FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CAMPBELL COUNTY HIGHWAY DEPARTMENT, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2012-198-M A.C. No. 40-00739-276522 Mine: County Quarry

DECISION

Appearances: Robert S. Bexley, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;

Charles W. Kite, Esq., Knoxville, Tennessee, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). In dispute are two section 104(d)(2) orders issued by the Mine Safety and Health Administration ("MSHA") to the Campbell County Highway Department as the owner and operator of the County Quarry mine. To prevail, the Secretary must prove the cited violations "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The two alleged violations in this case were issued at the Campbell County (Tennessee) Highway Department's County Quarry. Order No. 8542424 charges the Campbell County

Highway Department ("Campbell County" or "Respondent") with a violation of 30 C.F.R. § 56.4102[1] for failing to remove in a timely manner a pool of flammable hydraulic fluid on the cab floor of the mine's John Deere 544G loader. Order No. 8542431 charges the mine operator with a violation of 30 C.F.R. § 56.11001[2] for failing to clean up an accumulation of rock material on a walkway used to service the quarry's rock crusher, also known as the hammer mill. The Secretary designated both violations as significant and substantial ("S&S")[3] and in both instances characterized the Campbell County Highway Department's negligence as high. The Secretary further asserts that each violation was an unwarrantable failure[4] to comply with a mandatory health and safety standard. The Secretary proposed a penalty of $4,000.00 for each violation, for a total penalty of $8,000.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. SE 2012-198-M to me, and I held a hearing in Knoxville, Tennessee.[5] The Secretary presented testimony from MSHA Inspector Robert McPheeters. Campbell County presented testimony from Safety Director Samuel Franklin, Campbell County Highway Superintendent Dennis Potter, and Assistant Road Superintendent Estel Muse. The parties each filed post-hearing briefs, and Campbell County Highway Department filed a reply brief.

II. ISSUES

For Order No. 8542424, the Secretary asserts that Respondent failed to fulfill its duty imposed by 30 C.F.R. § 56.4102 by allowing a combustible liquid to accumulate on the floor of a vehicle at the mine. (Sec'y Br. at 5–7.) The Secretary further claims that the dangerous nature of the violation, the length of time the violation existed, and Respondent's knowledge of the violation provide sufficient aggravating circumstances to support the issuance of an order under section 104(d)(2). (*Id.* at 7–13.) Campbell County asserts that the Secretary did not satisfy its

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[1] Section 56.4102 provides: "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard."

[2] Section 56.11001 provides: "[s]afe means of access shall be provided and maintained to all working places.

[3] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes in gravity violations that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

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

[5] In this decision, the hearing transcript, the Secretary's exhibits, and Campbell County's exhibits are abbreviated as "Tr.," "Ex. P–#," and "Ex. R–#," respectively.

burden of persuasion to show that a combustible liquid was present. (Resp't Br. at 4–5.) Alternatively, Campbell County claims that additional safety measures mitigated the gravity of the violation and the operator's efforts to repair the violative leak mitigate the level of Respondent's negligence. (Resp't Br. at 5–7.)

For Order No. 8542431, the Secretary contends Respondent failed its duty under 30 C.F.R. § 56.11001 to maintain safe access to a workplace. (Sec'y Br. at 15–17.) The Secretary asserts that an accumulation of rock material made access to the mine's rock crusher unsafe. (*Id.*) He further claims that the duration of the violation's existence and the operator's knowledge of the violation were sufficient aggravating factors to support the issuance of an order under section 104(d)(2). (*Id.* at 16–25.) Campbell County contends the area where the accumulation occurred was not a working place and, alternatively, disputes the Secretary's allegations about the danger posed by the debris and the length of time the debris was present. (Resp't Br. at 7–15.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the removal of spills involving flammable or combustible liquids; (2) whether the cited conditions violated the Secretary's mandatory health or safety standards regarding safe access to working places; (3) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including the S&S determinations; (4) whether the record supports the Secretary's assertions regarding Campbell County's negligence, including the unwarrantable failure determinations, in committing the alleged violations; and (5) whether the Secretary's proposed penalties are appropriate.

III. FINDINGS OF FACT

The Campbell County Highway Department owns and operates the County Quarry in Jacksboro, Tennessee. Campbell County mines and crushes stone at the County Quarry for use on the county's roads. (Tr. 228:6–10.) Campbell County employs four workers at the County Quarry. (Tr. 162:2–10.) Among its equipment, Campbell County employs a rock crusher to grind larger pieces of rock into gravel. The mine also employs a John Deere 544G front-end loader to move and load rock. (Tr. 46:15–19.)

On June 22, 2010, MSHA Inspector Robert McPheeters and his supervisor, Inspector Don Ratliff, visited the County Quarry as part of a regular biannual inspection of the Mine. (Tr. 33:11–14.) McPheeters had extensive experience as a mining safety inspector, working for thirty-three years as a state or federal inspector, including thirteen years for MSHA. (Tr. 24:11–28:16.)

A. Order No. 8542424: The John Deere Loader

Prior to his visit, McPheeters looked at past MSHA inspection reports to check for any history of violations at the mine. (Tr. 37:1–25.) McPheeters' review revealed a history of

citations and orders issued under section 104(a) and (d) of the Mine Act. (Tr. 39:10–12, 42:11–19.) Upon arriving at the mine, McPheeters and Ratliff also examined the mine's pre-shift safety inspection reports, which included notes indicating the presence of a leak on the mine's John Deere front-end loader. (Tr. 57:4–6.)

Along with quarry Safety Director Samuel Franklin, inspectors McPheeters and Ratliff examined the mine's John Deere 544G front-end loader. (Tr. 46:12–20.) The front-end loader has a single-person cab. (Tr. 47:14–23.) The cab stands seven to eight feet above the ground and has one entry door. (Tr. 47:6–23) The vehicle's cab also has windows on all sides. (Tr. 47:22–23.) Although not required by law, the cab possessed a fire extinguisher. (Tr. 48:7.)

At the mine, an employee alerted McPheeters to a potential problem with the front-end loader, telling the inspector that a valve or hose in the machine was leaking. (Tr. 50:18–21.) Campbell County's Franklin testified that one of the inspectors asked him to remove a rubber mat covering the floor of the vehicle's cab before checking the interior. (Tr. 149:10–11.) Upon inspection of the cab floor, McPheeters found an oily sheen across the entire floor and a puddle of brown, oily fluid in the corner. (Tr. 48:12–49:19.) McPheeters identified the brown liquid as oil-based hydraulic fluid. (Tr. 48:19.) The fluid was mixed with dirt. (Tr. 51:21–22.)

The inspectors observed that the mine's workplace examination records first noted the presence of a leak of hydraulic fluid in January 2010, five months prior to the June 22 MSHA inspection. (Tr. 115:14.) Yet, Campbell County's records revealed no attempts to repair the hydraulic fluid leak. (Tr. 125:21–126:2.)

Based on his observations, Inspector McPheeters issued Order No. 8542424, alleging a violation of 30 C.F.R § 56.4102:

> Flammable or combustible liquid spillage or leakage was not removed in a timely manner or controlled to prevent a fire hazard. On the John Deere 544G loader, a hydraulic leak exist[ed] in the cab. The floor is covered with oil and employees are exposed to a fire or burn hazard. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. P–4 at 1.) McPheeters designated the order as an S&S violation affecting one person and characterized the Campbell County Highway Department's negligence as "high" and as an unwarrantable failure to comply with a mandatory health or safety standard (*Id.*) Because of the mine's history of citations and orders under section 104(d)(1) of the Mine Act, McPheeters issued a closure order under section 104(d)(2) for the alleged violation.

B. Order No. 8542431: The Hammer Mill

After examining the front-end loader, the MSHA inspectors checked the mine's rock

crusher, which they generally referred to as the "hammer mill." (Tr. 96:14–15.) The hammer mill is a big piece of equipment used to reduce large rocks to a size suitable for use by the Campbell County Highway Department. (Tr. 70:14–15.) The hammer mill operates almost continually when the mine is open. (Tr. 178:1–10.) The machine's design causes material to be expelled during the crushing process. (Tr. 172:6–8.) To prevent this expulsion of material, the hammer mill is equipped with chains covering the ejection points. (Tr. 168:14–25.)

A miner operates the hammer mill remotely from a stand located approximately 100 feet away from the crushing device. (Tr. 161:2.) However, workers must still access the area immediately surrounding the crusher device to perform occasional repairs and weekly maintenance. (Tr. 161:6–13.) To facilitate those repairs and maintenance, Campbell County installed an elevated walkway around the hammer mill. (Tr. 228:25–229:10.) The main portion of the walkway is approximately eight feet long, thirty inches wide, and stands about eight feet off the ground. (Tr. 71:5–14.) The walkway has guard rails around the outer edge. (Tr. 73:17–20.) The walkway runs around the side of the hammer mill and then reaches a small platform area that is level with the walkway. (Tr. 185:4–7.) A feeder runs across the small platform and connects to the hammer mill. (Tr. 182:23–183:3.) The feeder stands approximately four feet above the walkway and platform. (Tr 73:10–13.) A small catwalk branches off from the platform and runs to other parts of the rock crusher. (Tr. 183:21–184:17.)

Upon inspecting the elevated walkway, Inspector McPheeters discovered an accumulation of rock material six inches to a foot in depth. (Tr. 73:21–22.) The material covered the entire width of the elevated walkway and stretched a length of four to five feet. (Tr. 74:7–15.) The material, which included rocks ranging from the size of gravel to the size of a fist, had spilled out of the hammer mill where the feeder overhangs the walkway. (Tr. 73:5–9.) McPheeters testified that during the inspection an employee at the mine told him the hammer mill was missing chains that would prevent rock from being thrown out of the mill. (Tr. 97:12–15.)

When looking at the County Quarry's workplace records, McPheeters discovered that the accumulated material had been noted on June 16, six days prior to the inspectors' visit, but with no indication it had been cleaned up. (Tr. 79:18–21.) Franklin, the mine's safety director, testified that the hammer mill would take several days to expel the quantity of rock McPheeters found on the walkway. (Tr. 178:2–4.)

Based on his observations, McPheeters issued Order No. 8542431, alleging a violation of 30 C.F.R. § 56.11001:

> Safe means of access was not provided and maintained to all working places. At the primary plant the walkway adjacent to the hammer mill had a build up of rock material about six inches to a foot deep. Employees that work in this area are exposed to a trip or fall hazard. This condition was noted on work place exams; however, it was not corrected.

(Ex. P–18 at 1.) McPheeters designated Order No. 8542431 as an S&S violation affecting one person and characterized Campbell County's negligence as "high" and as an unwarrantable failure to comply with a mandatory health or safety standard. (*Id.*)

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 56.4102 – Spillage and Leakage

Section 56.4102 requires that operators (1) remove or control (2) flammable or combustible liquid spillage or leakage (3) in a timely manner.

MSHA has defined "flammable liquid" as a "liquid that has a flashpoint below 100°F." 30 C.F.R. § 56.2. The Secretary has defined "combustible liquids" to mean "liquids having a flash point at or above 100°F." *Id.* "Flash point" in turn is defined as "the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure." *Id.* As one Commission Judge observed, these expansive definitions mean the regulation covers nearly every liquid other than water. *See Lehigh Southwest Cement Co.*, 33 FMSHRC 340, 352–353 (2011) (ALJ).

The determination of whether an operator fails to correct a defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of the condition's existence. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001) (affirming Judge's ruling that the Secretary must present evidence of when a device became defective to show a violation of 30 C.F.R. § 56.14100(b) for failing to correct the defect "in a timely manner") (footnote omitted). Where an operator has actual knowledge of a violative condition and nevertheless continues to use the equipment without addressing the hazard, Commission Judges have found violations of this standard. *See, e.g.*, *Consolidated Rebar, Inc.*, 35 FMSHRC 3025, 3027–28 (Sept. 2013) (ALJ) (violation established because operator continued to use vehicle for several days while damaged); *Northshore Mining Co.*, 35 FMSHRC 1006, 1017 (Apr. 2013) (ALJ) (violation established because operator used vehicle for six months without replacing damaged mirrors); *Sweetman Construction Co.*, 21 FMSHRC 101 (Jan. 1999) (ALJ) (violation established because defective truck was in use at the time the inspector found the defect); *Walker Stone Company*, 20 FMSHRC 1225 (Oct. 1998) (ALJ) (violation established where the operator had been using equipment without functioning headlights for a long period of time due to a lack of knowledge that MSHA required them).

B. 30 C.F.R. § 56.11001 – Safe Access

Section 56.11001 requires that operators (1) provide and maintain (2) safe means of access (3) to all working places. The Commission has held that section 56.11001 "comprises the dual requirements of providing *and* maintaining safe access to working places." *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 680 (July 2002) (emphasis added) (citation omitted). The Commission also has concluded that the term "maintain" requires "an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Lopke*

Quarries, 705 at 708. MSHA has defined a "working place" as any place in or about a mine where work is being performed." 30 C.F.R. § 56.2.

The Commission has held that in determining whether a broadly worded standard that is intended to be applied to many factual situations, such as this one, applies to a specific situation, "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)). Applied to section 56.11001, the standard imposes an obligation on the operator to make each means of access to a working place safe unless, for example, there is no reasonable possibility that a miner would use the route as a means of reaching a workplace. *The Hanna Mining Co.*, 3 FMSHRC 2045, 2047 (Sept. 1981).

C. Significant and Substantial Violations

A violation is S&S "if, based on 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). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135-36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission has observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e. that the violation present a *measure* of danger." *U.S. Steel Mining Co.*, 3 FMSHRC 822, 827 (Apr. 1981). The Commission also has indicated that "[t]he correct inquiry under the third element of Mathies is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742–43 & n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

D. Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001

(Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003–04. Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. The Commission has identified several such factors, including: (1) the length of time a violation has existed, (2) the extent of the violative condition, (3) whether the operator has been placed on notice that greater efforts are necessary for compliance, (4) the operator's efforts in abating the violative condition, (5) whether the violation was obvious, (6) whether the violation posed a high degree of danger, and (7) the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC 1356, 1350-51 (Dec. 2009). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or mitigating circumstances exist. *Id.*

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Order No. 8542424 – The John Deere Loader

1. Further Findings of Fact

a. The Presence and Flammability of Hydraulic Fluid

Respondent claims the Secretary did not demonstrate that the material in the front-end loader's cab was hydraulic fluid. (Resp't Br. at 2, Resp't Reply at 2.) Respondent's argument lacks support in the evidence. Here, McPheeters, an MSHA inspector with thirty-three years of experience working at mines, identified the material on the cab floor as hydraulic fluid that had likely leaked from the front-end loader's steering column. (Tr. 48:19.) At the hearing, McPheeters testified that an employee of the mine alerted the MSHA inspectors to the hydraulic fluid leak before the inspectors checked the vehicle. (Tr. 50:18–21.) Moreover, Campbell County's own witness, Franklin, testified that the front-end loader had leaked oil into the cab intermittently for several months. (Tr. 217:2–218:4.) Franklin further testified that the mine had attempted to repair the leak by replacing seals in the hydraulic system. (Tr. 217:2–218:4). Finally, Franklin testified that he cleaned the pooled liquid from the cab floor with Oil-Dri, a material specifically designed for cleaning oil-based fluids. (Tr. 157:10–15.) Indeed, Campbell County's witnesses failed to provide any evidence suggesting an alternative origin for the fluid in the vehicle's cab, or even questioning the Secretary's assertion that the spill was of hydraulic fluid. Given the evidence before me, I find that the accumulated material on the cab floor of the John Deere loader was hydraulic fluid.

Respondent also argues that the Secretary has not demonstrated that the accumulated fluid was flammable or combustible.[6] (Resp't Br. at 2.) At the hearing, however, McPheeters

[6] Relying heavily on *LeBlanc's Concrete and Mortar Sand Co.*, 11 FMSHRC 660 (1989) (ALJ), Respondent claims 30 C.F.R. § 56.4102 requires the Secretary to collect a sample of the

credibly testified from his extensive experience that hydraulic fluid is combustible. (Tr. 52:7–53:3.) Given his experience, I find McPheeters' testimony persuasive. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination). Meanwhile, Campbell County again curiously failed to present any evidence at hearing suggesting the fluid in the cab was not flammable.

Based on the evidence before me, I therefore find that the accumulated liquid was hydraulic fluid and that it was combustible.

b. The Duration of the Spill

Respondent also disputes the amount of time the leaked hydraulic fluid was present in the front-end loader's cab. (Resp't Br. at 5–7.) Here, Inspector McPheeters testified the hydraulic fluid spill was first noted in equipment examination reports in January 2010, five months prior to the MSHA inspection. (Tr. 59:20–23.) Although McPheeters did not specifically note any subsequent equipment examination reports showing the presence of hydraulic fluid, the MSHA investigator testified that his use of the term "since" in his notes suggested he had found other examination reports noting the presence of the fluid after January. (Tr. 59:20–23, 134:18–135:23.) McPheeters also testified that Respondent did not produce any repair records showing him the front-end loader's leak had been remedied. (Tr. 89:6–19.) McPheeters further noted the quantity of hydraulic fluid present in the cab and the presence of dirt mixed into the fluid suggested the leakage was present "for sometime." (Tr. 51:15–52:6.) Accordingly, McPheeters inferred the material had been present since first reported in January. (Tr. 63:11–22.)

At the hearing, Respondent presented testimony that the mine attempted to repair the front-end loader after the leak's discovery in January. Assistant Superintendent Estel Muse, who oversaw repair of equipment at the mine during the period, claimed Campbell County had worked on the front-end loader three times, but he was unsure of the precise dates of the work. (Tr. 247:11–15.) Safety Director Franklin likewise testified the operator attempted to repair the leak twice prior to the June 22 inspection, but admitted neither attempt permanently solved the

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accumulated liquid and submit it to rigorous laboratory testing. (Resp't Br. at 5.) Respondent's argument runs counter to the text of the regulation. MSHA has defined the terms of section 56.4102 broadly enough to cover most liquids. *See Lehigh*, 33 FMSHRC at 352–53. The Judge in *LeBlanc's* relied on the definitions of "flammable" and "combustible," rather than the definitions for "flammable liquid" and "combustible liquid." *LeBlanc's*, 11 FMSHRC at 674. Furthermore, while some MSHA regulations require laboratory testing to prove a violative condition, the Commission has not extended that requirement to section 56.4102. *See Old Ben Coal Co.*, 2 FMSHRC 2806 (Oct. 1980) (upholding the use of band sample method to prove violations of 30 C.F.R. § 75.403). More importantly, decisions by Administrative Law Judges are not precedential. 29 C.F.R. § 2700.69(d). Thus, I am not bound by *LeBlanc's*, and I chose not to follow it.

problem. (Tr. 153:8–154:2.) Superintendent Potter testified that the county purchased a set of seals specific for the 544G John Deere front-end loader on November 3, 2009, over seven months prior to McPheeters' inspection, and that the seals were used on the machine. (Tr. 227:1–20.) Nevertheless, Campbell County failed to provide any record of repairs for the front-end loader during that period. Speaking specifically of the leak McPheeters cited on June 22, Franklin testified the accumulated liquid was present for at least two days prior to the inspection. (Tr. 215:14–25.)

Based on the above testimony, I conclude the leak in the front-end loader's hydraulic system existed from January until the MSHA inspection. Campbell County's efforts to repair the loader were repeatedly ineffectual. I further find the specific accumulation forming the basis of the Secretary's claim existed for at least two days prior to the examination.

2. Analysis and Conclusions of Law

a. Violation of 30 C.F.R. § 56.4102

Inspector McPheeters issued Order No. 8542424 for Campbell County's failure to clean up an accumulation of hydraulic fluid in the cab of the mine's John Deere 544G front-end loader. (Ex. P–4.) I have already found that the accumulated liquid present in the John Deere loader's cab was hydraulic fluid, which is a combustible liquid as defined by 30 C.F.R. § 56.2. I therefore determine that an accumulation of combustible material was present and not controlled, satisfying the first and second elements of a violation of § 56.4102.

Consequently, this violation turns on whether Campbell County failed to remove the leakage in a timely manner. As discussed above, I have found that the defect causing the leak existed for five months prior to the MSHA inspection. I have also found that the accumulation of hydraulic fluid on June 22 existed for at least two days, during which the operator knew of the leaked fluid and still operated the vehicle.

Given the evidence before me, I determine that Campbell County failed to remove the leakage in a timely manner. The repeated recurrence of the leak, despite numerous, inadequate repair efforts throughout the five-month period leading up to MSHA's inspection, put Campbell County on notice that it needed to be vigilant in checking for new accumulations of hydraulic fluid. Furthermore, Campbell County had actual knowledge that the combustible liquid lay at the feet of the front-end loader's operator for two days, yet failed to clean up the liquid. Considering the danger posed by having a pool of combustible liquid at the feet of a worker in a vehicle eight to ten feet off the ground, as well as the ease with which the material could be removed, the operator could be expected to remove the hydraulic fluid immediately upon noticing the accumulation. In fact, Franklin testified that he was able to clean the accumulation with a pressure washer and Oil-Dri. (Tr. 157:10–15.) Under the circumstances, two days certainly was not a timely response. Thus, I conclude that Respondent violated 30 C.F.R. § 56.4102.

b. Gravity and S&S Determination

Campbell County's violation of section 56.4102 establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard; that is, whether the violation provides a measure of danger to safety. Here, Inspector McPheeters credibly testified that accumulated hydraulic fuel contributed to the safety hazard of a fire in the cab of the front-end loader, as well as the hazard of slipping and falling from the vehicle. (Tr. 55:10–18.) Respondent claims that the risk of a fire was negligible because the vehicle's operator did not smoke. (Resp't Br. at 13.) However, McPheeters testified that the electrical components in the vehicle's cab or a related fire in the engine of the vehicle also could light the hydraulic fluid on fire. Accordingly, I determine that the violation contributed to the discrete safety hazard of a fire in the vehicle cab. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this instance are reasonably likely to be fatal. I recognize that the opinion of an experienced inspector is entitled to significant weight. *Harlan,* 20 FMSHRC at 1278–79. Based on the quantity of hydraulic fluid and its location in the cab of the vehicle, Inspector McPheeters determined that injuries from a fire were reasonably likely to be serious. (Tr. 58:9–11.) The potential for the vehicle operator to slip on the fluid and fall eight feet to the ground when evacuating in an emergency compounded the potential for a serious injury. (Tr. 55:10–18.)

Campbell County contends that several factors mitigate the threat of a serious injury posed by a fire in the vehicle's cab. First, Respondent argues that a second point of egress through the cab window increases a miner's chances of escaping from a dangerous fire. (Resp't Br. at 13.) Respondent adds that the presence of a fire extinguisher also reduces the chances of a fire causing serious injuries. (*Id.*) Finally, Campbell County argues that the rubber mat on the floor reduces any risk of the operator slipping and falling. (*Id.*)

The evidence and the law do not support Respondent's arguments. A second exit through the cab window adds only a negligible degree of safety. A miner forced to scramble out the cab window of his vehicle during a fire faces an increased risk of falling from the vehicle. McPheeters already testified that the accumulation of hydraulic fluid increased the risk of a potentially fatal fall from the vehicle cab. (Tr. 55:16–18, Tr. 129:19–130:4.) Next, the Commission has consistently rejected the argument that extraneous safety measures such as the front-end loader's fire extinguisher reduce the likelihood of a serious injury. *See Buck Creek,* 52 F.3d at 136 (indicating that the fact a mine operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners"). Finally, while a rubber mat may make the floor less slippery, McPheeters testified it would not prevent a fire, the primary danger involved in this case. (Tr. 130:17–131:7.)

Given the evidence before me, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, thus satisfying *Mathies*'

third and fourth elements. Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence and Unwarrantable Failure

The Secretary designated this violation as an unwarrantable failure and characterizes Campbell County's negligence as high. In support of his allegations, the Secretary points to the length of time Campbell County had knowledge of the leak's existence. The Secretary further emphasizes that Campbell County provided no evidence of mitigating circumstances during the inspection or in the following closeout conference. (Sec'y Br. at 10–13.)

Looking to the aggravating factors in the unwarrantable failure determination, five of the seven factors favor the Secretary's unwarrantable failure allegation. First, the violative conditions lasted for a long time. Respondent's own witness testified that the hydraulic fluid accumulation was present in the cab for at least two working days prior to the inspection, during which time the front-end loader was in regular use. When a hazard is found to exist, it must be addressed. *See Buck Creek,* 52 F.3d at 133 (finding unwarrantable failure where cited accumulation hazard must have been present at least since the previous shift). Considering the ease with which the fluid could be removed, allowing the combustible material to persist for two days exhibited a lack of care. Furthermore, the front-end loader had a defect in the hydraulic system of its steering column for approximately five months prior to the inspection on June 22, 2010. Over that period, Campbell County's safety director noted accumulations of hydraulic fluid in the loader's cab at least five times. Second, Campbell County had actual knowledge of the accumulation of hydraulic fluid in the front-end loader's cab. Third, Campbell County's actual knowledge of the violative conditions on June 22 and its repeated failure to repair the leak over the previous five months put Respondent on notice that greater efforts were necessary to come into compliance with the regulation. The Commission has indicated that a mine operator's own safety reports can serve to put the operator on notice that its existing abatement efforts are insufficient. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262 (1992) (holding that a mine's preshift examination books were "relevant in demonstrating that [the operator] had prior notice that a problem with coal and coal dust accumulations existed in the cited area, and that greater efforts were necessary to assure compliance. . . ."). Fourth, the extent of the violative condition was significant. The leaked fluid had formed a six-inch puddle at the feet of the vehicle's operator and was smeared across the cab floor. As such, the hazard posed a high degree of danger to the vehicle operator, which applies to the fifth factor. As I have already held, the violation was S&S and reasonably likely to cause a fatal injury.

In its defense, Respondent first contends that the presence of a rubber mat on the cab floor obscured the leakage. But the repeated incidences of the leaked hydraulic fluid in the months leading up to the MSHA inspection put Campbell County on notice that it should be extra vigilant in examinations of the front-end loader. Just as an apartment owner who covers his leaking pipes with a rug gets no reprieve when the apartment below floods, Campbell County merits no sympathy for having a mat covering the loader's floor.

Finally, Respondent claims that its efforts to fix the leak by replacing seals on the hydraulic lines should weigh against the Secretary's allegations. Campbell County's good intentions garner it minimal credit. As the Commission has observed: "Good intentions [] and good faith are not the same. Good faith requires vigilance about one's responsibilities, commitment to finding the resources to get the job done, and accountability for failure." *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (2000). Perhaps if this were the first or even the second time that the hydraulic fluid leak had arisen, I would credit Respondent's abatement efforts. But the condition was noted no less than five times. Campbell County's abatement efforts amount to treating a bullet wound with a Band-Aid; at some point, the efforts must become inadequate to any reasonable observer.

In light of Campbell County's failure to address the leakage of combustible material in the cab of the front loader, I conclude that the Secretary has met his burden of proving unwarrantable failure.

Similarly, I conclude that the Secretary has demonstrated Campbell County's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.") Here, Respondent knew of the hydraulic fluid leak yet dangerously allowed violative conditions to remain in the cab. For at least two days, the miner operating the loader faced potentially serious injuries from a known condition that Respondent failed to address. Campbell County's efforts to address the leakage repeatedly proved inadequate to fix the problem, and thus do not mitigate Respondent's negligence.

d. Penalty

The Secretary proposed a $4,000.00 civil penalty for this violation. I have found that this order was properly designated S&S. I also have found Campbell County's negligence to be "high" and its actions to amount to an unwarrantable failure. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In the two years prior to the MSHA inspectors' visit on June 22, 2010, Campbell County received approximately fifty citations or orders for violations of mandatory safety and health standards. (Ex. P-1.) Considering that the County Quarry employs a modest four miners on site, such a high number of violations is substantial. Nothing in the record suggests that the penalty would impinge on Campbell County's ability to remain in business. Moreover, Campbell County was highly negligent in allowing the hydraulic fluid accumulation to persist, and the violation exposed miners to a reasonable risk of fatal injuries. Nevertheless, I acknowledge the small size of Campbell County's mining operation and the operator's rapid efforts to repair the front-end loader after the June 22 inspection.

The Mine Act sets a minimum penalty of $4,000.00 for an order issued under section 104(d)(2). 30 U.S.C. § 820(a)(3)(B); *see Stansley Mineral Resources, Inc.*, 35 FMSHRC 1177 (May 2013) (holding that Administrative Law Judge cannot reduce penalty below statutory minimum set under 30 U.S.C. § 820(a)(3)(A) for analogous section 104(d)(1) violation).

Considering all of the facts and circumstances of this matter, I do not see that the violation deserves a penalty beyond the statutory minimum. Accordingly, I affirm the Secretary's proposed penalty and assess the statutory minimum penalty of $4,000.00.

B. Order No. 8542431: The Hammer Mill

1. Further Findings of Fact

a. Whether Work Took Place on the Elevated Walkway

Campbell County disputes at length the Secretary's allegation that the walkway upon which debris had accumulated was a workplace or the means of access to a workplace for the purposes of section 56.11001. (Resp't Br. at 7–10, Resp't Reply at 2–5.) Campbell County contends the only work performed on the elevated walkway is "clearing the catwalk of build-up, which miners are required to do, per quarry rules, as they make their way to the de-activated hammer mill to perform maintenance and repairs." (Resp't Br. at 9.)

The evidence does not support Respondent's position that work did not take place on the elevated walkway. In fact, Safety Director Franklin, testified that workers accessed the walkway at least once a week to grease the machinery. (Tr. 161:9–11.) Indeed, Superintendent Potter testified that the entire reason for installing the elevated walkway was to provide a safer means of performing maintenance work on the hammer mill. (Tr. 229:1–10.) In addition to this regular maintenance, miners accessed the walkway on a daily basis to perform necessary equipment safety checks. (Tr. 196:9–11.) Workers also occasionally accessed the catwalk branching off of the main walkway section. (Tr. 188:16–19.) Inspector McPheeters testified the walkway was a work area because mine employees accessed it to perform regular maintenance on the hammer mill. (Tr. 143:8–10.) Indeed, the testimony of McPheeters, Franklin, and Potter is uncontroverted.

All three witnesses agree that work is performed on the platform where the rock material had accumulated. Based on the evidence before me, I find that work did take placed on the elevated walkway on a daily basis.

b. Whether the Rock Material Covered Accessible Parts of the Walkway

Campbell County also asserts that the area containing the accumulation of material cannot constitute a working place or a means of access under the regulation because the accumulation was confined to the small area underneath the overhanging feeder. (Resp't Br.

at 9.) Respondent argues that the low clearance of the feeder makes traversing the area difficult, and thus not a means of access. (*Id.*)

Once again, the evidence does not support Respondent's argument. McPheeters testified that the rock pile covered nearly four feet of the elevated walkway, leaving no way to navigate past the rubble without traversing it. (Tr. 82:1–4.) In addition, the Secretary introduced into evidence photographs showing the accumulated rocks spreading to the edge of the walkway and completely blocking access to the catwalk. (Ex. P–5.) In the photograph, the debris spread well beyond the shadow of the feeder. (*Id.*)

Based on this evidence, I find that the accumulation of rubble extended to an accessible area of the walkway.

c. The Duration of the Rock Spill's Existence

Next, Respondent challenges the Secretary's assertion that the ejected material had been present on the walkway for approximately a week at the time of the inspection. (Resp't Reply Br. at 4.) At the hearing, Inspector McPheeters said the accumulation of debris along the walkway was noted on June 16, 2010, six days prior to the MSHA inspection. (Tr. 79:16–21.) He also speculated that the hammer mill would have to run for about a week to eject the amount of rock found at the site. (Tr. 75:19–76:6.)

In contrast, Superintendent Potter testified that the hammer mill would eject the amount of material present at the time of the inspection in merely two days. (Tr. 178:2–5.) Respondent emphasizes that McPheeters did not find any notes identifying the accumulated rock in the mine's workplace examination reports subsequent to the initial June 16 notice. (Resp't Reply Br. at 4; Tr. 81:13–22.) Notably, however, Respondent presented no specific testimony that anyone had cleaned the walkway in the time between the June 16 report and the inspection on June 22. Respondent urges me to make the negative inference that because McPheeters did not note any report of the debris accumulation subsequent to that of June 16, it therefore follows that Campbell County cleared the violation. The evidence does not support such a conclusion.

I find that the inspector's testimony is credible in that a regularly functioning hammer mill could eject the amount of collected material in one week. Because Potter had greater specific knowledge of the County Quarry's hammer mill, I also find credible his testimony that the hammer mill was functioning more poorly than McPheeters estimated. Furthermore, it is uncontroverted that the design flaw allowing a mass of material to eject onto the elevated walkway had been present for longer than a few days. (Tr. 170:22–172:11.)

Based on the evidence before me, I find that the rock spill had lasted at least two days. Indeed, the defect in the hammer mill causing the material to eject onto the elevated walkway likely existed since the hammer mill's installation.

2. Analysis and Conclusions of Law

a. Violation of Section 56.11001

Inspector McPheeters issued Order No. 8542431 for Campbell County's failure to clean an accumulation of rock debris off the elevated walkway around the mine's hammer mill. (Ex. P–5.) To demonstrate a violation of 30 C.F.R. § 56.11001, the Secretary must prove by the preponderance of the evidence that the operator (1) failed to provide or maintain (2) safe means of access (3) to a working places.

I have already determined that work regularly took place on the elevated walkway and that the expelled material covered the walkway where workers could walk. For the debris-covered section of the walkway to constitute means of access to a working area under section 56.11001, therefore, I need only find there was a reasonable possibility that a miner would access that area. *Hanna Mining*, 3 FMSHRC at 2047.

Here, the rubble was directly adjacent to access points to grease the hammer mill. Furthermore, a worker would have to traverse the material to reach the catwalk for equipment examinations. Thus I determine it is reasonable to believe a miner would have reason to walk across the walkway covered in debris to perform work.[7] Based on the evidence before me, I conclude that the walkway around the hammer mill was a working area. The Secretary has therefore satisfied the second and third elements necessary to show a violation of the regulation.

As there is no question that Campbell County provided safe access to the hammer mill by constructing the walkway,[8] the case turns on whether Campbell County *maintained* the walkway

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[7] Rather than attempting to show there was no reasonable possibility of miners crossing the debris pile, Campbell County contends its use of signs blocking the entrance to the elevated walkway while the hammer mill was in operation precludes the walkway from being considered a working area. (Resp't Br. at 8–9.) Respondent's argument, which is devoid of any citation to law, essentially claims that only areas in which work is currently taking place are subject to the Secretary's regulations. Such an interpretation effectively would require inspectors to observe work in progress in the area before MSHA could find a violation. Thus, an operator could escape penalty by shutting down operations upon the inspector's arrival. The Commission has consistently rejected this argument. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545–51 (Sept. 1987).

[8] Respondent appears to contend that it met its duty under section 51.11001 simply by building the elevated walkway. (Resp't Br. at 9.) Respondent argues that upholding Order No. 8542431 would tacitly deter mine operators from providing such safety measures. (*Id.*) This contention is inapposite. The question of whether providing maintenance on the hammer mill from ladder-top would constitute safe access is not relevant to the question of whether Campbell County maintained the walkway in a reasonably prudent manner. Simply stating that its conduct could have been worse is not evidence that the steps Campbell County took fulfilled the high

in a reasonably prudent manner.

At the hearing, Inspector McPheeters testified that accumulation of material presented a distinct trip-and-fall hazard to miners working on the walkway, and that no amount of ejected material would be safe. (Tr. 78:10–11, 77:4–8.) He also explained that the reasonably prudent course of action for the mine would be to repair the hammer mill to prevent the escape of material onto the elevated walkway. (Tr. 77:15–19.) In contrast, Campbell County claims that the ejection of material is a natural function of the hammer mill and that the Secretary's demands would require the mine to shut down the hammer mill several times per day to clean the accumulated debris. (Resp't Br. at 14; Tr. 178:5–9.)

Respondent's argument again is inapposite. By their nature, safety regulations may impede mining operations to ensure that workers are safe. In passing the Mine Act, Congress prioritized worker safety over mine output. In allowing the rock debris to accumulate around the hammer mill for days at a time, Campbell County prioritized output above the safety of its workers. At the very least, reasonable prudence would require the operator to clean up the debris on a daily basis to protect miners performing the daily workplace inspections. It is unclear from the record how daily cleaning would require the operator to alter the hammer mill's operating schedule. By Superintendent Potter's own admission, the ejected rock took at least two days to accumulate. Thus, Campbell County did not even reach the low bar of daily cleaning. I find McPheeters's testimony credible, and I determine that a mine's reasonable response to the continual ejection of material would be to modify the hammer mill to prevent the debris from spilling out. Campbell County eventually did exactly this, but only when faced with a work closure order from MSHA. (Tr. 169:2–13.)

Consequently, I determine that the Secretary has satisfied all three elements to show a violation of section 56.11001. The area around the hammer mill was a working place as defined in the regulation, and the elevated walkway was a means of access to that working place. Campbell County therefore had a duty to maintain the walkway in a reasonably safe manner. Campbell County failed in this duty by allowing the accumulation of rock material that created a risk of tripping and falling.

b. Gravity and S&S Determination

Campbell County's violation of section 56.11001 establishes the first element of the *Mathies* test for an S&S violation. Second, I must assess whether the violation contributed to a discrete safety hazard. Inspector McPheeters credibly testified that the debris on the walkway threatened to trip a miner traversing the area. (Tr. 78:10–11.) McPheeters judged that the material, which included fist-sized rocks, was six to twelve inches high. (Tr. 73:21–22.) I find his testimony credible, and determine that the loose rubble in the middle of a walkway presented a discrete risk of causing a worker to fall and suffer injury.

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standard of safety required under the Mine Act and the Secretary's mandatory health and safety regulations.

Next, I must determine whether the safety hazard is reasonably likely to contribute to an injury. In support of its assertion that the rubble pile would reasonably likely result in injury, the Secretary points to the size of the rock pile and the regularity with which miners accessed the walkway to perform maintenance and daily workplace examinations. (Sec'y Br. at 19.) Campbell County, on the other hand, emphasizes the low frequency with which miners access the hammer mill and the mine's efforts to limit access to the mill by chaining off walkway entrances while the mill is operational. (Resp't Br. at 13–14.) Campbell County also claims that the overhanging feeder belt forces miners in the area to move slowly, further reducing the risk of an injury occurring. Again, the evidence does not support Respondent's argument. The debris pile covered the entire width of the walkway in parts. A miner performing workplace evaluations would be forced to traverse the pile of rocks on a daily basis. I determine that a miner traversing the rock accumulation regularly could reasonably be expected to trip and fall, resulting in injury.

Finally, I must determine whether the injury caused would likely be serious. The Secretary claims the injuries in this instance are reasonably likely to be permanently disabling. (Sec'y Br. at 19.) McPheeters testified that the resulting fall from tripping on the walkway could result in a damaged back, broken bones, torn tendons, or a head injury. Respondent contends that, because a railing enclosed the walkway and because the overhanging feeder prevented workers from moving quickly through the area, any injuries resulting from a fall likely would be minor. In addition, Respondent suggests that a trip and fall hazard is insufficient to support a designation of S&S without the presence of aggravating circumstances.[9] (Resp't Br. at 14.)

Looking at the evidence, I am convinced that the injury likely to result from a fall on the walkway would not be permanently disabling. Given the presence of the railing and the fact that miners did not access the walkway while the hammer mill was operational, the injuries resulting from a fall on the platform likely would be limited in severity. In this context, the kind of injuries McPheeters describes are more likely to cause lost work time than to be permanently disabling. Accordingly, I reduce the type of injury in Order No. 8542431 from "permanently disabling" to "lost workdays or restricted duty"

Nevertheless, the Commission has consistently recognized that muscle strains, sprained ligaments and tendons, and broken bones are injuries of a sufficiently serious nature to support an S&S designation. *S & S Dredging Co.*, 35 FMSHRC 1979, 1981 (July 2013) (overturning a judge's ruling that muscle strains were insufficient to underpin an S&S designation); *see, e.g.*, *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562–63 (Aug. 2005) (affirming Judge's conclusion that serious injuries such as a leg or back injury would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb.

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[9] Respondent's argument relies on *Hamilton Pipeline, Inc.*, 24 FMSHRC 915 (Oct. 2002) (ALJ). In *Hamilton*, the judge determined on the evidence that a single crooked step on a short, narrow stairway bordered by two railings did not present a risk of injury resulting in lost workdays. *Id.* at 924–925. Those same facts are not present in the case before me. Furthermore, decisions by Administrative Law Judges do not constitute binding precedent. 29 C.F.R. § 2700.69(d).

1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming Judge's conclusion that a trip and fall would result in reasonably serious injuries such as "sprains, strains, or fractures").

Given the evidence before me, I determine that the Secretary has met his burden of proving that reasonably serious injuries were reasonably likely to occur, thus satisfying the fourth element of *Mathies*. Based on my above determinations, I therefore conclude that this violation was appropriately designated as S&S.

c. Negligence and Unwarrantable Failure

The Secretary designated this violation as an unwarrantable failure, characterizing Campbell County's negligence as high. In support of this allegation, the Secretary points to the obvious nature of the risk and the length of time the problem existed. (Sec'y Br. at 23.) In response, Campbell County asserts that its efforts to limit access to the walkway during operation and its policy of cleaning the walkway whenever work must be performed in the area mitigate the operator's negligence. (Resp't Reply Br. at 8.)

Each of the Commission's unwarrantable failure factors suggests Respondent's conduct was aggravated. First, the extent of the violation was significant, spreading across half the length of the eight-foot walkway and covering nearly the entire width of the walkway, as well as the platform directly under the feeder. Second, Campbell County's own safety inspections put the operator on notice regarding the need to clean the accumulating debris. Furthermore, Respondent had been cited for violations of section 56.11001 four times in the two years prior to the order in question, so it was well aware of the requirements of the regulation. (Tr. 84:7–14.) Third, the operator did not provide any evidence of specific efforts it had made to prevent the material from collecting, other than the assertion that miners servicing the hammer mill were told to grab both grease and a shovel to clear their way. Indeed, Campbell County did not clear the rock piles on even a daily basis and instead apparently adopted a policy of allowing the material to collect for days at a time. Fourth, the violation was obvious, accumulating quickly and spreading across the breadth of the walkway. Furthermore, the material was ejected in the direct line of site of the machine's operator. Because of the rapidity with which the hammer mill expelled material, the operator either knew or should have known of the existence of the accumulated debris on June 22. Sixth, as I determined above, the trip-and-fall hazard was dangerous because it could result in broken bones, torn tendons, or a head or back injury.

In response, Campbell County suggests its negligence is mitigated because the debris accumulation took place over two days instead of the inspector's estimated week. (Resp't Reply Br. at 4.) Respondent's argument is unsupported. It defies logic to suggest that the operator should be granted leniency because the machine creating a hazard functioned worse than the inspector believed when he found the violation. In light of the obviousness of the violation and the significant degree of danger, leaving the material on the walkway for two days is aggravated conduct. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 32–37 (Jan. 1997) (finding unwarrantable

failure for extremely unsafe violation that lasted only minutes).

Campbell County next argues that its negligence is mitigated because the hammer mill was operating within its design parameters. (Resp't Br. at 14.) Respondent's reliance on the hammer mill's safety manual is misplaced. The manual warns of the danger of ejected material and explicitly states that alterations may be necessary to conform to federal and state safety regulations. (Ex. R–3.)

Similarly, Campbell County Highway Superintendent Potters testified expansively on the pristine safety record the County Quarry enjoys. While it may be true that Campbell County has a commendable record of injury-free operations, MSHA does not need an injury to find a violation of a mandatory health or safety standard. The Mine Act is a strict liability statute. *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989).

In light of these factors, I find that the Secretary has met his burden of showing that Respondent's conduct was aggravated, amounting to an unwarrantable failure.

Likewise, I determine Campbell County's negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances."). Again, the violative conditions were readily apparent and exposed Campbell County's miners to significant injuries. Rather than clearing the walkway, however, Campbell County chose to continue operating the hammer mill.

d. Penalty

The Secretary also proposed a $4,000.00 civil penalty for this violation. Again, I have found that this order was properly designated S&S. I have also found Campbell County's negligence to be "high" and its actions to amount to an unwarrantable failure.

Turning to the relevant factors for assessing a penalty, I again note the mine's history of violations. The record does not show that the Secretary's proposed penalty would impinge on Campbell County's ability to remain in business, but I note that the County Quarry is a small mining operation. Campbell County's negligence in allowing the debris accumulation was high, but the hazard posed only the risk of lost workdays or restricted duty. Finally, Campbell County swiftly made adjustments to the hammer mill after the MSHA inspection to prevent future debris accumulations.

The evidence does not support a penalty above the Secretary's proposed penalty, which is the statutory minimum penalty allowed for an order issued under section 104(d)(2). 30 U.S.C. § 820(a)(3)(B); *see Stansley Mineral Resources*, 35 FMSHRC at 1177. Accordingly, I hereby assess a civil penalty of $4,000.00 for this violation.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Order No. 8542424 is **AFFIRMED**. It is further **ORDERED** that Order No. 8542431 be **MODIFIED** by changing the type of injury from "permanently disabling" to "lost workdays or restricted duty."

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $8,000.00 within 40 days of this decision.

Alan G. Paez
Administrative Law Judge

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