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October 15, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-351-M A.C. No. 05-00413-341975 X940
v.	
TRAYLOR MINING, LLC, Respondent	Bulldog Mine

DECISION

Appearances: Beau Ellis, Esq. and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado; Dennis Bellfi, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah for Respondent

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Traylor Mining, LLC ("Traylor") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act). The parties presented testimony and documentary evidence at a hearing held in Denver, Colorado, and filed post-hearing briefs. One section 104(d)(1) citation was adjudicated at the hearing. Traylor is an independent contractor that was performing work at the Bulldog Mine, which was an underground silver mine in Mineral County, Colorado.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCOLUSIONS OF LAW

On June 3, 2013, MSHA Inspector David M. Sinquefield[1] issued Citation No. 8597320 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.9100(a) of the Secretary's safety standards. (Ex. G-5). The citation alleges that the production supervisor for Traylor was injured by the roadheader on a Bobcat excavator when the boom on the excavator was accidentally activated by the excavator operator as he was backing out of a mucked out area.

[1] Inspector Sinquefield has been with MSHA for over eight years. He has investigated accidents as well as hazard complaints. Prior to his employment with MSHA, he worked in the mining industry from 1976 to 2003. He is trained as a mechanic and has worked on, and operated, numerous pieces of mobile equipment.

The citation further states that the supervisor was standing too close to the excavator while observing the mucked out area and, as a result, he failed to follow established rules governing rights-of-way. The citation states that the supervisor engaged in aggravated conduct because he failed to yield the right-of-way to the excavator while it was in operation.

Inspector Sinquefield determined that an injury was reasonably likely to occur, that the violation was of a significant and substantial ("S&S") nature, and that any injury could reasonably be expected to be fatal. He determined that Traylor's negligence was high and that one person would be affected. Section 56.9100(a) provides, in part, that "[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine[.]" 30 C.F.R. § 56.9100(a). The Secretary has proposed a penalty of $52,500 for this citation under the Secretary's special assessment procedure at 30 C.F.R. § 100.5.

The parties, both at hearing and in their briefs, have represented that Traylor is not contesting the fact of violation for Citation No. 8597320, nor is it contesting the S&S or gravity findings of the inspector. (Tr. 6-7; Traylor Br. 1; Sec'y Br. 2). Rather, Traylor is only contesting the unwarrantable failure and high negligence findings, as well as the specially assessed proposed penalty amount. *Id.* Accordingly, I address only these issues.

My findings of fact in this decision are based on the record as a whole and my observation of the witnesses. Although I have not included a summary of all the evidence presented at the hearing in this decision, I fully considered all of the evidence.

Discussion and Analysis

Summary of the Evidence

The Bulldog Mine was a single entry underground mine owned by Rio Grande Silver. Rio Grande Silver was not involved in the day-to-day operation of the mine. Traylor was contracted to excavate a new tunnel to intercept old mine workings at the Bulldog Mine. Traylor began work at the mine in July 2012 and ceased work in September 2013.

Traylor's typical mining cycle at the mine involved the drilling of shot holes, loading of shots, blasting, cleaning up and removing of material, and then providing support. As part of the cleanup phase, Traylor utilized a Bobcat excavator with a roadheader attached to the boom to trim the ribs, face, top and floor. The subject roadheader consisted of a boom-mounted cutting head that was attached to the Bobcat.

The cited standard requires, in pertinent part, that mines establish and follow right-of-way rules in order to provide for the safe movement of mobile equipment. 30 C.F.R. § 57.9100(a). Traylor had established a rule via a Job Hazard Analysis ("JHA") for "[t]rimming/scaling the perimeter with the Bobcat roadheader." (Ex. G-7 p. 2.). According to the relevant JHA[2], in

[2] At hearing, the Secretary introduced a second JHA, (Ex. G-8 p. 21), and seemingly planned to allege that Respondent had also violated this JHA. However, the Secretary did not advance that

order to prevent the hazard of personnel being struck by the excavator "[n]o personnel are to be forward of the Bobcat blade while trimming." The JHA further states that the equipment operator "shall stop trimming and place roadheader on the ground if personnel need to be in the area." *Id.* Finally, the JHA provides that the equipment operator must "maintain constant awareness of his movements and personnel locations." *Id.*

On May 29, 2013, Lowell Hicks was supervising a crew of miners engaged in the cleanup phase of the mining cycle. Michael Reagan, one of the crew members, was operating the Bobcat excavator with the roadheader attached. Following a trimming session, Reagan stopped the excavator and exited the cab so that he and Hicks could evaluate the situation, take measurements, and see if additional trimming needed to be done. After determining that additional trimming was needed, Reagan got back into the excavator and trimmed some additional rock. Hicks stood beside the excavator cab while Reagan operated it. Reagan then stopped the excavator and again discussed the situation with Hicks. After determining that no additional trimming was necessary, Hicks went to the back of the excavator and unhooked the water line.

Joseph Dalton, another miner on the crew under Hicks' supervision, then dragged the water line outby so that it would not be run over while the excavator trammed away from the face. Reagan, after waiting 20-30 seconds to make sure the water was unhooked, looked over his left shoulder from in the excavator cab and saw that the hose had been pulled down the drift and Dalton was rolling it up. (Tr. 189). He saw no other miners to his left. Reagan then looked over his right shoulder and saw miners outby the excavator down the drift. While Reagan could not identify the miners he saw over his right shoulder, he determined that all miners were clear of the excavator. He then throttled up the excavator, raised the boom, honked three times, and began to tram backwards.[3] Meanwhile, Hicks advanced inby on the left side of the excavator. Reagan did not see Hicks go back inby. After moving only a few feet backwards, the excavator shifted as it moved over uneven ground. As the excavator shifted, Reagan turned to his right to look behind him and, in doing so, his right hand accidently hit the swing lever, causing the boom to swing and hit Hicks and the rib. (Tr. 190). Reagan centered the excavator before noticing Hicks lying on the ground, at which point he asked Hicks if he had hit him, to which Hicks replied that he had been hit. As a result of his injuries, Hicks was evacuated from the mine and ultimately transported to a hospital in Denver.

Inspector Sinquefield traveled to the Bulldog Mine to investigate the accident involving Hicks. Sinquefield took notes, photos, and measurements of the scene of the accident. At

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theory in his brief and, as noted by Respondent in its brief, Exhibit G-8 does not apply to the case at hand. Traylor Br. 1-2 n. 1.

[3] Reagan testified that the Bobcat excavator was equipped with a backup alarm, which was loud enough to hear over the operation of the equipment, and lights on the front and back, which were bright enough to see where he was going and provided some bleeding light to the sides of the excavator. (Tr. 193). Further, he explained that, because of the length of the boom, the excavator could not spin around and drive out forward. Rather, it had to tram backwards to exit the face area. (Tr. 193-194).

hearing, Sinquefield acknowledged that he did not ask Dalton, Reagan, or anyone else at the mine about Hicks' normal practice during trimming, and that those individuals who worked with Hicks would have had firsthand knowledge regarding his usual practice. (Tr. 69). Sinquefield traveled to Denver the following day to interview Hicks at the hospital.

Sinquefield testified that Hicks was lucid, candid, and clear during his interview in the hospital. Sinquefield documented his interview with Hicks in his notes. (Ex. G-4). Sinquefield, testifying while reviewing his notes, stated that Hicks told him that during the production cycle it was normal for him to be forward of the cab during the cleanup phase. He stated that Hicks told him that the reason he advanced past the excavator just prior to the accident was because he was "in a hurry[.]" (Tr. 36). Further, the inspector stated that Hicks told him that he "messed up [and he] shouldn't have been there while the machine was running." *Id.*; (Ex. G-4 p. 7). At hearing, on cross-examination, Sinquefield, after stating that there were only inches between the excavator cab and the blade, conceded that there may have been two feet between those areas. (Tr. 64-65). Further, he agreed that if Hicks was next to the cab, behind the blade, he would not have been in violation of the JHA. (Tr. 66-67).

Sinquefield testified that "anybody forward of the blade" was exposed to the hazard of being hit or run over by the excavator. (Tr. 44). While he found that Hicks' exposure to the hazard was limited in time in this instance, he determined that such an accident was reasonably likely based on the repeated exposure of the individual since the violative conduct was a normal practice. Sinquefield acknowledged that, had this been a "one and done" situation, his finding regarding the level of exposure may have been different. (Tr. 45). He explained that similar accidents involving mobile pieces of equipment have been fatal and that Hicks was lucky to be alive in this instance. (Tr. 47-48).

Sinquefield testified that he designated the negligence as high because Traylor provided no mitigating circumstances to explain why it allowed this practice at the mine. (Tr. 48).

Sinquefield designated the violation as an unwarrantable failure. (Tr. 49). In reaching this determination, he concluded that the conduct posed a very high degree of danger given the size and weight of the machine and because Hicks' conduct was a normal practice. Based on Sinquefield's experience and a review of fatalgrams, he believed that a fatality was likely. (Tr. 23). He stated that fatalgrams are of great value to operators who can look at them, decide if they apply to their mine, and then make sure they take steps to avoid such an accident at their own mine. He found that the operator had knowledge of the violation because Hicks, who was a supervisor, admitted to him that he was where he should not have been, and that this was a procedure that Traylor allowed time and time again. (Tr. 52-53). Further, he found that the violation was obvious because Hicks was aware of his position relative to the moving excavator. (Tr. 55-56). Finally, the inspector found that, with regard to duration, the violative conduct was a common practice that was repeated each time. (Tr. 57).

Hicks testified that he was hired as a "walker" at the Bulldog Mine in April 2013. His position was paid hourly and he did not consider himself to be management, but he was hired in a supervisory role and directed the work of a crew. (Tr. 156). Prior to being hired, he was provided a safety manual, which he read and signed before going through several days of

orientation and walkthrough training with his supervisor, Duane Monks. Hicks recalled being trained on right-of-way and specifically remembered being trained on the JHA. He testified that, other than the time of this accident, he could not recall being forward of the excavator blade, it was not normal for him to move forward of the excavator cab while it was in operation, and that normally, after trimming, he would have been the one to drag the hose back down the drift. (Tr. 160-161). Hicks explained that the blade of the excavator was roughly three to four feet in front of the cab. (Tr. 169). In addition, Hicks testified that he had never seen any other Traylor personnel forward of the blade during trimming. Finally, Hicks testified that, while he was not disciplined as a result of the accident, he has been on workers compensation since the accident, and Traylor only worked at the Bulldog Mine for three months after the accident. He was laid off on August 21, 2013. (Tr. R-30).

Both Reagan and Dalton testified that they worked with Hicks on a daily basis and, with the exception of the accident, never saw Hicks or anyone else go forward of the excavator blade while it was operating. (Tr. 187-188, 204). Monks, the mine superintendent and Hicks' direct supervisor, testified that he had observed Hicks and other miners as they worked and that he only saw the miners walk forward of the blade when the roadheader was on the ground and the equipment was off. (Tr. 229). Neither David Pease, the project manager for Traylor Brothers, the parent company of Traylor Mining, nor Monks had ever received a complaint about Hicks acting in an unsafe manner or in an manner that was inconsistent with the JHA. (Tr. 139, 232).

Traylor's witnesses testified that the safety culture at Traylor was good, with routine training regarding rights-of-way and danger zones, including one day where the mine was shut down and miners were trained on all of the mobile equipment in the mine, as well as the specific JHA provision at issue. (Tr. 185, 191, 201-203). Further, they explained that Traylor's safety program encouraged miners to report violations to management, and miners had in the past reported "walkers" for violations. (Tr. 120-121, 207). Pease testified that Traylor had a discipline program and had terminated miners, including a "walker," for safety violations. (Tr. 120-122).

Reagan explained that, given the length of the boom on the excavator, a person standing next to the cab would be safe, as the boom would hit the rib and stop before it would get near an individual standing next to the cab. (Tr. 187). Reagan also testified that, at the time of the accident, he was certain he had taken steps to make sure he knew where everyone was. (Tr. 196). Hicks testified that he did not signal to Reagan that he was going forward. Reagan was not disciplined as a result of the accident. (Tr. 196-197).

Both Reagan and Dalton identified Hicks as their direct supervisor. (Tr. 192, 210). Dalton confirmed that Hicks had the ability to direct work and reprimand the crew for safety violations, however he didn't believe that Hicks had the ability to terminate miners. (Tr. 211). Monks testified that Hicks was in charge of advancing the tunnel and doing it safely. Pease testified that Hicks, as a "walker," was charged with coordinating and supervising the activities on the shift, but also stated that Hicks did not have authority to hire or fire, but that his input would be given weight. (Tr. 150-151).

Analysis of Negligence and Unwarrantable Failure

I find that Traylor was moderately negligent and that the violation was not a result of the operator's unwarrantable failure to comply with the mandatory standard. Many of the Secretary's allegations with regard to negligence and unwarrantable failure are based on his assertion that Hicks was an agent of the operator and that the violative conduct was not an isolated incident, but was normal and occurred on a regular basis. Based on the analysis below, I find that the Secretary established that Hicks was an agent of the operator. The Secretary did not establish by a preponderance of the credible evidence that Hicks regularly walked in front of the blade in violation of the JHA while the excavator was operating.

The Commission has held that, while "the negligence of an operator's 'agent' is imputable to the operator for penalty assessment and unwarrantable failure purposes[,] . . . the negligence of a rank-and-file miner is not imputable to the operator for" those same purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine[.]" 30 U.S.C. § 802(e). In determining whether an employee is an agent of the operator, the Commission has "'relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel.'" *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996) (quoting *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995)) (alteration in original); *See also Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

I find that Hicks was an agent of Traylor. Hicks testified that he supervised a crew of miners and directed their work activity. David Pease, the project manager for Traylor Brothers, confirmed that, as a "walker," Hicks was charged with, among other things, supervising, coordinating, and directing work, training and monitoring employees in the proper use of tools, and assuring that work was done in a safe manner. (Tr. 150-151). He further confirmed that walkers are able to issue verbal and written discipline to miners for safety violations and that Hicks' input would be given weight in a decision to terminate a miner. *Id.* Traylor's other witnesses confirmed that Hicks was a supervisor. Duane Monks, the project superintendent, agreed that Hicks was in charge and was the individual responsible for making sure "the work was done and done safely." (Tr. 234). In addition to the testimonial evidence, the parties also introduced documentary evidence that confirms these supervisory responsibilities. (Exs. G-10, G-11).

While Respondent argues that Hicks was not an agent because he was paid by the hour, was not a member of Traylor's management, could not hire or fire personnel, and was not required to hold certifications required by law, I find these arguments unavailing in light of the testimony and documentary evidence discussed above. Traylor Br. 11 n. 5. In addition, while Hicks may not have had ultimate authority to terminate an employee, Traylor's own witnesses confirmed that he was able to discipline employees and that his input would be given weight in a decision to terminate an employee. I find that Hicks' function was crucial to Traylor's operation, involved a level of responsibility consistent with that of a person in management, and that he was an agent of Traylor.

With regard to whether Hicks' violative conduct was normal and occurred repeatedly or was an isolated incident, I am persuaded both by the testimony and Respondent's brief that this was not a regular occurrence. Traylor, in its brief, argues that the Secretary's allegation that Hicks' violative conduct was normal and occurred repeatedly is premised upon a misinterpretation of the evidence. Taylor Br. 2-3. Specifically, Traylor argues that the Secretary misinterpreted a statement made by Hicks to Sinquefield during the interview at the hospital following the accident.

At hearing, Sinquefield, relying upon his field notes taken during his interview of Hicks, testified that Hicks told him that it is Traylor's normal procedure during the cleanup phase for Hicks to be at or forward of the cab. (Tr. 36, 61-62, 66; Ex. G-4 p. 7). Traylor asserts that the Secretary improperly interpreted this to mean that it was Hicks' normal practice to be out of compliance with the JHA's requirement that personnel be behind the blade of the excavator during the trimming phase. (Ex. G-7 p. 2). While Sinquefield initially testified that there were only inches between the cab and the blade on the excavator, he later conceded, after reviewing an exhibit showing a photo of what he identified as an identical excavator with a different attachment on the boom, that there could be two feet in distance between the cab and the blade. (Tr. 63-65; Ex. G-6). Hicks testified that the distance between the cab and the blade was three to four feet. (Tr. 169). I find that the photograph, combined with the testimonies of Hicks and Sinquefield, show that it was possible for Hicks to be *"[at] or forward of [the] cab"* while at the same time be in compliance with the JHA's requirement that he be *behind the blade.* (Ex. G-4 p. 7)(emphasis added).

The inspector, on direct examination, was asked who would be exposed to the hazard of being hit by the excavator. The inspector replied "[a]nybody forward of the blade, which at this time was Lowell Hicks." (Tr. 44). On cross-examination, Inspector Sinquefield conceded that, if Hicks were behind the blade, there would be no violation.[4] (Tr. 66-67). Accordingly, I find that the statement made by Hicks to the inspector while he was in the hospital cannot be relied upon by the Secretary to establish that it was normal practice for Hicks to be in front of the blade of the excavator and in violation of the JHA. Given that no other credible evidence was introduced in support of the Secretary's allegation that it was Hicks' normal practice to be in front of the blade, I find that the Secretary has failed to establish that the violative conduct was a common practice. Rather, I credit the testimonies of Traylor's witnesses that going in front of the excavator blade while the excavator was in operation was not a normal occurrence and, based on the evidence presented, find that the violative conduct that resulted in Hicks' injuries was an isolated event. (Tr. 186-187, 140, 204, 206, 229).

Negligence

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

[4] The citation charges Traylor with a violation of section 57.9100(a) because it was not following its established right-of-way rules as set forth in the JHA. Whether the JHA sufficiently protected miners working around the excavator while it was engaged in trimming operations is not an issue that is before me.

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).

I find that Traylor was moderately negligent. I have already found that Hicks was an agent of the mine. Accordingly, his negligence is imputable to the operator for penalty purposes. However, I find that, while Hicks' act of going into the danger zone was ill-advised and resulted in a serious injury, a finding of moderate negligence is appropriate. As discussed above, much of the Secretary's case rests on his belief that the violative conduct was a normal practice. For reasons set forth above, I find that the Secretary failed to meet his burden of proof on this issue of fact. The evidence establishes that Traylor took reasonable steps to ensure that miners did not endanger themselves by walking in front of the blade. It provided specific training and had in place specific policies to prohibit the exact conduct that resulted in Hicks' injuries. Each of the crew members testified that they were aware of the need to remain behind the blade during trimming and that it was not the normal practice of anyone, Hicks included, to go in front of the blade. Moreover, I credit the testimonies of Traylor's witnesses that safety violators were appropriately disciplined by this operator. Accordingly, I **MODIFY** the citation to moderate negligence.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as "reckless disregard," "intentional misconduct," "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 Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be 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) 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. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (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.

In *IO Coal Co.*, 31 FMSHRC at 1346, the Commission emphasized that the length of time that the violative condition existed is a "necessary element" of the unwarrantable failure analysis. Here, the condition existed only for a very short period of time. As discussed above,

there is no credible evidence that Hicks' conduct of walking in front of the blade while the excavator was in operation was a normal occurrence. Although Hicks' negligent act resulted in a serious injury, had Reagan not accidently hit the joystick that caused the boom to swing, the excavator would have continued proceeding outby past Hicks in a matter of seconds to the point where Hicks would no longer have been in danger.

In *IO Coal Co.*, the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." *Id.* The Commission has explained that the purpose of this element is to "account for the magnitude or scope of the violation[,]" and the judge may analyze it by looking at, among other things, the "extent of the affected area as it existed at the time the citation was issued[,]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane* Rental, 36 FMSHRC 3075, 3079-3080 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Moreover, a judge should not consider an operator's past practices in connection with the extensiveness factor. *Id.* In *Dawes Rigging* the Commission found that, because only one miner endangered himself by walking under a suspended boom, the violation was not extensive. *Id.* Here, the Secretary did not directly address the extent of the violation in his post-hearing brief but, at hearing in his opening statement, the Secretary averred that, while only one miner was injured, other miners were affected because these employees saw that their supervisor believed "that breaking the rules was okay, until it isn't and you get hurt." (Tr. 11). I find that the violation was not extensive in that it involved only one miner and was an isolated incident affecting only a small area.

The Commission has explained that repeated similar violations, even if those prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC at 1353-1354. The Secretary concedes that MSHA had not previously cited Traylor for a violation of the standard or discussed the issue with Traylor. He argues that fatalgrams describing mobile equipment accidents put Traylor on notice that increased efforts to comply were necessary. Sec'y Br. 12-13. I reject this argument. The rationale underlying this aggravating factor is whether the operator has been put on notice of a problem at its mine that requires additional efforts to comply. Here, the Secretary did not establish that Traylor had been put on notice that increased efforts were necessary.

In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC at 1356 and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). The Secretary did not directly address this factor in his brief. Traylor asserts that, while there was no opportunity to abate this condition in the time between when Hicks entered the danger area and when he was hit, the operator did make "considerable, meaningful efforts on its own initiative to abate, eliminate and prevent right-of-way rule violations in advance of issuance of the Citation[.]" Traylor Br. 12. I agree that Traylor took steps to prevent just this type of accident from happening. The JHA is clearly written and indicates that, in order to avoid the hazard of an individual being struck by the Bobcat excavator while it was trimming, no person should be

forward of the blade. (Ex. G-7 p.2). Further, Traylor provided substantial training in the form of orientation training, daily safety meetings, and even a full day training on all of the pieces of mobile equipment, each of which addressed the mine's right-of-way rules and the JHA at issue. Moreover, although the Secretary asserts that Traylor did not enforce its right-of-way rules or discipline miners for safety violations, I find the contrary to be true. Traylor offered credible testimony that one of the reasons Hicks was hired was because the previous walker was terminated after committing a safety violation. (Tr. 120). While the Secretary asserts that Traylor's failure to take disciplinary action against Hicks or Reagan is evidence of a lack of safety enforcement, I disagree. Sec'y Br. 9. Hicks never returned to the mine following the accident and it is debatable whether Reagan's involvement in the accident amounted to safety violation. Reagan offered credible testimony that he did check his surroundings before backing up. As a result, I find that Traylor did in fact enforce its safety program.

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC at 1356. The Secretary argues, and I agree, that the violative condition was obvious. Hicks was well aware of the need to remain behind the blade of the excavator while it was in operation. Sinquefield testified that the only item in his notes from the interview of Hicks which was a direct quote was Hicks' statement that he "messed up" and knew he "shouldn't have been there while the machine was running." (Tr. 36, 62; Ex. G-4 p. 7). Moreover, the area was lit, Hicks knew his position relative to the excavator, the equipment operator signaled via honking that he was preparing to move, and the backup alarm would have sounded. I find that the violation was obvious.

The Commission has determined that a high degree of danger posed by a violation is an aggravating factor that supports an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC at 1355-1356. The Secretary argues and Respondent concedes that the violative conduct presented a high degree of danger. I agree. Hicks' conduct and the resulting injuries including internal bruising and a slight fracture, are evidence of the high degree of danger that accompanies this type of conduct. (Ex. G-10). Moreover, I credit the inspector's testimony that, given the proximity of the miner to such a large, heavy machine, and the history of fatalities when mobile equipment comes into contact with miners, Hicks "was very lucky not to be dead." (Tr. 48-49).

In *IO Coal*, the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." 31 FMSHRC at 1356-1357. Here, I find that, because Hicks was an agent of the operator and, given his acknowledgement that he knew he should not have been in area, the operator had actual knowledge of the violation. (Tr. 36, 62; Ex. G-4 p. 7).

After careful consideration of each of the above factors, I find that Traylor did not unwarrantably fail to comply with the mandatory standard. While the violative condition was obvious, potentially involved a high degree of danger, and was known to the operator through its agent, it was not extensive, did not exist for a long period of time, the operator did not have notice that greater efforts were necessary for compliance, and it had taken significant steps towards preventing an accident of just this kind. Accordingly, I **VACATE** the unwarrantable failure finding and modify the citation to a 104(a) citation.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Traylor had a history of two violations during the 15 months preceding the issuance of subject citation, neither of which was designated as S&S, high negligence, or unwarrantable failure. (Ex. G-1). Respondent is a small independent contractor that worked about 16,361 hours. (Exhibit A to Petition for Assessment of Civil Penalty). The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon its ability to continue in business. The Respondent stipulated to the Secretary's gravity finding that the violation was reasonably likely to result in a fatal accident, that one person was affected, and that the violation was S&S. The negligence findings are set forth above.

While the Secretary offered testimony and documentary evidence in support of his special assessment, given that I have modified the citation to a 104(a) citation with moderate negligence, I need not address those arguments. The Secretary did not establish that this violation was "particularly serious or egregious[.]" *Coal Employment Project v. Dole*, 889 F2d. 1127, 1129-30 (D.C. Cir. 1989). The Special Assessment Narrative Form introduced into evidence at hearing shows that, had this citation been regularly assessed, the penalty would have been $2,000.00. (Ex. G-14 p. 3). Moreover, if Inspector Sinquefield had determined that the violation was the result of Traylor's moderate negligence, the Secretary's proposed penalty would have been about $436.00, before any reduction for good faith abatement. 30 C.F.R. § 100.3. In light of my findings set forth above, I find that a penalty of $1,000.00 is appropriate for this violation. I have given special consideration to the gravity of the violation in assessing this penalty.

III. ORDER

For the reasons set forth above, Citation No. 8597320 is **MODIFIED** to a citation issued under section 104(a) of the Mine Act and the degree of negligence is reduced to moderate. In all other respects the citation is **AFFIRMED**. Traylor Mining, LLC. is **ORDERED TO PAY** the Secretary of Labor the sum of $1,000.00 within 30 days of the date of this decision. [5]

Richard W. Manning
Administrative Law Judge

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

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