated in admitting that he had witnessed rock falls in the past from

[25] This Court believes that the possibility that an employee is "sugar-coating" his descriptions of unsafe conditions in a misguided attempt to protect his employer's interests is unfortunately a necessary consideration in assessing credibility.

Tuscola Stone's highwall. Tr. 188-189. His vague descriptions of the rock fall that he had witnessed on February 23, 2011, despite his close proximity to the scene simply did not ring true.

Michael Schafer's testimony was also equivocal and contradictory. As noted *supra*, Schafer appeared to vacillate between the position that water cascading over the highwall was a hazard and was also not a hazard. Tr. 125-131. In any case, Schafer was not personally present at the scene on February 21, 2011 or February 23, 2011, his testimony has little probative weight.

The undersigned also found the testimony of Robert McAdam and Justin Conder to be suspect. In a prior June 8, 2011 written statement, Conder averred that on June 23, 2011, a chunk of rock fell between himself and McAdam, who was standing only four to five feet away from Conder. SX-16. Yet at hearing, Conder claimed he could not remember making such a statement. Tr. 216. As trier-of-fact, this Court questions whether an individual who narrowly escaped serious injury and possible death could not recollect such an incident. Further, McAdam's assertions that he could not determine the distance of the rock fall were also highly problematic, casting doubt upon his entire testimony.

As trier-of-fact, the undersigned should attempt to resolve inconsistencies in testimony without concluding that witnesses are lying. However, in the instant case, the most reasonable benign explanation for the differing and contradictory nature of the witnesses' accounts is that there *were in fact different multiple rock falls on February 23, 2011*. This explanation is just as detrimental for Respondent's cause, inarguably confirming the high degree of danger posed by the unscaled highwall.

The undersigned essentially concurs with the arguments advanced by the Secretary as to Ludwig Explosives' negligence. Ludwig's employees were well aware that large volumes of water had been cascading over the highwall on February 21, 2011, causing the shot to be cancelled. The undersigned further finds that Ludwig Explosives' employee knew of the freeze and thaw cycles in winter time in Illinois.

The heavy downpour on February 21, 2011, coupled with the succeeding drying out cycle, posed a danger that debris and/or loosened material might be created that could fall from the highwall onto miners working below on February 23, 2011. That a rock or rocks did fall on February 23, 2011 confirms that such a hazard was reasonably foreseeable. The undersigned specifically rejects any suggestion by Respondent that the rock fall on February 23, 2011 was merely a coincidence or unforeseeable "act of God."[26]

Given such, Ludwig Explosives personnel should have known that a hazard of falling rock was existent subsequent to the February 21, 2011 downpour.

[26] Payton's description of such, at Tr. 205, reminds the undersigned of the unenlightened pre-Mine Act days when the beknighted explanation for all mining catastrophes was "It's God's will."

Just as Tuscola Stone was derelict in failing to inspect, test, and scale the highwall on February 23, 2011 before individuals would be permitted to work in the affected area, Ludwig was equally derelict in failing to wait for such corrective actions to be completed before proceeding to engage in its shot activities. Further, compounding its negligence was Ludwig's blasting team's decision not to immediately evacuate the affected area after a rock or rocks had fallen.

As a finding of fact, the undersigned rejects Ludwig's argument and testimony suggesting it had not entered the affected area and was in the process of evacuating such when sighted by Inspector Ackley. Instead, either because the blasting team did not wish to waste assets and/or felt the need to immediately detonate the shot, it improperly entered and remained in the affected area. Any prudent person, familiar with the mining industry, would not have entered the affected area, much less remained after a rock fall. The prudent course would have been to immediately evacuate to a safe distance from the affected area for a reasonable time and assess overall conditions before proceeding with any further work activity.

e) Penalty

In a recent decision, this Court opined that whether the Secretary proposes a regularly or specially assessed penalty the ultimate determination of the penalty amount is up to the Commission. *The American Coal Co*., LAKE 2011-701 *et al*, *slip op.*, at 33 (September 20, 2013) (ALJ Lewis). This Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The undersigned has been further guided by Commission case law instructing how §110(i) criteria should be evaluated. Inter alia, the undersigned notes: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

The undersigned in assessing the §820(i) penalty considerations, finds that both respondents demonstrated good faith in achieving rapid compliance after notification of the violation and that neither Respondent appears to be a significant recidivist in terms of

previous violations. The undersigned therefore finds that a reduction in the penalty is warranted for Ludwig Explosives from $20,900.00 to $15,900.00, and for Tuscola Stone from $11,900.00 to $9,000.00.

ORDER

It is hereby **ORDERED** that Imminent Danger Order No. 6555528 is hereby **AFFIRMED.**

It is hereby **ORDERED** that Citation Nos. 6555522 (Tuscola Stone) and 6555529 (Ludwig Explosives) are **AFFIRMED** as modified herein.

Respondent, Ludwig Explosives is **ORDERED** to pay civil penalties in the total amount of $15,900.00 within 30 days of the date of this decision.

Respondent, Tuscola Stone is **ORDERED** to pay civil penalties in the total amount of $9,000.00 within 30 days of the date of this decision.[27]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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[27] Payments should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390