FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 2, 2018

RIVER HILL COAL COMPANY, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. PENN 2014-0956-R Order No. 8012327; 09/02/2014 River Hill Tipple Mine ID 36-08683
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RIVER HILL COAL COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2015-0178 A.C. No. 36-08683-375386 Mine: River Hill Tipple

DECISION AND ORDER

Appearances: Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA, for the Secretary of Labor;

Joseph A. Yuhas, Esq., Northern Cambria, PA, for the Operator.

Before: Judge L. Zane Gill

These proceedings arose from a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") and a Notice of Contest filed by the operator, River Hill Coal Company, Inc. ("River Hill" or "Operator") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(d). These cases involve one section 104(d)(1) citation, one section 104(d)(1) order, and one section 104(b) order.

The Secretary seeks civil penalties of $2,000.00 for Citation No. 8012325 and $2,000.00 for Order No. 8012326, requesting that they be affirmed as issued. River Hill argues that the court should vacate the citations because it lacked fair notice of the violative nature of its

conduct. Failing that, the operator argues the citations are neither significant and substantial ("S&S") nor unwarrantable failures.

Additionally, River Hill argues the section 104(b) order, Order No. 8012327, was improperly issued because the inspector did not provide a reasonable time for abatement.

For the reasons listed below, I find that the violations for which Citation No. 8012325 and Order No. 8012326 were issued are S&S and constitute unwarrantable failures to comply with a mandatory standard. I find that a total penalty of $4,000.00 is appropriate. Additionally, I find that Order No. 8012327 was properly issued.

I. STIPULATED FACTS

1. River Hill Coal Company, Inc. operated the River Hill Tipple (Mine No. 36-08683) at the time that the violations in this matter were issued.

2. Respondent was an "operator" as defined in § 3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the citations in this matter was issued.

3. The operations of Respondent at the Mine at which the citations in these matters were issued are subject to the jurisdiction of the Act.

4. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act.

5. The citations in these matters were properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time, and place stated therein as required by the Act.

6. True copies of the citations in these matters were served on Respondent and/or its agents as is required by the Act.

7. The violations contained in "Exhibit A" attached to the Secretary's petitions in these matters are authentic copies of the subject violations, with all the appropriate modifications or abatements, if any.

8. Payment of the total proposed penalty in this matter will not affect Respondent's ability to continue in business.

II. FACTUAL BACKGROUND

On June 26, 2013, River Hill idled the Old Processing Plant ("Old Plant") and the New Old Processing Plant (referred to here as the "Wash Plant")[1] at the River Hill Tipple, a coal preparation plant near Karthaus, Pennsylvania. (Tr.209:20-22; 225:11-16; Ex. S–5)

In either late June or early July, Keith Thompson, a contractor who supervised plant operations for the operator, consulted MSHA's Clearfield Office and explained River Hill's intention to idle the plants. (Tr.209:20-210:12; 226:22-227:1) Over the phone, Thompson informed Inspector John McMurray that while he intended to maintain electricity through both buildings, he no longer planned to use or run the plants. (Tr.210:17-21) He agreed to restrict power to the equipment and lighting and prevent access to both buildings. (Tr.211:4-13)

On August 7, 2014, McMurray[2] inspected the plants, accompanied by Thompson and Elwood King, the mine's electrician. (Tr.22:13-15; 46:12-14; 121:7-15) McMurray observed numerous structural hazards, (Tr.26:23-28:25; 50:1-7; 51:5-9), and decided to return with an expert to determine the extent of structural deterioration before issuing citations. (Tr.51:12-52:19; 139:12-140:18) McMurray received assurances from Thompson that the plants would remain locked and restricted from access. (Tr.54:25-55:7; 140:7-10; 217:23-218:10)

On August 25, 2014, McMurray returned with Terrance Taylor, an MSHA expert on structural engineering.[3] (Tr.156:6-20; 167:18-23; 170:8-11) Collectively, they observed the following:

A. Old Plant Conditions

Numerous support beams within the Old Plant were corroded or deteriorated. Corroded steel floor plates hung from an outdoor overhanging structure. (Tr.198:8-24; Ex. S–17) McMurray testified that miners walked under this overhanging structure. (Tr.42:20-43:7) Large delaminated metal sheets hung from the walls. (Tr.29:20-22; 30:22-23; 42:16-19; 193:11-14; Exs. S–1, 5, 15) These plates posed a danger to those standing below on the ground floor.

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[1] Both plants are referred to by a variety of names throughout the testimony. The Old Processing Plant is also known as the Old Plant, the Old Side, the Old Side Tipple, and the Screen building. (Tr.25:1-3; 136:16-20; 137:13-21) The New Old Processing Plant is also known as the New Old Plant, the New Old Building, the New Side Tipple, the New Side, the Fines Building, and the Wash Plant. (Tr.25:4-5; 87:2-6; 136:6-15; 137:9-12; 228:20-229:4) For the purpose of clarity, I refer to the New Old Processing Plant as the Wash Plant.

[2] At the time of the hearing, McMurray had been an MSHA employee for 32 years. (Tr.13:23-25; 121:6) As a surface mine inspector, McMurray conducted thousands of inspections on surface mines and served as a technical advisor to other inspectors. (Tr.14:1-15:23)

[3] At the time of the hearing, the Secretary's expert witness was a senior civil engineer and had worked in technical support for MSHA for 28 years. (Tr.158:5-12; 167:4-15)

(Tr.194:8-12; Ex. S–15) The garage door, the garage door opener, and a fresh water pump were located below these plates on the ground floor. (Tr.31:6-24; 33:12-34:2) McMurray testified all three pieces of equipment required inspection or service, and that at least two employees accessed the area. (Tr.31:14-24; 32:18-33:4; *see* Ex. S–5)

McMurray and Taylor were unable to access the upper floors because the second floor walkway that led to the stairs was corroded. (Tr.35:4-15; 36:23-37:18; 194:24-195:8; 200:25-201:16; Exs. S–16, 18) This walkway had rust, holes, lacked support, and bent under applied pressure. (Tr.37:12-38:10; Ex. S–16) McMurray observed King cross this walkway. (Tr.38:1-16) The metal and the tread of an outside stairwell were deteriorated. (Tr.44:6-17) A pipe obstructed the bottom of the stairwell as a warning against access. (Tr.28:4-7) The pipe was moveable and lacked any cautionary signs.[4] (Tr.28:8-25; *see* Ex. S–5)

B. <u>Wash Plant Conditions</u>

The Wash Plant's main support columns were completely compromised with rust. (Tr.87:10-14; Ex. S–7) The diagonal bracings for numerous columns were corroded or detached.[5] (Tr.50:17-18; 176:24-178:25; Ex. S–8) Two columns had corrosion holes within their webbing. (Tr.174:14-176:2) Numerous horizontal support beams had delamination damage, corrosion holes, and pitting. (Tr.180:1-181:10) One sagging horizontal beam supported an elevated platform. (Tr.181:20-182:8; Ex. S–10) The stairwell's support posts were almost completely deteriorated from severe corrosion and pitting. (Tr.97:5-13; 188:17-189:21; Exs. S–13, 20) The stairway's inclined channel stringers also had corrosion holes. (Tr.187:2-8; Ex. S–12) The horizontal beam that supported the stair landing was weakened with corrosion holes. (Tr.87:22-25; 97:2-13) The plant had flooring that was totally corroded and bending down, causing a bow in the floor. (Tr.88:11-90:3; Ex. S–10) Three or four support posts for a sump bin were severely deteriorated. (Tr.183:11-184:22; Ex. S–11) There were severe corrosion notches in four of the vertical support posts for the plant's BC-1 conveyor belt. (Tr.190:12-191:24; Ex. S–14) Additionally, the Belt BC-1 had a large corrosion hole in the webbing of the channel. (Tr.190:15-17) At the time of the inspection, the Wash Plant lacked any barricade, lock, tape, or cautionary warning sign to discourage entry. (Tr.47:11-19; *see* Ex. S–5)

On inspection, Taylor determined that both buildings were not maintained in good repair. (Tr.171:12-13; 172:1-2; Ex. S–5) He testified that a significant number of areas in each building were unsafe. (Tr.204:18-205:16) In Taylor's expert opinion, neither the Old Plant nor the Wash Plant was maintained in good enough repair to prevent injuries and accidents to miners. (Tr.203:20-204:15)

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[4] After the inspection, River Hill welded a bar across the entrance of the stairwell. (Tr.44:22-25)

[5] Diagonal braces provide lateral resistance to the structural frame and resist stress from mechanical vibrations that could weaken the structural integrity of the building. (Tr.177:1-20)

C. Plant Use and Employee Access

The plants were accessed and used in the eighteen months before the issuance of the citation. King, Operator's electrician, conducted monthly electrical examinations of both plants. (Tr.46:18-25; 57:19-61:1; 76:15-20; 213:22-214:11; Ex. S–21) The routine records from these examinations confirm King walked through the first floors and accessed the upper floors of the Old and Wash Plants.[6] (Tr.46:18-25; 149:18-150:1; 214:2-11; 239:13-23; Ex. S–21)

From May 24-27, 2014, the mine ran raw coal on conveyor belts through both plants. (Tr.61:23-62:4; 67:12-68:18; 231:5-233:5; 237:10-18; Ex. S–21, at 14) This activity does not necessitate employee presence within the plants. (Tr.69:1-22; 121:19-25) However, conveyor belts usually spill coal over the edges of the belts and produce coal dust that accumulates on all the structures. (Tr.70:8-16) Every active working area and active surface installation must be examined once each shift and cleaned of spilled coal and coal dust. (Tr.69:9-14; 122:1-16; 30 C.F.R. § 77.1713(a)) Thompson alleges the miners performed visual examinations by standing outside the plant and that coal did not spill in either building. (Tr.234:11-235:2; 237:19-238:1) Had maintenance been required, Thompson claims he would have shut down the plant and performed inspections to ensure safe travel within the plants. (Tr.238:22-239:2) The buildings must be hosed down from the top floor to the bottom floor to entirely remove coal dust. (Tr.75:9-18) McMurray testified that it was obvious the Wash Plant had been washed down because it was "remarkably clean" and without coal dust three months later.[7] (Tr.48:7-8; 70:17-71:3)

On August 28, 2014, McMurray issued Citation No. 8012325 and Order No. 8012326 to River Hill under 30 C.F.R. § 77.200 for a failure to maintain two buildings in good repair to prevent accidents and injuries to employees. (Tr.7:18-24; Exs. S–1, 2) At the time of the cited violations, the plants had been idled for over a year. (Tr.109:22) McMurray did not want to economically damage the operator by issuing numerous citations. (Tr.140:19-141:1) After discussion with the MSHA field office supervisor the next morning, McMurray issued a 104(d)(1) citation for the Old Plant and a 104(d)(1) order for the Wash Plant. (Tr.19:3-10; Exs. S–1, 2) McMurray gave River Hill until September 2, 2014—five days—to abate the violations. (Tr.107:3-8; Exs. S–1, 2) River Hill made some suggestions and considered how to restrict access to the buildings. (Tr.105:22-106:1)

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[6] On July 31, 2013, King's records indicate he repaired an electrical ballast on the fifth floor of the New Side Tipple plant. (Tr.75:19-76:8; Ex. S–21, at 1) Thompson and McMurray disagree whether the New Side Tipple refers to the Wash Plant. (Tr.136:21-137:12; 228:7-229:11) The issue is not determinative. Thompson admitted that King accessed the upper levels of the Wash Plant during inspections. (Tr.214:2-11)

[7] As part of the procedure to initially close the buildings a year earlier, the operator hosed down the plants from the top to the bottom floors on August 29, 2013. (Tr.74:16-75:18; 225:21-226:6; Ex. S–21, at 3)

On September 2, 2014, the abatement deadline, McMurray returned and discovered that while the entrances to the plants were locked, the key was readily accessible to the mine employees in the office. (Tr.107:11-17) He issued a 104(b) order for a failure to abate the conditions.[8] (Tr.106:19-22; Ex. S–3)

On September 16, 2014, McMurray terminated the 104(b) order when he observed that the buildings were completely barricaded, the power within the buildings was disconnected, and River Hill submitted a plan to the District Office to keep the Old Plant and the Wash Plant idle. (Ex. S–3)

III. ANALYSIS AND DISPOSITION

A. PENN 2015-0178

1. Notice

River Hill seeks to avoid liability by arguing that it lacked fair notice of the requirements of section 77.200. (Resp't Br. 9) River Hill argues MSHA's conduct on numerous occasions affirmed River Hill's compliance with the regulation. Thompson testified that when he consulted McMurray on the best practice to close both buildings, he indicated the intent to maintain electricity within the buildings. (Tr.210:17-21) River Hill argues that MSHA either approved of or failed to raise objections to the implied monthly electrical examinations necessary to maintain electricity in both buildings. (Resp't Br. 10) It cites MSHA's failure to issue citations during two inspections and the three week delay in the issuance of the citations after the third inspection as evidence of MSHA's belief of River Hill's compliance. (*Id.*) River Hill also highlights McMurray's "NVO" notation in the inspector's notes as evidence that no violations were observed during the final inspection. (*Id.*) Finally, River Hill highlights an instance where McMurray told King "that's fine for you" while crossing a dangerous walkway. (*Id.*, *citing* Tr.38:17-18) McMurray indicated that while the state of the walkway might satisfy King, it did not satisfy his own standards for safety. (Tr.38:18-25) River Hill, nevertheless, argues that McMurray's response ("that's fine for you") indicated approval of King's actions. Essentially, the operator argues that MSHA should be estopped from issuing the citations because MSHA did not raise objections to electrical examinations in the idle buildings and because of a lack of previous citations from prior inspections. (*See* Resp't Br. 9-11)

The operator's argument that it detrimentally relied on MSHA's implicit approval of electrical examinations within the buildings and the lack of previous citations fails. The Commission has declined to apply equitable estoppel against the government or its agents. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981). Generally, "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 63 (1981); *see also Emery*

[8] Order No. 8012327 only applies to the Old Plant, as personnel were already required to be withdrawn from the Wash Plant pursuant to 104(d)(1) Order No. 8012326. Accordingly, Order No. 8012327 only refers to Citation No. 8012325 in the condition or practice narrative. (Ex. S–3)

Mining Corp. v. SOL, 744 F.2d 1411, 1416 (10th Cir. 1984). The Commission has held that an inconsistent enforcement history by MSHA inspectors "does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Maxxim Rebuild Co.*, 38 FMSHRC 605, 610 (Apr. 2016) (citing *Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug. 2012)) (citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000)); *see also Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) ("prior instances of inconsistent action by MSHA do not constitute a viable defense to liability."). Rather, confusing MSHA actions may be a mitigating factor in determining an operator's negligence. *King Knob*, 3 FMSHRC at 1422. I find that a lack of prior citations and a conversation permitting the idling of the plants without MSHA's explicit approval of regular miner access within the buildings cannot be used to deny the electrician protections afforded to him by the statute.[9]

A mine operator is held strictly liable for violations that occur at its mine. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). The operator may, however, avoid liability by showing that it was not properly on notice of the violative nature of its conduct. *See Hecla Ltd.*, 38 FMSHRC 2117, 2125 (Aug. 2016) ("To comport with due process, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The Commission has held that where the language of a standard is clear and unambiguous, the standard provides operators with fair and adequate notice. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010) (citing *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997)). Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the mining industry and the protective purposes of the cited standard would have recognized a hazard warranting corrective action within the purview of the applicable regulations. *Hecla*, 38 FMSHRC at 2125; *Lafarge N. Am.*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Ala. By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

I reject the operator's fair notice defense as to these violations. The D.C. Circuit has held that the plain language of section 77.200 gives fair notice of what it requires and that the regulation is not unconstitutionally vague. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). The plain meaning of the standard requires that structures be maintained in good repair so that they do not deteriorate to a condition that is hazardous. *Id.* The court found that any reasonably prudent person would recognize that allowing steel beams supporting a walkway to corrode and deteriorate to the point of collapse constitutes a failure to maintain a facility in good repair. *Id.* Similarly, I find the standard is clear on its face as it

[9] There is no evidence that the Secretary actually took inconsistent positions with respect to this particular application of the standard. Neither party testified that MSHA allowed a miner to enter the unmaintained buildings and expose himself to potentially serious injuries. It was only the operator's "understanding" of the discussion that led it to conclude that it was acceptable to provide the electrician regular access throughout both buildings despite the severity of structural decay. (Tr.211:13-22; 222:13-19) As for the lack of citations from previous inspections, the inspectors understood access to the idled plants was restricted and, consequently, performed only cursory inspections of the buildings. (Tr.216:22-217:7)

applies to the facts in this case. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would recognize that allowing a miner access to buildings with sagging support beams, deteriorated staircases, and corroded support columns and walkways constitutes a failure to maintain a structure in good repair to prevent accidents and injuries to that miner. The operator's impressions of MSHA's actions do not overcome the clear language of the statute or the standard of a reasonably prudent miner in similar conditions. Accordingly, I conclude that operator had adequate notice of the requirements of 30 C.F.R. § 77.200.

2. S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a [. . .] mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord. Buck Creek Coal, Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Ill., LLC*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Newtown*, 38 FMSHRC at 2037-38. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* at 2038.

The third step requires the judge to assume the existence of a hazard and assess whether the hazard "would be reasonably likely to result in serious injury." *Id.* at 2037; *ICG*, 38 FMSHRC at 2476. The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard contributed to by the violation is reasonably likely to cause an injury. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011), *citing Musser Eng'g, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010). When determining whether a hazard is reasonably likely to result in a serious injury, the Commission has held that the degree of danger increases when an operator ignores a chronic problem. *Arnold Stone, Inc.*, 39 FMSHRC 1719, 1723 (Sept. 2017).

I find that the violations were S&S. River Hill violated section 77.200 by failing to maintain the buildings in good repair to prevent injuries and accidents to miners. The hazard to

which the violation allegedly contributes is that a person could be struck by falling debris or trip or fall on or from the many rusted stairs and walkways. (Tr.91:19-93:12) I find that these hazards were reasonably likely to occur given the severity and extensiveness of the deterioration, the frequency with which King entered the plant, and his documented presence throughout the upper floors of both plants. I also find this hazard was reasonably likely to occur given that of the stairways King would have used, one was only accessible via a thoroughly corroded second-story walkway, and the other was supported by posts that were almost completely deteriorated. (Tr.92:1-7) I find that the mine undertook no corrective measures to improve the structural integrity of the buildings despite King's frequent exposure to the hazardous conditions. I find that the growing structural deterioration after the alleged closing of both plants increased the danger to King over time. I find it likely that a trip or a fall contributed to by rotted floors and stairways, particularly from the upper floors of either building, would be reasonably likely to result in an injury to a miner. A trip or a fall over corroded metal is reasonably likely to result in a serious cut, infection, or severed limb injury—all serious injuries. A fall from the second floor to the ground below is also reasonably likely to result in a serious injury. Accordingly, I find the violations were S&S.

3. 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 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.

I find that the gravity of this violation was moderately serious. Given the increasing decay, I find it reasonably likely that King would be injured during his inspections within the plants for the reasons discussed above. If an injury did occur, it could reasonably be expected to be serious, possibly resulting in a permanently disabling injury. Nevertheless, although I am not in full agreement with Inspector McMurray's evaluation after viewing the totality of the record, I will not alter his official severity rating of "Lost Workdays or Restricted Duty." Because the operator restricted access to the plants to King for his monthly inspections, I find that only one miner was potentially affected.

4. Negligence and Unwarrantable Failure

I find that the violation was a result of the operator's high negligence and unwarrantable failure to comply with the cited standard. The Commission has recognized that "[e]ach mandatory standard [. . .] carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of that standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator has met its duty of care, the Commission considers "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) (footnote omitted). The

Commission has stated the real gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Newtown*, 38 FMSHRC at 2049 (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

The operator was highly negligent when it provided King regular access to the buildings and when it transferred coal through both plants as recently as three months prior to the structural inspection. The degree of danger increases when an operator ignores a chronic problem. *Arnold Stone*, 39 FMSHRC at 1723. Thompson acknowledged to the inspector that unmaintained buildings deteriorate quickly. (Tr.45:14-20) Despite knowing the increased risk to King, the operator had no intention to correct the conditions. Given the visible extent of the damage, as demonstrated by corrosion in the walls and floors, sagging horizontal support beams, large holes in the vertical support columns, and holes within the support posts of the stairways, I find that a reasonably prudent person familiar with the mining industry would know not to use the buildings, much less access its upper floors. I find that King's monthly access to such conditions for an extended period of time, during which the likelihood of a hazard developing continued to increase, demonstrates an aggravated lack of care that amounts to high negligence.[10] Because Thompson was the Tipple's main supervisor, his knowledge of King's regular access to both buildings is imputed to River Hill for purposes of finding that the operator was highly negligent and engaged in aggravated conduct.

Confusing MSHA actions may be a mitigating factor in determining an operator's negligence. *King Knob*, 3 FMSHRC 1422. When consulted regarding the proper protocol to idle the plants, McMurray failed to raise objection to the operator's implied monthly electrical examinations. This failure may have served as a mitigating factor to the operator's negligence when the plants lacked visible structural deterioration. However, the hazardous conditions of the plants at the time of the inspection were undeniable. Accordingly, I do not find MSHA's failure to raise initial objections to King's electrical examinations a mitigating factor in this case.

Section 104(d) of the Act, 30 U.S.C. § 814(d), describes unwarrantable failure as more serious conduct by an operator in connection with a violation. In *Emery Mining Corporation*, 9 FMSHRC 1997, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by conduct described as "reckless disregard," "willful intent," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). The Commission has explained that an "unwarrantable failure" determination is evaluated based on the facts and circumstances in each case, and in light of each of the following factors: (1) the length of time that the violation has existed; (2) the extent of the violative condition; (3) whether the operator has been placed on notice that greater efforts were necessary for compliance; (4) the operator's efforts in abating the violative condition; (5)

[10] Thompson testified that, other than himself, King was the only employee allowed to enter the buildings. (Tr.242:24-243:1) In *Arnold Stone*, the operator's neglect was not diminished simply because only two miners were exposed to a known and obvious danger over a period of time. 39 FMSHRC at 1734. Similarly, the presence of only one employee within the plants does not diminish the level of negligence here.

whether the violation was obvious; (6) whether the condition posed a high degree of danger; and, (7) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346, 1362-63 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I find that the violation was obvious, extensive, and existed for an extended period of time. As discussed above, I find the operator had been placed on notice that greater efforts were necessary for compliance. I find that the operator had no intention to correct the conditions and that, apart from one movable pipe warning against access to a rotted stairwell, no steps were taken to abate the condition prior to the issuance of the citations. For the same reasons provided in my S&S analysis, I find that the conditions presented a high degree of danger. While the Secretary presented little evidence that Thompson, as supervisor, had actual knowledge of the violations,[11] on balance, my findings on the factors establish that the operator engaged in aggravated conduct and unwarrantably failed to comply with the cited standard.

5. Penalty

Under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Judges must consider six criteria in assessing a 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 of the person charged in attempting to achieve rapid compliance after notification of a violation. The Commission has held that Judges must make findings of fact based on these statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once these findings have been made, a Judge's penalty assessment is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000); *Arnold Stone*, 39 FMSHRC at 1724.

I find that the proposed penalties of $2,000.00 are appropriate for both Citation No. 8012325 and Order No. 8012326. I assess this total penalty of $4,000.00 because the cited conditions created severe and obvious hazards and because River Hill was highly negligent.

B. PENN 2014-0956-R

River Hill contests the 104(b) order, No. 8012327, arguing the order was invalid. River Hill requests the 104(b) order be vacated by arguing the following: (1) the inspector abused his discretion because he had an improper understanding of the "full abatement" necessary to terminate a 104(b) order; (2) the abatement period to correct the conditions was unreasonable;

[11] Thompson accompanied an inspector through a previous inspection of the buildings, but the state of the deterioration at that time remains unclear. (Tr.215:10-217:7)

and, (3) the inspector's refusal to extend the abatement period was unreasonable. (Resp't Br. 14-15)

The Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the citation existed at the time the section 104(b) withdrawal order was issued. *Mid-Continent Res., Inc.*, 11 FMSHRC 505, 509 (Apr. 1989). The Commission has held that it is the Secretary, as the proponent of a section 104(b) order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. *Id.* Here, the termination deadline for Citation No. 8012325 was set for September 2, 2014. (Tr.107:3-5; Ex. S–1) Within this five-day abatement period, the operator welded the railing that was across the steps, put "some clasps" on the garage door, put a lock on, put up some no trespassing signs, and locked the door. (Tr.107:11-15; 149:8-10) However, the operator hung the key in its office—a location accessible to the mine's employees. (Tr.107:15-17) Because of the accessibility to the key, access to the dangerous conditions existed on September 2, 2014. Accordingly, I find the violative condition existed at the time the 104(b) order was issued.

In contesting a section 104(b) order, an operator may challenge the reasonableness of the length of time set for abatement or the Secretary's failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (Nov. 1989). The Commission has applied an "abuse of discretion" standard in reviewing an inspector's issuance of a failure to abate an order. *See Energy W. Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (applying an abuse of discretion standard in reviewing Secretary's failure to extend abatement time). An abuse of discretion has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Id.* (citations omitted).

In challenging the reasonableness of the abatement period, River Hill asserts that the inspector abused his discretion based on an improper understanding of the law when he allotted an abatement period of five days—only two of which were business days. (Resp't Br. 14) The inspector testified that the termination deadline does not require full abatement of a violation. (Tr.142:1-25; 147:20-148:16) River Hill asserts that the Commission requires full abatement by the deadline and the inspector's misunderstanding of the law led him to set an unreasonably short abatement period. (Resp't Br. 14-15) The Commission does require full abatement by the deadline. *Hibbing Taconite Co.*, 38 FMSHRC 393, 399 (Mar. 2016). Accordingly, I find the inspector had an improper understanding of the law.

The analysis next turns to whether Inspector McMurray's improper understanding of the law subjected the operator to an unreasonable abatement deadline; in other words, whether achieving full abatement was reasonable within the abatement period.

The Mine Act does not indicate what satisfies full abatement. When the Mine Act is silent on an issue, the Secretary's interpretation, which reasonably effectuates the health and safety goals of the Act, is controlling. *Sec'y of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 115 (4th Cir. 1996). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W.*

Mining Co. v. FMSHRC, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

I find that full abatement of the violations could be achieved by restricting all access to the buildings. My review is limited to whether the Secretary's interpretation of full abatement reasonably effectuates the goals of the act. The cited regulation requires that mine structures be maintained in good repair to prevent accidents and inquiries to employees. I further find the purpose of the regulation is to prevent accidents and injuries to miners from unsafe structural conditions. McMurray testified that he considered the violations fully abated when access to the structurally unsound conditions was "totally eliminated," thus preventing accidents and injuries to mine employees.[12] (Tr.109:3-11) I find that the Secretary's interpretation of what constitutes full abatement of the citations reasonably effectuates the goals of the Act.

The abatement period was not unreasonable. Within the abatement period, the operator welded the railing that was across the steps, put "some clasps" on the garage door, put a lock on, put up no trespassing signs, and locked the door but hung the key in the office. (Tr.107:11-17; 149:8-10) I find that five days is a reasonable duration for an operator to install locks on the entrances of the buildings and prevent employee access to the conditions. I further find that the assigned abatement period was a reasonable amount of time to fully abate the citations by restricting access to the buildings. I conclude that the inspector's misunderstanding of the law did not subject the operator to an unreasonable abatement deadline.

River Hill's argument that the operator unreasonably refused to extend the abatement period also fails. The inspector must determine whether an extension in abatement time is warranted or whether he should issue a section 104(b) order. *Hibbing Taconite*, 38 FMSHRC at 399. In making that determination, the inspector may consider information such as whether the operator delayed beginning the abatement process and whether any delay was justified, giving priority to the safety of miners exposed to the unabated condition. *Id.* By installing some locks on the buildings, I find that the operator demonstrated that abatement of the conditions could reasonably be achieved in five days. By keeping the key to the buildings in an accessible location, however, the operator unjustifiably failed to prevent miner access to the buildings. I find that the inspector did not abuse his discretion when he determined that further extension of the abatement time was not warranted.

Finally, I note that River Hill's post-hearing argument that the termination deadline was unreasonable because it would have taken "months to correct the conditions" assumes full abatement required a structural overhaul and does not comport with the facts. While repairing and rebuilding the Old Plant, which would have taken months to accomplish at great cost, was but one way of terminating the citation, totally restricting access was another sufficient option. Respondent appears to have realized this as evidenced by its attempts at restricting access—putting locks on doors, installing no trespassing signs, putting up posters—in the five days

[12] While the inspector did not inform the operator how to abate the citations, the operator considered and made suggestions on how to best prevent access to the buildings. (Tr.105:13-106:5)

between August 28, 2014, and September 2, 2014. Further, McMurray testified that King had commented that repairing and rebuilding the tipple was not a realistic option for Respondent, which is why both plants had been allowed to deteriorate the way they did. (Tr.82:3-83:3)

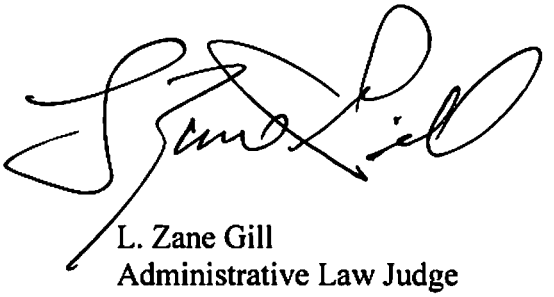
In any event, and despite Inspector McMurray's misunderstanding of the requirement to fully abate, River Hill should have been aware of the expectations placed on them. McMurray testified that he gives operators short initial termination deadlines but liberally grants extensions. (Tr.142:8-21) Importantly, McMurray had utilized this process with River Hill in the past, so they knew or should have known that there was no realistic expectation to completely repair and rebuild the Old Plant in only five days.[13] (Tr.142:22-25)

The 104(b) order was validly issued. The record indicates the operator did not conduct sufficient repairs or sufficiently limit access to the Old Plant within the abatement period. I find the violative conditions existed at the time the 104(b) order was issued. While some locks were on the building, warning posters were put up, and a railing was welded across the steps, the key to the locks was accessible to mine employees by the abatement deadline. (Tr.107:11-17) Because of the access to the key, I find the employees had access to the conditions and were susceptible to the accidents and injuries caused by the violations. I find the 104(b) order was valid because the operator failed to abate the violation by the abatement deadline.

IV. ORDER

For the reasons set forth above, Citation No. 8012325 and Order No. 8012326 are **AFFIRMED**.

WHEREFORE, it is **ORDERED** that River Hill Coal Company, Inc. **PAY** a total penalty of $4,000.00 within forty (40) days of the date of this decision.[14]



L. Zane Gill
Administrative Law Judge

[13] Application of the operator's definition of full abatement—i.e., repairing and rebuilding the tipple—would have them remain in violation of section 77.200. Fortunately for the operator, my review is limited to whether the Secretary's interpretation of full abatement is reasonable.

[14] Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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