FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-7240
FAX: (412) 928-8689

December 10, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2010-1144
Petitioner,	:	A.C. No. 15-17110-215738-01 2AC
	:	
v.	:	Docket No. KENT 2010-1145
	:	A.C. No. 15-17110-215738-02 2AC
A&R TRUCKING,	:	
Respondent.	:	Mine: Calvary Mine

DECISION

Appearances: LaTasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor

Ned Pillersdorf, Esq., for A&R Trucking, Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These civil penalty proceedings are conducted 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. 8217796 and Order No. 8217797 issued against Respondent, A&R Trucking, pursuant to Section 104(d) of the Mine Act. A hearing was held in Pikeville, Kentucky, on July 9, 2013. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

STIPULATIONS

At hearing, the parties entered the following joint stipulations into the record:

1) A&R Trucking is subject to the Federal Mine Safety and Health Act of 1977.
2) A&R Trucking has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3) A&R Trucking is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.

4) A&R Trucking's Mine I.D./Contractor Number is 2AC. (The original stipulation listed the incorrect Mine ID for A&R Trucking as 15-17110.)

JX-1.[1]

SUMMARY OF THE TESTIMONY AND RECORD

In 2009, Patricia Fouts owned three trucks, which would haul coal from underground mines in Knott Country to the tipples.[2] Tr. 44-45. The distances hauled ranged from one and half miles to four miles. Tr. 45.

Inspector Samuel Hill was at the Calvary Mine on December 15, 2009 to inspect the trucks as part of a general inspection.[3] Tr. 23.[4] As part of the inspection, Hill did a visual inspection for safety defects, as well as checking driver training. Tr. 23. As a result of the inspection, Hill issued Citation No. 8217796, and served it to Randy Fouts and Ronnie Miller of A&R Trucking. Tr. 19; SX-1. Hill also issued Order No. 8217797 to Randy Fouts. Tr. 20; SX-2.

Citation No. 8217796

On December 15, 2009, Hill found the following conditions or hazards related to the truck that placed miners in danger: the steering box and hydraulic hose were leaking oil, which could contribute to a loss of control of the vehicle; the left steering tire was worn smooth, which could contribute to a blowout or a loss of steering control and accident; an audible air leak in the rear of the truck, which could impact and compromise the brakes; the front rear tandem differential was pouring oil, which could cause a fire; the exhaust manifold was leaking and allowing smoke into the cab, which was adversely affecting the driver's eyes; and there was oil

[1] Joint exhibits will hereinafter be referred to as "JX" followed by the exhibit number. Secretary's exhibits will hereinafter be referred to as "SX" followed by the exhibit number. Respondent's exhibits will hereinafter be referred to as "RX" followed by the exhibit number.

[2] Patricia Fouts does business as A&R Trucking. Tr. 43. In addition to running A&R Trucking, she also worked in the Administrative Office of the Court for the Circuit Clerk's Office of Knott County. Tr. 54-55. At the time of hearing, she had been in the trucking business for 24 years. Tr. 55.

[3] Samuel Hill worked as an inspector for MSHA in December 2009 when the instant citations were issued. Tr. 16. He has a mining tech degree, as well as an associate's degree from the University of Kentucky. Tr. 16-17. Hill graduated as an inspector from the Mine Academy at Beckley in 1995, and at the time of hearing had worked for over 18 years as a coal mine inspector. Tr. 17. He had also held positions in private industry as an engineer, foreman, and superintendent of both surface and underground mines. Tr. 17. In total, Hill had approximately 39 years of experience in mining. Tr. 18.

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

and diesel fuel pouring into the turbo on the motor. Tr. 24-25. As a result of these conditions, Hill issued Citation No. 8217796 for violation of 30 C.F.R. § 77.404(a). Tr. 25.

In 2009, the Mack coal truck at issue was 22 years old and the normal life of a coal truck is 30-40 years.[5] Tr. 46. Though Randy Fouts was familiar with the cited truck, he was not driving it when it was cited. Tr. 48. At the time that the truck was cited, Ronnie Miller was the driver. Tr. 47. However, Randy Fouts was responsible for fixing the trucks and ensuring that they were safe. Tr. 51-52. Randy Fouts testified that the truck was not in a dangerous condition and still had good brakes. Tr. 47. It was hauling three days per week, eight to ten hours per day. Tr. 47.

Randy Fouts admitted that the truck had an oil leak, but stated that it would not have caused a fire. Tr. 48-49. He testified that it was common for large coal trucks to have oil leaks; however Hill testified that hydraulic leaks in coal trucks were uncommon. Tr. 34-35, 49. Randy Fouts disputed Hill's assessment of a fuel leak, and said that the truck was leaking water. Tr. 48.

Fouts also admitted that the passenger side window was cracked, but said that this condition was not dangerous. Tr. 49. The headlight had gone out the morning of the inspection, and Fouts did not know about it. Tr. 49. He testified that he had fixed the steering arm and also performed other repairs to the truck. Tr. 49-51.

Patricia Fouts denied having many reports of problems with the truck, but stated that she was not involved in day-to-day operation or maintenance of the trucks. Tr. 55-56. Her husband, Randy Fouts, was responsible for the day-to-day operations. Tr. 60. She testified that she did the paperwork at the company, which includes MSHA citations. Tr. 61-62.

Inspector Hill noted the gravity as "highly likely" because he believed that the conditions could result in a loss of control to the driver. Tr. 26. Adding to the dangerous conditions, was the fact that the vehicle was being operated on long winding grades, on a narrow road that was one lane at points, with a steep outslope, and in wintertime conditions. Tr. 26. He marked the injury or illness as "fatal" because of the steepness of the outslopes and the possibility of the vehicle going over the mountain or hitting another vehicle. Tr. 26-27. He marked the citation as "Significant and Substantial" (S&S) because he determined that the conditions had a likelihood of leading to a serious injury to a driver. Tr. 27.

Hill originally marked the citation as "high" negligence, but later modified it to "reckless disregard." Tr. 27. He made this modification after speaking to the vehicle driver and Randy Fouts and concluding that the conditions had been allowed to exist for at least one week. Tr. 27-28. Randy Fouts was responsible for the upkeep of the vehicle and directed the workforce on a daily basis. Tr. 34. Randy Fouts had worked on the truck on the day before the citation was issued, and the driver indicated that some of the issues had existed for over a week. Tr. 28. Furthermore, there had recently been two fires in the truck, and the truck was cited for an out of service fire extinguisher. Tr. 28.

[5] Randy Fouts has been in the coal trucking business for 25 years, and has been driving coal trucks for 20 years. Tr. 45-46. He is married to Patricia Fouts. Tr. 43.

Hill determined that the violation was an unwarrantable failure to comply with a mandatory safety standard because the conditions would be obvious to the casual observer. Tr. 28. These conditions included visible and audible leaks, as well as substantial oil puddling on the ground beneath the truck. Tr. 28. Additionally, the worn chain on the steering wheel was obvious. Tr. 28-29. Hill testified that these hazards caused a high degree of danger. Tr. 29.

Hill testified that the driver would know of the conditions he cited. Tr. 29. Randy Fouts told him that this type of truck was prone to such problems. Tr. 29. Hill described A&R Trucking as having a "long history" of such violations, and considered the conduct aggravated. Tr. 30.

Order No. 8217797

Inspector Hill issued Order No. 8217797 under §104(d)(1) of the Act for failure to conduct a pre-operational check on the unit and to repair the defects obvious to a casual observer. Tr. 30-31; SX-2. He originally wrote the Order pursuant to 30 C.F.R. § 77.1606(a), but changed it to §1606(c). Tr. 31.

Hill issued Order No. 8217797 for the same conditions on the Mack truck that led him to issue Citation No. 8217796. He marked the gravity as "Highly Likely" due to a confluence of factors contributing to a serious accident. Tr. 31. Hill marked the Order as "Fatal" because of the road conditions, specifically the steep winding grades and traffic volume. Tr. 31. He marked the Order as S&S because the conditions were likely to result in a significant and substantial injury to a driver. Tr. 31-32. Hill determined that the violation was the result of an unwarrantable failure. Tr. 32. He determined that the conditions existed for approximately one week after talking with Randy Fouts and the truck driver, Ronnie Miller. Tr. 32. Miller had stated that he had problems with his eyes for over a week because of the smoke coming into the cab. Tr. 32. Randy Fouts told Hill that he had tried to work on some of the problems. However, he also stated that there had been fires and leaks several days and one week prior to the inspection. Tr. 32.

Hill testified that he believed that A&R Trucking failed to make reasonable efforts to eliminate the issues and hazards present in the truck. Tr. 33. He testified that fatal injuries could reasonably be expected to occur from the violation. Tr. 33. He found the violation to be due to "Reckless Disregard" because there were so many problems present for an extended period. Tr. 33. Those conditions that would have been evident and obvious to anyone. Tr. 33.

The conditions that were cited were repaired six days after the inspection. Tr. 36.

The Correspondences

Several letters were exchanged between MSHA and the Respondent regarding the instant citation and order. On March 5, 2010, Jay Mattos, the Director of the Office of Assessments, sent a letter to Randy Fouts stating in pertinent part:

> This letter is in reference to citation number 8217796 and 8217797. The citations were contained in Mine Safety and Health Administration Assessment Case Number (MSHA Case Number) 000209193, Mine Identification Number 15-17110, Contractor Identification Number 2AC.
>
> The citations were modified, which changes the associated civil penalties. Therefore, the citations and associated civil penalties have been removed from this case and the citations will be re-assessed with an increased penalty under a new MSHA Case Number. This action reduced the balance of this case from $12,885.00 to $300.00.
>
> We apologize for any inconvenience this may have caused you or your company. If you have any questions, please contact Mrs. Toni Rauch-Balot of my staff at 202-693-9717.

RX-1.

Patricia Fouts testified that she paid the $300.00 and wrote at the bottom of the letter, "Pd. $300.00 3/22/2010 Check # 5043. Tr. 56-57; RX-1.

Norman G. Page, the District Manager, sent a follow-up letter to Randy Fouts on March 22, 2010, stating:

> As you may know, the Mine Safety and Health Administration has conducted a special investigation regarding Order No. 8217797 and Citation No. 821776. We have decided not to pursue further investigative action at this time and the case is closed.[6]

RX-2.

On April 16, 2010, Respondent's counsel, Ned Pillersdorf, sent a letter to Norman Page and Jay Mattos at MSHA concerning the citations, stating:

> I am in possession of correspondence to my client, Randy Fouts, from each of you gentlemen. In the correspondence from Norman Page, there is reference to the fact that citation number 8217797 and 821776 were closed. Thereafter, my client also received correspondence from Mt. [sic] Mattos indicating that he has a balance of $300.00. My client further advises that he paid the $300.00, shortly after receipt. Since that time, we have received additional correspondence seeking payment of $136,000.00. We take the position that my client satisfied the claim when he submitted the $300.00.
>
> Mattos sent a response to Pillersdorf on May 24, 2010, stating in pertinent part:
>
> This is in response to your April 16 letter regarding correspondence your client, Randy Fouts, received from me regarding civil penalties assessed against Mr. Fouts company, A&R Trucking for order number 8217797 and citation number 8217796.

[6] There was a typographical error in this letter, and the Citation No. should have read 8217796 rather than 821776.

> Civil penalties in the amounts of $6,624 and $5,961, respectively, were originally assessed against A&R Trucking in Mine Safety and Health Administration (MSHA) case number 000209193 on January 20, 2010. These penalties were erroneously assessed as regular assessments when they should have been assessed as special assessments as described in Title 30 CFR section 100.5. When MSHA staff identified the error, I notified Mr. Fouts by letter dated March 5, 2010 that the penalties were being removed from case 000209193 reducing the balance owed for that case to $300. In the same letter, I informed Mr. Fouts that penalties for the two issuances would be re-assessed with increased penalties under a new case. Order 8217797 and citation 8217796 were reassessed as special assessments of $110,900 and $25,800, respectively, in case 000215738 on April 10. We will process these assessments for a hearing as requested in your letter.
>
> The correspondence from Norman Page relates to a special investigation that was being conducted into the violations to determine personal liability. Mr. Page's letter advised Mr. Fouts that the special investigation/case was being closed. This is unrelated to the company's liability for the civil penalties.
>
> I hope I have adequately responded to your concerns. If you have any further questions, please contact Ms. Linda Weitershausen of my staff at 202-693-9712.

On questioning by the Court, Patricia Fouts testified that she was not aware that there were five citations, and that she believed that all the citations were being reduced to $300.00 and the case was being closed. Tr. 61-63.

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).

The citation and order at issue in this case were both marked as "Reckless Disregard," "Fatal," "High" negligence, with 1 persons affected, Significant and Substantial (S&S), and "unwarrantable failure."[7] SX-1.

[7] Inspector Hill thereafter modified Citation No. 8217796 from "High" negligence to "Reckless Disregard."

a) The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that 30 C.F.R. § 77.404(a) and 30 C.F.R. § 1606(c) were Violated as Cited in Citation No. 8217796 and Order No. 8217797 Respectively

On December 15, 2009, Inspector Samuel Hill issued Citation No. 8217796 against Respondent, A&R Trucking, for a 104(d) (1) violation of 30 C.F.R. § 77.404(a). This citation, in pertinent part, under Section 8, "Condition or Practice," states as follows:

> At the time of inspection the black Mack unit #3, s/n U162119, was not maintained in a safe operating condition and was removed from service until repairs to the cited deficiencies can be corrected. The following deficiencies were found: 1) the steering box and hydraulic hose were leaking oil; 2) the front of the bed sub frame was broken on both sides and had bolts missing holding the hydraulic bed cylinder yoke allowing the unit to slide back and forth during dumping; 3) the front left steering tire was worn smooth; 4) an audible air leak was coming from where the air supply line connects to the tail gate actuator; 5) the front rear tandem differential had gear oil pouring from the seals; 6) the exhaust manifold where it joins the exhaust stack was leaking in front of the hydraulic tank; 7) the steering actuation arm where it attaches to the steering gear box was worn and had a movement of 3/8 inch. The truck is operated on steep long elevated grades and at elevated dump bins. These conditions both individually and collectively and other deficiencies cited during this inspection could result in a lose [sic] of control with dire consequences. These deficiencies are obvious to anyone with any knowledge of equipment operation. The operator, Randy Fouts engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that these conditions existed and that employees would have to operate the truck in the existing condition. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-1.

On the same date, Inspector Hill issued Order No. 8217797 against Respondent, A&R Trucking, for a 104(d)(1) violation of 30 C.F.R. § 1606(c). This order, in pertinent part, under Section 8, "Condition or Practice," states as follows:

> At the time of inspection the black Mack unit #3, s/n U162119 used to haul coal from the ICG Calvary mine did not have a properly conducted inspection prior to placing the unit in operation. Numerous safety defects were found that would be obvious to the casual observer. The truck was cited for a lack of headlights, operational rear and bed lights, brake lights, hydraulic leaks on the steering box, broken sub frame and bolts missing from hydraulic bed lift mount, oil and fuel leaks on the turbo area of the motor, broken windshield, exhaust leaks in front of the hydraulic tank, front tire worn, air leak on the rear tailgate actuator, oil leaks from the front tandem differential, fire extinguisher not adequate, steering arm worn at steering gear box. The operator Randy Fouts stated [sic] had performed work on the truck in the same area as the deficiencies only the night before and that the conditions are common and normal for that model of truck. Operator Fouts engaged in aggravated conduct constituting more than ordinary negligence in that he knew the deficiencies existed and the employees would be exposed to the hazards of

operation during normal work practices. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-2.

Section 77.404(a) of the regulations states, "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. §77.404. Section 1606(c) of the regulations states, "Equipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. §77.1606(c). These regulations have similar requirements and will be considered together.

I fully concur with Judge Andrews' recent summary of the duties imposed under §77.404(a):

> According to well-settled Commission precedent, 30 C.F.R. §77.404(a) imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. *Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979); *see also U.S. Steel Mining Company*, LLC, 27 FMSHRC 435, 438 (May 2005). "Derogation of either duty violates the regulation." *Id*. With respect to the first duty, equipment is maintained in an unsafe operating condition "when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action." *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1557 (Sept. 1996). With respect to the second duty, the Commission has held that equipment is still in use if it "is located in a normal work area, fully capable of being operated." *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 845 (April 1981) *see also Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990) (equipment was in use when it was "parked in the mine in turn-key condition and had not been removed from service.") The Commission found that allowing equipment to stay "parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Id*.

Triple H Coal, LLC, 2013 WL 2286137, *3 (ALJ) (April 19, 2013). The Commission has further clarified that knowledge of the condition is not relevant to the inquiry of whether §77.404(a) was violated. *Peabody Coal Co*., 1 FMSHRC 1494, 1495 (Oct. 1979) ("The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.")

Inspector Hill credibly testified that there were a host of problems on the cited Mack truck. Tr. 24-25. These included leaking oil, worn tires, air leaks, and a smoke leak inside the cab. Tr. 24-25. These conditions placed the truck driver in danger. In fact, the exhaust leak had already caused an injury to the truck driver's eye. Tr. 24-25. The only response from the

Respondent concerning these conditions were they thought the truck was not in a dangerous condition, that oil leaks were common for large coal trucks, that one of the oil leaks was water, and that the truck had good brakes. Tr. 47.

Patricia Fouts testified that she was not involved with the day-to-day operation or maintenance of the truck, so I find her opinion on the truck's safety less than compelling. Tr. 55-56. Randy Fouts was more involved with the day-to-day operations, but his admissions concerning the cracked window, leaking oil and water, and other problems, indicated that he was resigned to the truck having problems. Tr. 48-51. Therefore, I fully credit Inspector Hill's testimony as to the hazardous conditions, and find that the truck was not in safe operating condition. Section 77.404(a) required that the truck either be maintained in safe operating condition or be removed from service. Randy Fouts confirmed that at the time of inspection, the Mack truck was still hauling three days per week, eight to ten hours per day. Tr. 47. Therefore, the Mack truck was neither being maintained in safe operating condition nor removed from service, violating both duties of §77.404(a). Similarly, the conditions on the truck were not corrected prior to the truck being used, in violation of §77.1606(c).

b) Respondent's Violation of §77.404(a) and §77.1606(c) were Highly Likely to Lead to Fatal Injury or Illness, and were Significant and Substantial in Nature

Taking into consideration the record *in toto* and applying pertinent case law, I find that A&R Trucking's violation of §77.404(a) and §77.1606(c) were "highly likely" to lead to "fatal" injury or illness, and were "Significant and Substantial" in nature.

The violative conditions on the Mack truck were "highly likely" to lead to fatal injury or illness. Inspector Hill's credible testimony revealed that the conditions on the Mack truck could lead to loss of control, a tire blowout, compromised brakes, and reduced driver visibility. Tr. 24-26. Furthermore, the roads that the truck driver was driving on were long winding grades, on a narrow road that was one lane at points, with a steep outslope and in wintertime conditions. Tr. 26. The conditions made it highly likely that the vehicle could go over the mountain or collide with another vehicle. Tr. 27.

I further find that the conditions were Significant and Substantial in nature. 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 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 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. Loss of control of the Mack truck and vehicle collisions are inarguably discrete safety hazards. Taken together, the violative conditions on the Mack truck contributed to the real possibility that an accident would result.

I find that the third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – has been satisfied here. The Secretary's argument is persuasive that there was a reasonable likelihood that the hazard contributed to would result in injury. The hazard at issue here, collision or loss of control of the Mack truck, would likely lead to injury of the truck driver. 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 treacherous road conditions described by the inspector, it is reasonably likely that the hazard would lead to fatal injuries. Furthermore, while not fatal in itself, the truck driver was already beginning to develop an eye injury from the truck conditions.

I therefore find that Inspector Hill's S&S designations were justified.

c) Respondent's Conduct Were the Result of Reckless Disregard and Constituted Unwarrantable Failure on Respondent's Part

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.

I find that in the instant case the operator displayed conduct which exhibited the absence of the slightest degree of care. 30 C.F.R. §100.3(d). In the instant case, the violative conditions on the Mack truck were obvious and extensive. Many of the problems, such as oil, air, and exhaust leaks, bald tires, and other problems were either visible or audible. Tr. 24-25. The conditions had existed for at least a week, when the truck was being utilized for 24-30 hours per week. Tr. 27-28, 47. Furthermore, the effects of the leaking exhaust had already led to visible eye injuries to the truck driver. Tr. 32. Based on these conditions, it is evident that the Respondent failed to exhibit the slightest degree of care.

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*, I find that the violative condition was obvious and extensive and had existed for a significant period of time. The violation clearly posed a high degree of danger. I note 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 injuries by the hazardous conditions on the Mack truck, I find 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. I therefore find that Respondent's conduct did constitute an unwarrantable failure.

d) The Penalty is Not Barred Due to Claim Preclusion, Issue Preclusion, or Contract Law Principles

The crux of Respondent's argument appears to be that they understood MSHA's March 2010 correspondences to mean that the entire penalty assessment totaled $300.00, which was promptly paid, thereby barring MSHA from imposing a special assessment. Respondent's counsel stated in his brief opening argument:

> There was correspondence issued from the US Department of Labor dated March 5, 2010 to Randy Fouts of A&R Trucking, Pike, Kentucky. In the correspondence it indicated that it was basically a balance that was reduced to $300 that my clients paid by check on 3/22/2010, Check No. 5043.
>
> Our position is there was an agreement with the Government whether you call it accord and satisfaction, collateral estoppel, res judicata, whatever you want to call it, it's [sic] been resolved.
>
> We continuously maintain this matter was settled when the Government received a check and negotiated it and the Government or the Department of Labor settled it.
>
> Tr. 12-13.

This argument is not compelling. As will be discussed *infra*, Respondent misinterpreted MSHA's letters, has suffered no detriment based on its reliance, and now misinterprets basic legal principles in arguing its defense.

Though MSHA could have arguably worded the letters in more precise terms, Respondent's interpretation was unreasonable. The March 5, 2010 letter stated clearly that Citation Nos. 8217796 and 8217797 were being removed from the case and "the citations will be reassessed with an increased penalty under a new MSHA Case Number." RX-1. Though the next sentence states, "This action reduced the balance of this case from $12,885.00 to $300.00," it is clear that this figure reflects only the penalty amounts in the remaining citations. RX-1. Unless one engages in selective reading, ignoring select terms and sentences, there is no reasonable way to read this letter to mean these citations are being vacated and the penalty reduced. I therefore find Patricia Fouts' testimony incredible that she believed that the letter stated that all five citations involved in the original case were being reduced to a new penalty total of $300.00.

The March 22, 2010 letter from Norman G. Page to Randy Fouts is arguably more ambiguous and open to misinterpretation. However I cannot find that the poor drafting of a letter should relieve a company of liability when the misunderstanding was quickly corrected and there was no showing of prejudice based upon reliance. The letter stated that a special investigation had been conducted regarding the citation and order at issue here, and that MSHA had decided not to pursue further investigative action and to close the case. "Special investigation" is a term of art in the context of MSHA and refers specifically to investigations pursuant to §§105(c) (discrimination) and 110(c) (agent liability) of the Act. In this case, there were no allegations of discrimination, so anyone familiar with the Mine Act would conclude that the letter is referring to a §110(c) investigation. As a general principle, *Ignorantia juris non excusat*; so the Respondent cannot argue that the mistake in understanding the nature of a special investigation excuses it of liability. Furthermore, Randy and Patricia Fouts have nearly a half-century of experience in the trucking industry between them, which means that they should have some experience and knowledge of MSHA rules and processes.

Lastly, the May 24, 2010 letter clarified the Respondent's misinterpretation of previous letters. There is nothing in the record to show that the Respondent had any detrimental reliance on its mistaken belief that all citations were being reduced to $300.00. Even if Respondent's interpretation were reasonable, based on the evidence in the record, Respondent could only claim to have suffered a $300.00 loss under a false belief.

Respondent raises the issues of *res judicata*, collateral estoppel, and accord and satisfaction as apparent defenses. They are misplaced. The doctrine of accord and satisfaction holds that "as a general proposition, that a creditor's acceptance of a check explicitly tendered as payment in full of an unliquidated or disputed obligation discharges the underlying obligation by accord and satisfaction." 42 A.L.R. 4th 12 (Originally published in 1985). "Accord and satisfaction is an affirmative defense with the burden of proof on the proponent." *Weinstein v. District of Columbia Housing Authority*, 931 F.Supp.2d 178, 187 (D.D.C. 2013) (citations omitted). As such, the Respondent here would have to prove each element of the defense in order to prevail. Courts applying the doctrine have consistently held that the debtor's offer must be accompanied by acts or declarations that the payment consists of full satisfaction of the claim. 1 Am. Jur. 2d Accord and Satisfaction § 14 (2013). In the instant case there is nothing in the record to indicate that the $300.00 check was accompanied by a statement that it represented satisfaction for all pending citations. Without such a showing there can be no accord and satisfaction.

Res judicata and collateral estoppel are similarly inapposite here. In order for either issue or claim preclusion to apply, the citation and order would have had to have been previously adjudged in some manner. As explained, *supra*, it was only due to Respondent's unreasonable interpretation of several correspondences that there was a belief that these issues were closed.

e) Penalty

The Secretary proposed special assessments of $110,900.00 in Order No. 8217797 and $25,800.00 in Citation No. 8217796. 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.

I have been further guided by Commission case law instructing how §110(i) criteria should be evaluated. *Inter alia*, I note: 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.

In assessing the §820(i) penalty considerations, I find that both respondents demonstrated good faith in achieving reasonably rapid compliance after notification of the violation. Furthermore, the Respondent's history of previous violations is not extensive. I therefore find that a reduction in the penalty is warranted, and reduces the special assessment in Order No. 8217797 to $75,000.00 and in Citation No. 8217797 to $17,500.00.

ORDER

It is hereby **ORDERED** that Order No. 8217797 and Citation No. 8217796 are **AFFIRMED** as modified herein.

Respondent, A&R Trucking, is **ORDERED** to pay civil penalties in the total amount of $92,500.00 within 30 days of the date of this decision.[8]

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

[8] 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

Distribution:

LaTasha T. Thomas, Esq., Office of the Solicitor, U.S. Dept. of Labor, 618 Church St., Suite 230, Nashville, TN 37219

Ned Pillersdorf, Esq., Pillersdorf, DeRossett & Lane, 124 W. Court Street, Prestonburg, KY 41652

/mzm