FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. SE 2012-0266 M A.C. No. 08-01203-279931
v.	
YOUNGQUIST BROTHERS ROCK, INC., Respondent	Mine: Youngquist Brothers Rock Inc.

DECISION AND ORDER

Appearances: Emily O. Roberts, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;

Jake Huffman, Youngquist Brothers Rock, Inc., Myers, FL, pro se litigant, for Respondent

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves one section 104(a) citation, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Youngquist Brother's Rock, Inc. ("Youngquist").[1] The parties presented testimony and documentary evidence at the hearing held in Fort Myers, Florida on September 24, 2013.

The contested issues at trial for Citation No. 8642418 included whether MSHA had jurisdiction under the Act to issue the Citation to Youngquist and whether Youngquist violated 30 C.F.R. § 56.15005 as alleged in the Citation.

For the reasons set forth below, I find that MSHA did have jurisdiction to issue the Citation under the Mine Act. I also find that Youngquist violated Section 56.15005 under the Act, the negligence was moderate, the injury was highly likely to result in fatality, and I find that the citation was significant and substantial. I assess a penalty in the amount of $6,458.40.

[1] On July 25, 2013, I signed a Decision Approving Partial Settlement for the remaining eight Citations for Docket No. SE 2012-0266 M, and ordered Youngquist Brothers, Inc. to pay a total sum of $3,278.00.

I. Stipulations

At the hearing, the Secretary read the Stipulations into the record: (Tr. 6:6-22)

1. The respondent owns and operates a surface mine producing sand and gravel lime rock products. The mine, Youngquist Brothers Rock, Inc., ID number 08-01203, is located in Lee County, Florida.

2. Employees at Youngquist Brothers Rock, Inc., Mine ID 08-01203 worked 80,543 hours in 2011.

3. Copies of 104(a) citation number 8642418 and 107(a) order number 8642417 were served on the respondent by an inspector employed by the Mine Safety and Health Administration.

4. The Respondent timely contested the 104(a) citation number 8642418.

5. The proposed penalty will not affect the respondent's ability to continue business.

Prior to the hearing, the parties also stipulated to the Commission's jurisdiction to hear and rule on this case in a Joint Prehearing Report received by the Court on September 18, 2013, which states:

> Jurisdiction exists because the Respondent was an operator of a mine, I.D. Number 08-01203, as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), and the products of that mine entered into the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803, at all times relevant to these proceedings.

Joint Prehearing Report at 1.

II. Jurisdiction

A. Statutory Definition of "coal or other mine"

Section 3(h)(1) of the Mine Act defines of "coal or other mine" as follows:

> [C]oal or other mine means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) *private ways* and roads *appurtenant to such area, and* (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, *equipment*, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface

> or underground, *used in, or to be used in, or resulting from, the work of extracting such minerals* from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1). (emphasis added)

It is well established that Congress intended this definition to be interpreted broadly. *See, e.g., Calmat Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005), *citing* S. Rep. No. 95-181, at 14 (1977) ([I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation.). However, the courts have recognized that the jurisdiction of the Mine Act is not without limitations. *See, e.g., Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc., et. al*, 573 F.3d 788, 794-95 (D.C. Cir. 2009) ("*National Cement*") (rejecting unreasonably expansive reading of subsection 3(h)(1)(B)); *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (Nov. 1985) (While we have recognized that the definition of coal or other mine provided in section 3(h) of the Mine Act is expansive and is to be interpreted broadly the inclusive nature of the Act's coverage is not without bounds.); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984).

In *National Cement*, the Court of Appeals for the D.C. Circuit discussed reasonable limitations on what could be considered part of a "coal or other mine under subsections 3(h)(1)(A), (B), and (C). 573 F.3d at 793-97. The Secretary interpreted subsection (B) more narrowly than subsection (A). *Id.* at 793. She took the position that subsection (A), which covers extraction areas, extends to all the facilities and equipment within the boundaries of the extraction area, because virtually everything within an extraction area is necessarily related to mining activity. *Id.* at 794. However, she interpreted subsection (B), which covers private ways and roads appurtenant to extraction areas, to apply only to the ways and roads themselves. *Id.* Additionally, equipment and vehicles traveling on such roads would fall under MSHA jurisdiction only if they were covered under subsection (C), which covers only those facilities and equipment that are used in, or to be used in, or resulting from mining activities. *Id.* at 795. The D.C. Circuit found that the Secretary's interpretation of section 3(h)(1) was reasonable and entitled to deference. *Id.* at 794-97.

The Court in *National Cement* also adopted the Secretary's interpretation that "private" means are "restricted to a particular group or class of persons (not to a particular person)." *Id.* at 791,795. However, liability under the Mine Act requires a finding of control because only mine "operators" can be cited and held liable for violations. *See* 18 U.S.C. §§ 802(d), 814(a); *Sec'y of Labor v. Berwind Natural Res. Corp.*, 21 F.M.S.H.R.C. 1284, 1293 (1999) (stating that to be an "operator," an entity must have "substantial involvement" in the operation of the mine). Therefore, an entity cannot be held liable unless it "operates, controls, or supervises" the mine. 30 U.S.C. § 802(d).

Section 3(h)(1)(A) of the Mine Act is not in issue here. What is in issue is subsection (B), which covers private ways and roads appurtenant to extraction areas themselves, and subsection

(C) which covers equipment and vehicles that are used in or resulting from mining activities traveling on such roads. *National Cement* at 794-795. Thus, what must be determined is if the area is a private way, appurtenant to the mine and under the control of the mine, and that the truck in question is equipment used in or resulting from mining activities.

B. The Parties' Positions

On December 14, 2011, MSHA Inspector Leroy Ford[2] ("Inspector Ford") issued Citation No. 8642418 to Youngquist alleging a violation of 30 C.F.R. § 56.15005. Inspector Ford observed a truck driver on top of his load in the bed of his truck shoveling material. Ex. S-1. The driver was not wearing a safety belt or line. *Id.* Inspector Ford testified that he had just finished inspecting the mine and was doing some work in his vehicle when he looked up and noticed a truck driver on the back of his bed about two hundred to three hundred feet from where he was sitting. (Tr. 24:24 – 25:6) He testified that the truck was approximately three hundred to four hundred feet inside the gate entrance to the mine. (Tr. 26:12-20) Inspector Ford was able to take a picture[3] of the vehicle before it drove away. (Tr. 27:3-8)

Immediately, Inspector Ford went straight to the office to talk to Jake Huffman[4] ("Mr. Huffman") and explained that he was going to issue a 107(a) imminent danger order. (Tr. 27:18-21) Inspector Ford also testified that he wrote the Citation because he believed the property where the truck was located belonged to the mine. (Tr. 64:22-24) Inspector Ford testified that he told Mr. Huffman the truck was located at the gate entrance (Tr. 28:8-9) and located on mine property because it was just inside the gate to the mine. (Tr. 66:24-25) If the truck driver had been outside of the gate, Inspector Ford noted, it would not have been under MSHA's jurisdiction. (Tr. 65:2-4)

Mr. Huffman testified that Youngquist owns two thousand acres, and that there are pieces of land that are leased out that MSHA does not have jurisdiction over, including the "restaurant" that sits on the property.[5] (Tr. 51:4-10; Ex. S-4) Mr. Huffman testified that the truck in the picture was taken in the "restaurant" parking lot. (Tr. 51:4-10) Mr. Huffman testified that while the truck was on the mine property owned by Youngquist Brothers, that particular section was leased out. (Tr. 52:12-14) Mr. Huffman testified that truck drivers or the general public can drive into the dirt lot and go over into the leased "restaurant" area to have lunch. (Tr. 51:22-24)

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[2] After serving in Vietnam, Inspector Ford worked in the coal mines in Kentucky. (Tr. 10:19-21) During his twenty-six year tenure for a surface mine (Tr. 5-13), he was a safety director for ten years, and worked on pretty much everything else in the mine. (Tr. 16-18) He also worked as a truck driver for ten years before working for MSHA. (Tr. 12:5-6) Inspector Ford began working for MSHA in 1998 in the metal non-metal division. (Tr. 12:8; 12:19-25) As of the day of the hearing, Inspector Ford worked a total of sixteen years for MSHA in Florida. (Tr. 13:20-21)

[3] The picture was admitted into evidence. Ex. S-4.

[4] At the time of the hearing, Mr. Huffman was the general manager of Youngquist Brothers Rock and agreed to represent the Respondent and to give testimony as required at trial. (Tr. 5:9-15)

[5] The "restaurant" Mr. Huffman refers to is nothing more than a "truck that this man has turned into his restaurant... [that] hasn't moved... [and] [h]e set it up on blocks." (Tr. 75:4-9)

Inspector Ford spoke to Mr. Huffman and told him that the violation occurred on his property, but Mr. Huffman testified that he did not bring up any issues because "it's best not to ruffle those feathers." (Tr. 60:19-22)

Mr. Huffman, however, did admit that the land that the "restaurant" leases abuts the entrance and exit gate of the mine. (Tr. 77:1-3) Inspector Ford testified that he told Mr. Huffman at the time he wrote the imminent danger order that the truck was on his property, (Tr. 86:10-11) and at the time he issued the Citation there was no conversation that the area in question was a lunch area and not part of the mine. (Tr. 86:21-23) To Inspector Ford the area in question appeared to be a meals-on-wheels set up. (Tr. 66:9-12)

C. Analysis of the Facts

It is important to note that at no point during the hearing, (Tr. 82:12-14) or at any point after the hearing, did Mr. Huffman or any agent of Youngquist provide the Court with a copy of the lease agreement between Youngquist and the "restaurant."[6] Nor did Mr. Huffman call the "restaurant" owner as a witness to leasing out a portion of the mine property. As such, there is no evidence on record other than trial testimony of Mr. Huffman that a lease exists, and that the area in question does not in fact belong to Youngquist's mine and subject to MSHA jurisdiction. Indeed, other than vague testimony that the leased property to the "restaurant" was a "dirt" section of approximately one acre, there is no evidence on record to show that the truck in the picture taken by Inspector Ford was actually on the restaurant's property.[7] Mr. Huffman did provide a handwritten drawing of the property, but without a lease or evidence showing where the actual property line existed, I cannot be certain that the truck was on any other property but on Youngquist's mine property. Ex. S-4, Ex. R-1.

Even if Respondent had put forth credible evidence that the area in question where the truck was located was leased property to the "restaurant," I would still find that under *National Cement*, the area in question is subject to the jurisdiction of MSHA.[8]

Mr. Huffman admitted that the land that the "restaurant" leases abuts the entrance and exit gate of the mine. (Tr. 77:1-3) Additionally, according to the drawing made by Mr. Huffman, the "restaurant" property abuts the mine property. Ex. R-1. Mr. Huffman testified that the whole property within the gates was owned by Youngquist (Tr. 51:4-10); that the "restaurant" was within Youngquist's property gates (Tr. 77:1-3; 77:11-12); and assuming a lease does exist, the area in question is leased to a private party who provides food for patrons of the mine and other people who came onto the property. (Tr. 52:12-14) Mr. Huffman also testified that the truck depicted in the picture was in the "restaurant's" dirt parking lot. (Tr. 51:9-10; Ex. S-4) The "restaurant" property is considered private even if it is open for business to the public because it

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[6] The Court did provide Mr. Hufffman and Youngquist the opportunity to provide a copy of the lease to the Court after the hearing.

[7] Mr. Huffman made the distinction that the mine property is the area that is asphalted and the "restaurant" property is the dirt area. (Tr. 67:8-18)

[8] As the litigant was pro se, I will include the *National Cement* reasoning in the decision to explain that MSHA had jurisdiction to issue Citation No. 8642418 even if the land was leased to the "restaurant."

is "restricted to a particular group or class of persons, namely its customers. Therefore, according to the above, I find that the truck in question was located on a private way appurtenant to Youngquist's operations.

Mr. Huffman testified that the distance from the scales to the road, which is directly outside the mine gates, is approximately four hundred to five hundred feet. (Tr. 59:17-20) The mine property and the "restaurant" property share this gated entrance. (Tr. 77:11-12) When Mr. Huffman was asked if the load on the truck in the picture appeared to be sand and gravel, Mr. Huffman testified that it seemed to be the color of sand and gravel in the bed of the truck in the picture. (Tr. 54:16-18; Ex. S-4) By looking at the picture and the hand drawing made by Mr. Huffman together, it appears as though the truck in question was driving from the scales towards the exit gates of the mine, and on his way out, the truck driver pulled over slightly off to the side of the paved road to level off his load. (*See* Ex. S-4; *See* Ex. R-1) I therefore conclude that the truck was used in and resulted from the mining activities at Youngquist.

Youngquist's control over the "restaurant" lot can be proven circumstantially by its location and testimony of Mr. Huffman. The "restaurant" is inside the mine's gates, three hundred to four hundred yards away from the scale house, and adjoining the lot on which Youngquist's printers and scales sit. (Tr. 77:1-3; 77:11-12; Tr. 26:12-20; Tr. 26:12-20; Ex. R-1) There is no barrier between the "restaurant" lot and the mine. (Tr. 79:19-21) Additionally, Mr. Huffman's testimony showed that the behavior which led to Citation 8642418 is unusual because of the mine's zero tolerance policy:

> They're all aware that if they get caught in the back of their trucks, in any of the rock mines, we'd just forever ban you from the rock mines... There's a zero tolerance for any of this. It's an issue we really don't have. They go down the road where they're far away from the mines, and they do what they have to there. This is something that we do not see.

(Tr. Tr. 58:25 – 59:9)

Mr. Huffman testified that the best place for the truck drivers to level off their load would be four miles down the road (Tr. 59:5-9; 60:4-7), and that this was because "[w]e don't encourage it anywhere in the general vicinity of the mines." This indicates that Youngquist did have some control over what the truck drivers did within the mine gates.[9]

I find that MSHA did have jurisdiction to issue Citation No. 8642418 to Youngquist because the area where the violative condition occurred was a private way appurtenant to the mine under the control of the mine, and the truck in question was used in mining activities.

[9] This is not to say that MSHA has jurisdiction of the operations of the "restaurant," but over violations such as the Citation at issue in this docket.

III. Citation 8642418

A. The Violation

On December 14, 2011, MSHA Inspector Leroy Ford issued Citation No. 8642418 to Youngquist alleging a violation of 30 C.F.R. § 56.15005. The regulation states that "[s]afety belt and lines shall be worn when persons work where there is a danger of falling." Section 56.15005 regulates a mandatory safety standard. The Citation alleges:

> One truck driver was observed on top of a load in the bed of the truck shoveling material. The driver was not wearing a safety belt or line. The fall to the ground was estimated to be a 6' to 7' drop. The truck was hauling from the scale house. The operation manager had signs posted all around the scale house with instructions to stay off the bed of the trucks. The signs were written in Spanish and English. This condition was a factor that contributed to the issuance of imminent danger order # 8642418 [sic]. Therefore no abatement time was set.

Ex. S-1.[10]

The Citation also alleges that the condition was highly likely to cause injury, that the injury was reasonably likely to be fatal, that the violation was significant and substantial ("S&S"), and the negligence standard was moderate negligence. *Id.* The Secretary proposed a penalty of $7,176.00 for this violation.[11] Inspector Ford observed a truck driver on top of his load in the bed of his truck shoveling material. *Id.* Inspector Ford testified that the truck driver was approximately six or seven feet off of the ground, (Tr. 25:24) and the truck driver was not wearing a safety line, harness, belt, or anything to keep him from falling. (Tr. 26:2-5) Inspector Ford could tell the driver did not have safety equipment on because he had a shovel in his hand and he could see the truck driver moving around the back part of the bed. (Tr. 26:6-9; *See also* Ex. S-4) I find that Youngquist violated Section 56.15005.

B. Negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed

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[10] The actual imminent danger order number is 8642417.

[11] The Respondent failed to present any evidence regarding the Citation itself. The Respondent's sole defense at the hearing was that MSHA lacked jurisdiction to issue the Citation. In fact, upon the conclusion of the Secretary's direct examination of Inspector Ford, Mr. Huffman stated that "[e]verything he said is very accurate" when referring to Inspector Ford's testimony. (Tr. 50:10)

conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

> Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Inspector Ford marked the citation as moderate negligence because he explained to Mr. Huffman at the time that he felt like they did everything they could possibly do as a company because they had signs. (Tr. 38:14-17) Inspector Ford considered the signs to be mitigation. (Tr. 38:22-25)

Mr. Huffman testified that he is aware that there is an issue that some of the truck drivers want to get into the bed of their trucks. (Tr. 57:1-5) Youngquist had seven signs at the scale house, in English and Spanish, telling the truck drivers not to get inside the beds of the trucks. (Tr. 21:7-10; 21:13-15; 56:23-25; 51:17-19) Mr. Huffman testified that there is a zero tolerance policy for getting onto the truck beds at Youngquist and that the drivers go down the road four miles where they are far from the mine to level the loads. (Tr. 59:5-9; 60:4-7)

Youngquist, however, does not provide a safe place for the drivers to level the load on the mine property. (Tr. 59:11-13) They do not provide safety lines, belts, or harnesses. (Tr. 59:14-16) Truck drivers are not advised of safe methods of tying off on the mine property. (Tr. 60:8-10) There are no signs that say that truck drivers must wear a belt to line if they need to tarp. (Tr. 58:9-11) There is no site-specific hazard awareness training for tying off. (Tr. 58:12-15) There are no trainings or signs for acceptable safety methods for leveling the load of the truck bed. (Tr. 58:16-18) There are no trainings or signs about acceptable safety methods for leveling the load of the truck bed. (Tr. 58:16-18) I find that given the known issue to Youngquist, they

should have training for safely tying off and safely leveling the load of the truck bed. For the reasons stated above, I find the negligence to be moderate.

C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Inspector Ford testified that the truck driver was approximately six or seven feet off of the ground, (Tr. 25:24) and the truck driver was not wearing a safety line, harness, belt, or anything to keep him from falling. (Tr. 26:2-5) Inspector Ford could tell the driver did not have safety equipment on because he had a shovel in his hand and he could see the truck driver moving around the back part of the bed. (Tr. 26:6-9; *See* Ex. S-4) The safety harnesses tether the drivers to the truck itself to prevent falls. (Tr. 33:22-25) From what Inspector Ford observed, the truck driver could fall over the side, hit the ground head first, and probably break his neck. (Tr. 32:7-13) The driver could have been killed because he was high enough off of the ground. (Tr. 32:7-13) Based on the above, I agree that the injury is serious in nature and that the resulting injury could result in a fatality.

D. Significant and Substantial

The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.") Some of the citations in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). 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). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574.

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a high likelihood that the injury in question will be of a reasonably serious nature, i.e. broken neck or broken back resulting in a fatality. A measure of danger to safety, a discrete safety hazard, was contributed to by the lack of harness or safety equipment, and thus could fail to keep the truck driver from falling from the truck bed, which could result in serious injuries to a miner. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Ford had just finished inspecting the mine. He was doing paper work in his vehicle when he looked up and noticed a truck driver on the back of his bed about two hundred to three hundred feet from where he was sitting. (Tr. 24:24 – 25:6) That is what led Inspector Ford to write the imminent danger order. (Tr. 25:20-22) Inspector Ford told Mr. Huffman that the reason he wrote the imminent danger order was because a man was inside the back of the bed without any fall protection and he could fall and possibly be killed. (Tr. 28:3-6)

Inspector Ford testified that he marked the citation as highly likely because he felt that if the man had fallen from the top of the truck he could have broken his neck or his back, and that

would have resulted in paralysis or death. (Tr. 36:14-19; 37:3-6) Inspector Ford also testified that he felt that falling was very likely to happen from where the truck driver was standing in the back of the bed. (Tr. 36:24-25) It is also apparent form the photo exhibit that the truck driver was standing towards the back of the truck bed. Ex. S-4. Inspector Ford testified that he designated one person affected, and that person was the truck driver. (Tr. 37:7-8) Accordingly, I find that the Secretary did meet his burden to prove S&S.

E. Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.,* 293 *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

The Secretary assessed the penalty for this citation as $7,176.00. Youngquist operated the mine for approximately 80,543 hours in 2011, which indicates that the mine is medium sized. (Tr. 6:6-22; Ex. S-6) I have already determined above that Youngquist's negligence was moderate. As per the joint stipulations, Youngquist's business will not be significantly affected by the assessed penalty of $7,176.00. (Tr. 6:6-22) As to the gravity of the violation, I found the violation to be S&S. The Secretary did not apply to ten percent penalty reduction for good faith abatement because it was issued in conjunction with an imminent danger order, Order 8642417. Therefore, no abatement time was set. However, given the circumstances that the truck driver was not apprehended and Youngquist could not abate the violation, I will give Youngquist the ten percent penalty reduction. Therefore, I assess the penalty amount against Youngquist to be $6,458.40.

WHEREFORE, it is **ORDERED** that Youngquist pay a penalty of **$6,458.40** within thirty (30) days of the filing of this decision.

L. Zane Gill
Administrative Law Judge

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