

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

**OCT 16 2014**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

v.

WARRIOR INVESTMENTS COMPANY,  
INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE-2013-361  
A.C. No. 01-03419-317249-01

Docket No. SE-2013-252  
A.C. No. 01-03419-312649

Docket No. SE-2014-33  
A.C. No. 01-03419-330771-01

Mine: Maxine-Pratt Mine

**DECISION AND ORDER AFFIRMING BENCH DECISION  
AND APPROVING SETTLEMENT**

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor, Office of the  
Solicitor, Petitioner

J. D. Terry, Esq., Respondent

Before: Judge McCarthy

**I. Statement of the Case**

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

A hearing was held in Birmingham, Alabama on April 3, 2014. Witnesses were sequestered. After the hearing, the parties filed a Joint Motion to Approve Settlement and Notice of Vacating Citation, which resolved all outstanding citations and orders left unresolved at hearing.

Docket No. SE-2014-33 involves five citations, which the parties agreed to settle prior to hearing, and one unresolved Section 104(g)(1) Order No. 8525679. At the hearing, the parties agreed to file a post-hearing Settlement Agreement on the five settled citations, and joint stipulation of facts and cross-motions for summary judgment on unresolved Order No. 8525679. I left the record open for such filings. Tr. 269-74. After filing the joint stipulation of facts, the

parties agreed to settle that Order, as set forth in their Joint Motion. Specifically, the Secretary decided to vacate that Order.

Docket No. SE 2013-361 involves a single 104(a) Citation No. 8524664 that the parties resolved at the conclusion of the hearing. The outlines of the Settlement Agreement were placed on the record and the undersigned left the record open for receipt of the written Settlement Agreement. Tr. 267-69.

Docket No. SE-2013-252 involves a single Section 104(d)(1) unwarrantable failure Citation No. 8524528 alleging a violation of 30 C.F.R. § 75.1501(a). 30 C.F.R. § 75.1501(a) provides: “(a) For each shift that miners work underground, there shall be in attendance a responsible person designated by the mine operator to take charge during mine emergencies involving a fire, explosion, or gas or water inundation. 30 C.F.R. § 75.1501(a)(1) further provides: “(1) The responsible person shall have current knowledge of the assigned location and expected movements of miners underground, the operation of the mine ventilation system, the locations of the mine escapeways and refuge alternatives, the mine communications system, any mine monitoring system if used, locations of firefighting equipment, the mine’s Emergency Response Plan, the Mine Rescue Notification Plan, and the Mine Emergency Evacuation and Firefighting Program of Instruction.”

Specifically, Citation No. 8524528 alleges that on September 4, 2012, there was no one at the Maxine-Pratt mine trained as a responsible person designated by the operator to take charge during a mine emergency involving fire, explosion, or gas or water inundations. The gravity was categorized as “reasonably likely,” the injury or illness that was reasonably expected to result was alleged to be “lost workdays or restricted duty,” the violation was designated as “significant and substantial, and the negligence was categorized as “high.”

At hearing, I issued a bench decision affirming Section 104(d)(1) Citation No. 8524528, as written, and assessing the proposed penalty of \$3,143. Having carefully reviewed the record, I affirm my bench decision set forth below.

## **II. Bench Decision Affirming 104(d)(1) Citation No. 8524528, As Written**

“I’m going to find a violation. I’m going to affirm the citation [Citation No. 852458] as written. I find that there were no persons at the mine trained as responsible person designated by the operator to take charge during a mine emergency. I’m going to find that based on the credited testimony of Inspector Weekly, that, in fact, there was a statement made by Mr. Meadows that he didn’t have training as a responsible person at this mine. Mr. Meadows testified that he had the training at another mine.

Also, there was an admission by Mr. Terry that, in fact, he had not given the training because he had not gotten around to it. Therefore, I would find that any responsible person training that was given to the others was not effective under the Mine

Act. I find that the violation contributed to a discre[te] measure of safety; i.e., the ability to get out of the mine in the event of an emergency.

I find that the violation was significant and substantial. In making this finding, I assume the existence of an emergency. Specifically, I assume existence of a fire. I find that if a fire occurred and there was not a responsible person designated to direct the men out of the mine during the emergency, that that would contribute to a hazard, the inability to escape that was reasonably likely to result in serious injury as written, lost work days or restricted duty; specifically, smoke inhalation.

Furthermore, I find that negligence is high. I base my finding of high negligence on the admission by the Respondent that it did not give the training and knew or should have known that it should have been given.

Finally, I find that there is no evidence of mitigating circumstances to reduce the negligence from high to a lower level. I affirm the proposed penalty of \$3,143.00.

We'll adjourn for lunch . . . .

Tr. 177-79.

. . . . Prior to breaking for lunch I issued a bench decision explaining why I was going to affirm the citation as written. While I was walking to lunch I realized that I hadn't specifically explained my rationale for affirming the unwarrantable failure order under (d) -- I'm sorry -- unwarrantable failure citation under 104(d)(1).

I hereby find that the citation as written was an unwarrantable failure, that there was aggravated conduct that constituted more than ordinary negligence; specifically, that there was a serious lack of care on the Respondent's part for failing to insure that there was an individual who had responsible person training at this specific mine.

Addressing the seven factors that the Commission looks to for an unwarrantable failure, I find that the duration of the violation supports an unwarrantable failure finding. When Superintendent Meadows became superintendent on May 8th of 2012, he had not received the responsible person training at this mine, and that lasted until the date of the citation, which is

September 4th, 2012. Therefore, for several months it's been established that there was no responsible person at the mine.

I find the violation was extensive. There was no responsible person trained for the entire mine at this mine under the standard. Although Mr. Meadows, Superintendent Meadows was trained at another mine as a responsible person, there's no evidence presented and the Secretary has established through the credible testimony of Inspector Weekly that there were no training records, and through admissions by the Respondent's witnesses, through the credited testimony of Inspector Weekly, that there was no responsible person trained at this mine when the citation was issued. Therefore, all of the other miners who received the training that was given by Mr. Meadows prior to hi[s] receiving responsible person training at this mine was ineffective. And I find that constitutes an extensive violation because it covers the whole mine without a responsible person trained in the event of an emergency in regard to evacuation.

I further find that the Respondent knew or should have known that a responsible person was not trained at this mine. The un rebutted testimony of Inspector Weekly establishes that the Respondent knew that the training should have been given and, according to his testimony, Mr. Terry admitted that he knew the training was required to be given but had not gotten around to that. Mr. Terry was not called to rebut that testimony. Mr. Meadows did not rebut that testimony because he did not recall the nature of the conversation. So I find that the knowledge element supports the unwarrantable failure finding, together with the duration of the violation and the extensiveness of the violation.

I further find that the violation contributed to a high degree of danger. Without a responsible person trained at this mine, I credit Inspector Weekly's testimony that the miners may be confused in the event of an emergency if there was a fire and they were required to evacuate both as to who they had to take direction from during the emergency and receiving the requisite training that would affect their ability to escape. I assume the event of an emergency, as I did in my S & S analysis. Therefore, I find the failure to train a responsible person directly affects miners' ability to escape in event of emergency.

I find the violation was also obvious because it's specifically set forth in the regulations and the regulation requires that a responsible person be designated and trained. I find that the Respondent took no efforts to abate the citation before it was

written because it made no efforts to give the responsible person training to Mr. Meadows. He had the training at another mine site but did not have the training at this mine site.

The only factor that does not support an unwarrantable failure finding is the notice factor. I find that MSHA did not give the Respondent notice that greater efforts were necessary to comply with 75.1501(a). However, I credit Inspector Weekly's testimony that there was a PIL that was given to the industry generally that put them on notice of this requirement. Nevertheless, I don't find that specific notice required, and that factor cuts against an unwarrantable failure finding.

Given that I've found a serious lack of care arising to more than ordinary negligence based on the fact that six of the seven factors establish an unwarrantable failure, I find the unwarrantable failure and I affirm the citation as written.

Tr. 179-183.

Although my bench decision affirmed the proposed penalty of \$3,143, I hereby make clear I have evaluated the Secretary's proposed penalty in light of the principles announced in my recent *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC\_\_slip op. at 4-6 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of \$3,143 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act and with the public interest. 30 U.S.C. 820(i). Accordingly, I assess a \$3,689 civil penalty against Respondent for Citation No. 8524528.

## **II. Joint Motion to Approve Settlement**

I have reviewed the parties' Joint Motion to Approve Settlement and Notice of Vacating Citation for Docket Nos. SE 2013-361 and SE 2014-33. A reduction in penalties from \$11,854.00 to \$4,896.00 is proposed under the Settlement Agreement.<sup>1</sup>

In Docket No. SE 2013-361, the parties request that Citation No. 8524664 be modified to delete the significant and substantial designation and to reduce the negligence from "high" to "moderate."

In Docket No. 2014-33, the parties state that Order No. 8525679 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *E.g.*, *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Citation No. 8525667 remains unchanged, but the parties justify the reductions in penalties by stating there are legitimate factual and legal disputes

---

<sup>1</sup> Pursuant to 29 C.F.R. 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraphs four and five from the motion as immaterial and impertinent to the issues legitimately before the Commission. The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlement under the Mine Act.

justify the reductions in penalties by stating there are legitimate factual and legal disputes regarding gravity and negligence. The parties also request that Citation Nos. 8525669, 8525670, and 8525671 be modified to reduce the negligence from “high” to “moderate.”

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, I approve the parties’ Settlement Agreement as consistent with the criteria set forth in section 110(i) of the Act and in furtherance of the public interest. The settlement amounts are as follows:

**SE 2013-0361**

<b><u>Citation No.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
8524664	\$6,115.00	\$1,000.00
	\$6,115.00	\$1,000.00

**SE. 2014-0033**

<b><u>Citation No.</u></b>	<b><u>Assessment</u></b>	<b><u>Settlement</u></b>
8525667	\$540.00	\$486.00
8525669	\$946.00	\$757.00
8525670	\$1,795.00	\$1,436.00
8525671	\$946.00	\$757.00
8527002	\$460.00	\$460.00
8525679	\$1,052.00	\$0.00
	\$5,739.00	\$3,896.00

**III. Order**

For the reasons set forth above, Citation No. 8524528 is **AFFIRMED**, as written.

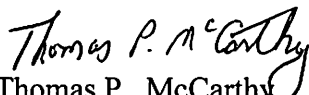
**WHEREFORE**, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8524664 be **MODIFIED** to delete the significant and substantial designation and to reduce the negligence from “high” to “moderate.”

It is **ORDERED** that Citation No. 8525679 be **VACATED**.

It is **ORDERED** that Citation Nos. 8525669, 8525670, and 8525671 be **MODIFIED** to reduce the negligence from “high” to “moderate.”

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent, Warrior Investments Company, Inc., is **ORDERED TO PAY** a total civil penalty of \$8,039, i.e., \$3,143 for the litigated citation and \$4,996 for the settled citations.<sup>2</sup>

  
Thomas P. McCarthy  
Administrative Law Judge

Distribution:

J.D. Terry, Attorney and Safety Director, Warrior Investment Co., Inc., 218 Highway 195,  
Jasper, AL 35503

Thomas A. Grooms, U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite  
230, Nashville, TN 37219

---

<sup>2</sup> 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. This penalty reflects the \$3,143.00 penalty assessed in Docket SE 2013-0252 for Citation No. 8524528 and the settlement agreement penalty of \$4,896.00 for the Citations in Dockets SE 2013-0361 and SE 2014-0033.