FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

JAN 10 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-0128 A.C. No. 41-00320-366885
v.	Docket No. CENT 2015-0365 A.C. No. 41-00320-377526
ALCOA WORLD ALUMINA, LLC, Respondent	Docket No. CENT 2015-0401 A.C. No. 41-00320-378824 Mine: Bayer Alumina Plant

DECISION AND ORDER

Appearances: Lindsay Wofford, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas and

Maria C. Rich, CLR, U.S. Department of Labor, MSHA, Dallas, Texas for Petitioner

Christopher Bacon, Esq., Vinson & Elkins L.L.P., Houston, Texas, for Respondent

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation and two orders issued to Alcoa World Alumina, LLC ("Alcoa"), which were litigated at a hearing on January 12 and 13, 2016, in Victoria, Texas.[1] The parties presented testamentary and documentary evidence and filed post hearing and reply briefs.

[1] Citation No. 8778037 and Order No. 8856305 were assigned to Docket No. CENT 2015-0401. Order No. 8778039 was assigned to Docket No. CENT 2015-0365. Order No. 8778038 was assigned to Docket No. CENT 2015-0128. The parties requested that Order No. 8778038 be modified from a 104(d)(2) to a 104(d)(1) order. Tr. 8. The parties settled Order No. 8856305 in Docket No. CENT 2015-0401 prior to hearing. Tr. 8; J. Prehearing Rep. 2.

The relevant citation and orders (hereinafter "citations") were issued as a result of MSHA's investigation into an accident that occurred at Alcoa's Point Comfort, Texas plant,[2] on September 3, 2014, that resulted in serious injury to a contract miner from an on-site contract maintenance company, Turner Industries ("Turner"). Tr. 34, 112-13. The citations allege that Alcoa failed to protect miners from the hazardous motion of a caustic liquid, that Alcoa did not require miners to wear necessary personal protective equipment ("PPE") while exposed to dangerous chemicals, and that Alcoa allowed a miner to unsafely access a work area. Ex. S-18, S-19, S-20. The violations were all designated as significant and substantial ("S&S"), unwarrantable failures to comply with mandatory standards, and allegedly the result of Alcoa's high negligence. *Id.*

Alcoa does not contest the fact of the violations or the S&S designations, rather, Alcoa disputes the unwarrantable failure and high negligence levels assigned to the three citations. Resp. Br. 2-3; Resp. Reply at 7. In support of the unwarrantable failure and negligence designations, the Secretary asserts that Steven Alvarado, an Alcoa employee who was present at the scene of the accident, was an agent of Alcoa tasked with supervising the contractors, and that he failed to take reasonable steps to prevent the accident and keep the contract miners safe. Sec'y Br. 4. Alcoa contends that Alvarado did not have the requisite authority to be considered a "supervisor," and was merely a rank and file miner present at the scene, and as such the negligence levels of each citation should be reduced, and the unwarrantable failure designations deleted. Resp. Br. 2. Alcoa also argues that even if Alvarado is found to be a supervisor, the negligence and unwarrantable failure categorizations are in error because Alvarado and Morales did not step into an area that would require wearing PPE until the moment of the accident, that Alcoa verified the system being maintained was free of harmful liquid, and that Alvarado reasonably believed that a Turner employee cited for kneeling/sitting on a pipe while working did not need fall protection and was safe. Resp. Br. 2.

Prior to the hearing the parties made the following stipulations:

1. At all relevant times, Alcoa's Bayer Alumina Plant was a "coal or other mine" as defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802.

2. At all relevant times, Respondent was operator of the Bayer Alumina Plant, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802. The products of Bayer Alumina Plant, MSHA ID No. 41-00320, entered the stream of commerce and/or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803.

3. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act");

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this matter.

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[2] MSHA issued several identical citations to Turner Industries, which were settled without a hearing. Tr. 13; Resp. Br. 1. Citations were also issued to Alcoa, because Steven Alvarado, an Alcoa employee, was present at the time accident. Tr.13.

5. The Administrative Law Judge has jurisdiction over this matter.

6. The subject citations were served by a duly authorized representative of the Secretary on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The assessed penalties, if affirmed, will not impair the Respondent's ability to remain in business.

8. The parties have settled Citation No. 8856305 in Docket No. CENT 2015-401 and only Citation Nos. 8778037, 8778038 and 8778039 remain at issue.

J. Prehearing Rep. 1-2.

For the reasons that follow I conclude that Order Nos. 8778037, 8778039, and Citation No. 8778038, were all violations of the respective cited standards, properly designated as S&S, and that the gravity designations for each violation were appropriate. I conclude, however, that Alcoa exhibited low and moderate, rather than high negligence and that none of the violations were the result of unwarrantable failure.

This decision will begin with an overview of the relevant legal standards. Next, a factual background of the mine and the accident that gave rise to the citations will be given, followed by an analysis and the disposition of each alleged violation, and finally my assessment of civil penalties and order.

I. Basic Legal Principles

Significant and Substantial

All of the citations in dispute were designated by the Secretary as significant and substantial ("S&S"). The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission has held that a violation is properly designated S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981); *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

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

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

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

Generally, the Commission considered the third step of the *Mathies* test to ask both whether there was a reasonable likelihood that a hazard contributed to by the violation would occur *and* whether there was a reasonable likelihood that the occurrence would result in injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). As a result of this paradigm, the second step was often a given in S&S analysis, with the third prong traditionally being the most contended and discussed aspect the evaluation.[3] The Commission recently revisited the S&S analysis to clarify the interplay between the second and third prongs of the *Mathies* test. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).

The Commission explained in *Newtown* that the ultimate inquiry at the heart of the *Mathies* test has not changed but now "the proper focus of the second step of the *Mathies* test is the likelihood of the occurrence of the hazard the cited standard is designed to prevent." *Newtown Energy,* 38 FMSHRC at 3307, n. 8. The third step focuses primarily on gravity, and the focus shifts from the violation to the hazard (which is established in stage two), and whether the hazard would be reasonably likely to result in injury. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir. 2016). Essentially whether the hazard was reasonably likely to occur is moved to the second step and the consideration of whether an injury was reasonably likely in the event of that occurrence remains in the third step. *Id.* The second step "likelihood" analysis and third step "gravity" analysis are tied together by the "hazard" at issue. *Newtown Energy,* 38 FMSHRC at 2038.

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[3] In *U.S. Steel Mining,* the Commission provided additional guidance regarding the third step: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985) (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*; *PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)).

The *Mathies* test now requires that the judge adequately define the particular hazard to which the violation contributes in the second step of the test. The starting point of determining the hazard is the cited C.F.R. section, as the Commission defines "hazard" in terms of the prospective danger the cited safety standard is intended to prevent. *Id.* After a hazard is clearly identified and defined the judge must then determine whether the alleged violation sufficiently contributed to that hazard.[4] This requires a determination of whether, in light of the facts surrounding the violation, there is a reasonable likelihood of the occurrence of the hazard the standard addresses. *Id.*

If a Judge concludes that based on the evidence the violation sufficiently contributes to the defined hazard, the occurrence is assumed, and he must move on to the third step of *Mathies*. *Id.* The third step then requires the judge to determine whether based on the particular facts, the occurrence of the hazard would be reasonably likely to result in an injury. *Id.* The Commission recognized that "reasonable likelihood" is not an exact standard and the degree of risk of injury cannot be quantified into precise percentage, but it is a matter of degree evaluation, requiring a judge to apply experience and discretion to resolve fact intensive questions. *Id.* at 2039. The fourth and final step in the analysis is to determine whether a resulting injury would be reasonably likely to be reasonably serious. *Id.*

Unwarrantable Failure

The three citations at issue were also designated as "unwarrantable failures" to comply with the cited standards. A violation of a standard is the result of an operator's unwarrantable failure if it demonstrates "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). A violation is also an unwarrantable failure if it demonstrates the operator's "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991). A court must examine all relevant facts and circumstances to determine whether an operator's conduct is aggravated or whether mitigation is present. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). Specific factors to consider to determine whether a violation constitutes an unwarrantable failure include: 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 or posed a high degree of danger and 6) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). All the factors must be considered, although the court may find some factors are not relevant or are more or less important than the others under the circumstances. *IO Coal*, 31 FMSHRC at 1351.

In addition to these six unwarrantable failure factors, other circumstances must be considered in the analysis. The Commission has held that the dangerousness of a violative condition in itself may be so severe as to warrant an unwarrantable failure finding. *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Additionally, the conduct of mine management

[4] The "revised" *Mathies* test now requires two tasks, or sub steps, within the second step.

must be considered in an unwarrantable failure analysis. When a supervisor, within the scope of his employment, violates a standard, the supervisor's misconduct is imputed on the operator and should be "considered in conjunction with the traditional unwarrantable failure factors." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2046 (Aug. 2016).

Negligence

The Secretary designated the three citations to be the result of "high" negligence on the part of the operator. The Mine Act creates a strict liability enforcement model[3], and as result negligence is not an essential part of the calculus to determine an operator's fault. When an MSHA inspector observes conditions that create mine hazards or otherwise fall short of the Act's requirements, a citation is required; irrespective of fault.[4] Negligence, however, is central to the assessment of civil penalties[5] and to the evaluation of the enhanced enforcement elements of S&S, unwarrantable failure, and flagrant violation.[6]

Negligence is considered in light of the action that would have been taken under the same circumstances by a "reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the regulation." *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). An operator is negligent if it should have known that its actions (or failure to act) would cause a violation. *Id.* Considerations

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[3] "*If, upon inspection or investigation, the Secretary* or his authorized representative *believes that an operator* of a coal or other mine subject to this chapter *has violated* this chapter, or *any mandatory health or safety standard, rule, order, or regulation* promulgated pursuant to this chapter, *he shall, with reasonable promptness, issue a citation to the operator.*" 30 U.S.C.A. § 814(a) (emphasis added). This court has held that "[t]he Mine Act is a strict liability statute, and an operator is liable for a violation of a mandatory safety standard regardless of its level of fault." *Brody Mining, LLC*, 33 FMSHRC 1329, 1335 (May 2011) (ALJ) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). *See also, A.G. Smith Stone Co.*,5 FMSHRC 13, 15 (Jan. 1983) (holding that each mandatory standard has an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet that duty can lead to a finding of negligence if a violation occurs).

[5] Section 110(i) of the Mine Act requires that in assessing penalties, one criterion that must be taken in account is "whether the operator was negligent." 30 U.S.C. § 820(i). *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)("the operator's fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty.").

[6] Although the same or similar factual circumstances may be included in the Commission's consideration of an operator's misconduct with regard to an unwarrantable failure finding and the Commission's evaluation of an operator's negligence for purposes of assessing a civil penalty, the concepts are distinct and subject to separate analysis. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1122 (Aug. 1985).

regarding negligence include "the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue." *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The operator may be charged with varying degrees or levels of negligence, which becomes an important consideration during the penalty assessment. The Commission has described that ordinary negligence may be characterized by "inadvertent," "thoughtless," or "inattentive" conduct. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2004 (Dec. 1987). A finding of high negligence, however, "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (1998); *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992). Also, actual knowledge of violative conditions and the failure to act in light of that knowledge amount to high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Moreover, mine management is held to a higher standard of care, because they are tasked with the safety of their miners and must also set an example for miners under their direction. *Midwest Materials Co.*, 19 FMSHRC 30, 35 (Jan. 1997); *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987).[7]

MSHA's definition of negligence and corresponding degrees in part 100 are not binding on Commission judges, but are helpful in evaluating culpability. *Brody Mining LLC*, 37 FMSHRC at 1701-03 (holding that Commission judges are not bound to apply MSHA's negligence definitions in 30 C.F.R. Part 100.). Negligence is defined in Part 100 as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d).[8] MSHA's Part 100 also takes into account mitigation, stating that "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." 30 C.F.R. § 100.3(d). Accordingly, reckless negligence is present if "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is properly attributed to the operator if "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is appropriate when

[7] There is an exception to this principle that applies in limited circumstances. The Commission has held that where an operator takes reasonable steps to prevent accidents and the "erring supervisor unforeseeably exposes only himself to risk," a finding of no negligence will be upheld, but if an operator was blameworthy in respect to hiring, training, safety procedures or the accident itself, there may be a negligence finding. *NACCO Mining Co.*, 3 FMSHRC 848, 850-51 (Apr. 1981). Notably, the Commission has never applied the *Nacco* exception to preclude a finding of unwarrantable failure or to mitigate the civil penalty assessment for an unwarrantable failure violation.

[8] "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." 30 C.F.R. § 100.3(d).

"[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is appropriate if "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Mitigation becomes an important consideration when analyzing the level of negligence attributable to the operator. Essentially, mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. While mitigation is an important consideration, an ALJ is not constrained to an evaluation of "mitigating" circumstances, but is charged to consider the "totality of the circumstances holistically." *Brody Mining LLC,* 37 FMSHRC at 1702; *Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1264 (D.C. Cir. 2016).

Agency

As noted in the negligence and unwarrantable failure summaries above, the Commission has recognized that the negligence of an operator's "agent" is imputable to the operator for both penalty assessment and unwarrantable failure purposes. *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure determinations. *Whayne*, 19 FMSHRC 447 at 451, 453; *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995).

The question of whether a miner is an agent is often contested, and demands an intensive factual analysis. The Mine Act gives a starting point for the inquiry. Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a ... mine or the supervision of the miners in a ... mine." 30 U.S.C. § 802(e). Next, the miner's function, responsibilities, authority, and representations to MSHA must be taken into account. *Ambrosia Coal & Constr. Co.,* 18 FMSHRC 1552, 1560 (Sept. 1996)("We consider factors such as the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine.").

The Commission looks at the particular miner's function, rather than solely his job title to determine whether a miner had supervisory or managerial duties. *REB Enters.,* 20 FMSHRC 203, 211 (Mar. 1998). It is important to examine the responsibilities of the miner at the time of the alleged negligent conduct, and whether they were those that would normally be delegated to management, or were crucial to the mine's operation. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328–31, (Mar. 2009); *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). *Ambrosia Coal & Constr. Co.,* 18 FMSHRC 1552, 1560 (Sept. 1996); *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the Commission has concluded that in carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation

of part of a mine. *R&P*, 13 FMSHRC at 194; *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner's knowledge was imputable to the operator for unwarrantable failure purposes under principles of *respondeat superior*); *Ambrosia*, 18 FMSHRC at 1561 (finding relevant to the agency determination that an employee made required daily examinations and entered findings in an examination book).

In the same vein, a miner's authority is also important in an agency analysis. There are no hard and fast rules as to what authority a miner must have to be considered an agent of the operator. The authority to hire, fire, or discipline other employees in and of itself is not a prerequisite to a finding of agency, especially in light of other circumstances that indicate an agency relationship, because such authority often rests at a higher level due to the impact of these decisions. *Nelson Quarries, Inc.*, 31 FMSHRC 331-32. *Cf. e.g., REB Enters.*, 20 FMSHRC at 211-12 (holding that highwall leadman was not an agent because he did not have authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding discipline of employees).

Apparent authority, or how a miner is treated my co-workers, must also be taken into consideration. A miner is more likely to be considered an agent of the operator if other employees treated them as a supervisor. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328–31 (2009). *See also All American Asphalt*, 21 FMSHRC 119, 130 (Feb. 1999) (holding that leadmen who acted in a supervisory capacity and were in a position to affect safety were agents of the operator to whom employees would logically voice their complaints). Representations made to MSHA regarding authority are also relevant in an analysis of agency. *Ambrosia*, 18 FMSHRC at 1561 n.12 (finding relevant, based on analogy to common law agency principles, that employee held himself out as the employee in charge at the mine and signed MSHA documents as mine foreman); *Nelson Quarries, Inc.*, 31 FMSHRC 318, 331–32. On the other hand, the authority of a rank and file miner to tell other miners what to do on the job, does not on its own, make a miner an agent of the operator. The intrinsic nature of on the job training by fellow miners requires that more experienced miners give guidance to new miners on how to safely perform a job and to imply agency in such a situation would create an "every man for himself" atmosphere, detrimental to health and safety. *Martin Marietta Aggregates*, 22 FMSHRC 633, 640 (May 2000). Likewise, the Commission has held that the authority of a miner to tell miners to stop working on dangerous machinery and to remove it from service does not create an agency relationship. *U.S. Coal,* 17 FMSHRC at 1688. Also, a miner's independence is not dispositive in an agency determination. *See e.g., Whayne,* 19 FMSHRC at 451-52 (finding that an experienced miner who needs little supervision and assists less experienced miners is not necessarily a supervisor).

Gravity

In order to properly assess a civil penalty, a determination regarding gravity must be made. 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 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined

by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)(ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be assessed assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Burden of Proof

The Secretary bears the burden of proving all elements of a citation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. SOL v. Keystone Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence."). *See also, Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1976-1977 (Aug. 2014) (holding that to prove his imputed negligence is proper, the Secretary must describe the specific action an operator did not take to meet the requisite standard of care). In general, this preponderance standard "means proof that something is more likely so than not so." *In re: Contest of Respirable Dust Sample Citations,* 17 FMSHRC 1819, 1838 (Nov. 1995).

Penalty

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

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

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g*, 32 FMSHRC 1257, 1289 (Oct. 2010)(holding that the judge was justified in relying on utmost gravity and gross negligence in imposing a penalty substantially higher than that proposed by the Secretary); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (finding it appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (holding that the judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592-01, 13,621(Mar. 22, 2007)(codified at 30 C.F.R. pt. 100).

In addition, Commission judges are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone*:

> When it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Sellersburg Stone, 5 FMSHRC at 293.

Special Assessment

Through notice and comment rule making, the Secretary promulgated regulations specifying the "Criteria and Procedures for Proposed Assessment of Civil Penalties." 30

C.F.R. Pt. 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary: regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the "regular assessment" process whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act. 30 C.F.R. §100.3.

The regulations also allow MSHA to bypass the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[9] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory. The Secretary's proposed special assessment is not binding on the Commission; the Commission imposes civil penalties *de novo*.

II. Factual Background

The Mine and the Alumina Refining Process

Alcoa's Bayer Alumina Plant in Point Comfort, Texas processes alumina, which is used to produce aluminum metal. Tr. 38-44; Ex. S-1. Alcoa extracts alumina from bauxite in a four step process referred to as the Bayer Refining Process. Tr. 15, 52, 55, 210; Ex. S-1. The accident giving rise to the citations at issue occurred during the second step, the clarification process. Ex. S-1; Tr. 41, 46.

During the clarification process liquid bauxite, which is referred to as "liquor"[10] due to its reddish-brown color, is pumped from the digestion process area, to the clarification department,

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[9] In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations that would be reviewed to determine whether a special assessment is appropriate including, violations involving an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances. Criteria and Procedure for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 at 13,621 (Mar. 22, 2007).

[10] In the first step of the Bayer Refining Process, called digestion, raw bauxite is pulverized and mixed with sodium hydroxide in large pressure tanks, creating a caustic solution. Ex. S-1; Tr. 56. The alumina in the bauxite is dissolved and forms sodium aluminate, which is referred to as "liquor." Tr. 40, 56, 61. The name is derived from the reddish brown color of the liquid. Tr. 60-61.

The Material Safety Data Sheet ("MSDS") for sodium aluminate, or liquor, refers to the solution as "Bayer Liquor," "Caustic Liquor," "Alumina Refining Process Liquor," or "Alumina Refining Process Liquor." Ex. S-5 at 1. The MSDS for liquor describes it as caustic and corrosive. Ex. S-5 at 1. Additionally, the thermal temperature of liquor during the alumina

where it is passed through presses that remove impurities to refine or clarify it for the next step in the process. Tr. 45-46. The liquor is then moved via pipes to the precipitation department for the third step, and then to calcination for the fourth and final step. Tr. 42-46. The final product is alumina, a white powder composed of half aluminum and half oxygen. Ex. S-1.

The refining or clarifying process takes place in the clarification department. Tr. 47; Ex. S-3. The clarification department contains a press building, with three stories. Tr. 46. The bottom or first floor is the mud floor and contains drains to catch material or liquor that spills during clarification. Tr. 18, 26, 47. It also contains pump headers and pipes which push the liquor vertically up through the second floor valves and pipes, and then up to the presses on the top floor. Tr. 47-48, 73-74, 224.[11] The pipes that feed the presses are called risers, and are referred to by the press to which they connect. Tr. 50.

System Maintenance and the Flange Break Procedure

As the liquor cools and hardens when travelling through the piping system, scale, a rock-like substance, builds up along the walls within the risers. Tr. 56-57, 62, 66, 70, 403. This scale, often called "pancake," can be removed either by hydro blasting, jackhammering, or a caustic solution wash. Tr. 62, 64, 70.[12] Cleaning by these methods is scheduled periodically to remove buildup. Tr. 403. In order to remove scale with caustic solution ("caustic"), pipes are removed from the production process, liquor is drained from the risers and a caustic is introduced into the risers through ancillary lines. Tr. 51, 54, 320. One riser at a time is removed from the pumping process and drained before caustic is introduced through the ancillary lines. Tr. 54, 55, 320, 492.

The ancillary lines serve two risers and connect the pairs with a "T" pipe, which allows the caustic to flow into both risers. Tr. 51, 54, 215, 320. To isolate one pipe for cleaning and keep the other in production, a round flat metal plate, or blind, is placed between the joint of the T pipe to prevent flow of caustic between the risers. Tr. 68, 69. Another metal plate with a hole in the center, a dutchman, is placed on the other side of the T pipe to allow flow into that riser. Tr. 55, 68, 69. In order to remove the caustic from one pipe, or take it "off caustic," and begin using caustic on another (putting that pipe "on caustic"), the blind must be relocated and swapped with the dutchman, in a process called a blind swap. Tr. 403. The blind swap requires that the pipes be empty, and that the T pipe connecting the risers be removed by unbolting the flanges, referred to as a flange break. Tr. 118, 141, 356, 427, 441.

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refining process is about 220 degrees Fahrenheit. The MSDS warns that direct contact with liquor can cause "severe irritation, corrosive burns and permanent injury to eyes, skin and gastrointestinal tract," and that liquor mists can seriously irritate or damage the respiratory tract. *Id.* The MSDS states that PPE should be worn when handling liquor, and safety goggles, a face shield, gloves, and protective clothing should be worn when exposed to liquor. *Id.* at 3.

[11] Presses are long tube-shaped devices with a series of screens that capture and filter solid materials like sand and mud from the slurry. Tr. 45-46; Ex. S-1.

[12] The caustic solution ("Caustic") is sodium hydroxide, or NaSO4, a corrosive base material that Alcoa uses to break down built up scale in pipes. Tr. 51, 54. When a caustic solution is sent through the pipes, the system is "on caustic."

The flange break portion of the blind swap presents a danger because miners are opening the piping system, which might contain residual caustic liquid which can spray or leak out of the pipe. Ex. S-12. Miners are at risk of contact with a hazardous material if the riser is charged, containing liquid that can escape. Tr. 30-31. For this reason, Alcoa created a Standard Work Instruction ("SWI") which outlines safety measures necessary for the task. Ex. S-12.

Alcoa's flange break SWI requires miners to perform a lockout/tagout procedure on the piping system to isolate the flow of any liquid. Ex. S-12. Miners must then verify that the system is isolated by draining the pipes and then flushing them with water (conducting a "flush verification"), which should run clear. Tr. 32, 61, 505, 506; Ex. S-12.[13] During the flange break miners are required to wear standard personal protective equipment ("PPE") to avoid chemical or thermal burns, including a hardhat, goggles, long sleeve shirt, and hearing protection. Ex. S-12. Additional PPE, including a chemical suit, face shield, and rubber boots is required if verification is not performed before the flange break, or if a miner cannot place himself in a position above the flange being broken. Ex. S-12. Miners are also instructed to attempt to work from above the flange being unbolted, and to avoid putting body parts underneath the flange, in the area known as the "line of fire". Ex. S-12. The area where the flange break is being performed should be barricaded and barricading should be maintained if working above ground level to protect anyone who walks under the flange break from dripping liquid. Ex. S-12.

The Flange Break on September 3, 2014

On September 3, 2014, Turner contractors were tasked with performing a blind swap of risers 25 and 27, a pair of risers that shared a T pipe. Tr. 318, 403, 406. Riser 27 was to come off caustic and be put back into the clarification process ("on liquor"), requiring the blind swap. Tr. 403-04. At the time the task was assigned, a dutchman was in place allowing flow into Riser 27, but the caustic wash was removed. Tr. 403-04.

On the morning of September 3, before the blind swap was to start, Jeff McCaskill, an area supervisor for Alcoa, had a safety meeting with Turner employees, including their supervisor Rusty Morales, to discuss the hazards presented by the task. Tr. 167, 405-06. Morales then held a meeting with his team and went through a Job Safety Analysis ("JSA") for the blind swap, and reviewed the safety measures the miners should take. Tr. 168-70; Ex. S-14, S-15.

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[13] Alcoa's Tagout/Lockout Verification Program defines verification as "the inquiry, observation and testing methods" used to ensure energy sources are isolated and secured in a safe position and that any "equipment, process or system is in a zero or controlled energy state" necessary for the task being performed. Ex. S-25. Flush verification is defined by Alcoa's SWI as "the witnessing of water being flushed through piping, vessels, tanks, pumps and valves." Ex. S-12. An observer is looking for the water to run clear, absent of color or material. Tr. 505-06. Additionally, the temperature of the pipe after flush verification may indicate whether liquor is drained, as a properly drained pipe will cool upon the introduction of water. Tr. 233-34.

The SWI states that if verification cannot be performed additional PPE must be worn and a "Flange Break Permit" must be completed and authorized by a superintendent or his designee before the flange break begins. Ex. S-12.

Before the blind swap, Alcoa was to isolate the system, drain the 25 riser, verify the piping was empty, and perform the lockout /tagout, as Turner contractors were not authorized to lock out the system. Tr. 130. Alcoa has lockout/tagout procedures in place for flange breaks, along with an SWI that outlines the procedures necessary when a flush verification is not performed. Ex. S-12; Tr. 453. The Flange Break SWI states that verification must be performed before starting the task of unbolting "any flange associated with piping, vessels, tanks, pumps and valves." Ex. S-12. The instruction explains that the individual performing the flange break "must personally observe the flushing of water across the flange being unbolted." *Id.* The General Instructions in the SWI advise that proper lockout / tagout and verifications procedures should be followed before starting work, and that an individual must verify that a system has been flushed with water by witnessing the flushing and draining. Ex. S-12. If verification cannot be performed addition PPE must be worn and a "Flange Break Permit" must be completed and authorized by a designated individual before the task begins. Ex. S-12.

At around 8:00 a.m. Alcoa began the process of stopping the flow to Riser 25. Tr. 410. This required closing and tagging out Mud Floor Valve 30 between the pump and riser 25, to prevent flow to the riser, and to ensure that Valve 28 leading to riser 27 was closed. Tr. 417.[14] When McCaskill believed the valve was closed, he hung a green tag on the valve to indicate the closure. Tr. 410-11. Liquor was then drained from the line and a white work permit was placed on the press floor control room to indicate that the lockout / tagout was complete, the system was isolated, and that work could commence. Tr. 413-14, 421-22. Alvarado testified that the 25 riser was not flush verified, despite the SWI requirement, because there was a blind between the 27 and 25 risers, and the riser was "on caustic." Tr. 453-54. Alvarado admitted that a flush verification could have been performed regardless of the blind. Tr. 454-55.

Morales and McCaskill then "walked out the job," so McCaskill could show Morales that the tag-out process was done and to verify that the drain hose had no flow. Tr. 119, 174, 421.[15] McCaskill informed Morales that he would be leaving the facility, and then left for the day around lunchtime. Tr. 158, 422. At around 1:00 p.m., Turner employees Morales, Dominic Cano, and Leo Gaytan arrived at the Press Building to begin the blind swap. Tr. 14, 360, 361. Morales and Alvarado went over the isolation points once more. Tr. 133, 144, 176, 426.

Turner employees Gaytan and Cano removed the T pipe connecting Risers 25 and 27 and the blind that was on Riser 25. Tr. 356. At this time they discovered a chunk of hardened scale, referred to as "pancake," on the opening of the pipe behind the blind blocking the opening to Riser 25, which

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[14] Alcoa employees closed the mud floor valve with a sledgehammer. Tr. 412. During this process Alvarado broke the siphon on the line to facilitate draining. Tr. 416-17. Rudy Peña, an Alcoa employee, then began to "rod out" or drill a line into the ball valve between riser 25 and valve 30 to remove scale build up. Tr. 414, 415. When Peña attempted to attach a hose to the ball valve to drain the line, liquor from the pipe sprayed him. Tr. 414. Peña received first aid to treat the skin that was exposed to liquor. Tr. 413.

[15] Alcoa did not flush verify the isolation of Riser 25, as mandated by the SWI. Tr. 453-54. The policy generally requires that the individuals performing the flange break observe the flushing of water across to the flange to be unbolted. Ex. S-12.

needed to be removed so caustic could be forced into the line. Tr. 356, 428.[16] Gaytan testified that he saw liquor coming out of the drain hose at around 1:00 p.m., before he started breaking the flange. Tr. 360-61. Gaytan informed Morales, who then told Gaytan that the job was ready to go and that there was only a little liquid leaking. Tr. 360-61, 395. Gaytan said that Alvarado was nearby, about three or four feet away, when he told Morales about the liquid. Tr. 360-61, 396-97. Gaytan also stated that liquid was coming out of the hose while he was working. Tr. 378, 380-83.

Cano initially kneeled onto the pipe, about four feet from the ground and began jack hammering for twenty minutes until Gaytan took over. Tr. 273-74, 357. Gaytan jackhammered from a stand he had pulled over to the area. Tr. 104, 198, 316. The jackhammer broke through the scale and Alvarado, who was standing nearby noticed liquor coming out of a hole in the pancake, and began shouting for the miners to stop jackhammering. Tr. 431-32. Morales, who had been standing 8 to 10 feet away, walked up at this time and was struck in the back by the liquor spewing heavily from the riser. Tr. 431-32. Morales was not wearing the proper PPE for exposure to liquor when he was struck. Tr. 75, 432.

Alvarado pulled Morales into the chemical safety shower about ten feet away, where Morales rinsed himself under the solution for several minutes. Tr. 161-62, 433. Emergency medical personnel arrived thereafter. Morales suffered third degree burns from his elbow to shoulder, requiring skins grafts. Tr. 163. Morales's tongue, ear and face were also burned. Tr. 162.

MSHA Inspector Brett Barrick was assigned to conduct an investigation of the accident. Tr. 81-82.[17] After investigating and questioning various Turner and Alcoa employees, he issued the disputed citation and orders.

III. Analysis

The parties agree that the three cited standards were violated, that the violations are properly categorized as S&S, and that the gravity designations are appropriate. However, Alcoa challenges the negligence levels and unwarrantable failure charges of each citation.

The Secretary supports his negligence and unwarrantable failure classifications in large part by arguing that during the violative conduct, Alvarado was Alcoa's agent, particularly, an acting supervisor, tasked with ensuring the safety of the Turner contractors in McCaskill's absence. Sec'y Br. 9, Tr. 404, 406, 410, 423. Conversely, Alcoa contends that Alvarado was simply a bystander and a mere rank and file miner who was present during the flange break because he needed to perform a

[16] The pancakes are hard, like concrete, and are typically removed by jackhammering. Tr. 64, 70, 428.

[17] Brett Barrick was an MSHA Inspector at the time the citations were issued, but is now a Conference Litigation Representative ("CLR"). Tr. 23. Barrick was an inspector for four years, and conducted about 30 inspections of alumina facilities, including Alcoa plants. Tr. 24, 26. Barrick worked for companies that performed contract work for Alcoa for 19 years before becoming an MSHA Inspector, including 17 years working as the Safety and Health Manager for Rexco, a contract company imbedded at Alcoa. Tr. 27-29. While at Rexco, Barrick supervised flange breaks. Tr. 29-30.

task after the Turner employees were finished. Resp. Br. 8, Tr. 301-05. Before the citations are discussed, it is necessary to define Alvarado's role at the time of the incident, as it ultimately shapes the disposition of the violations.[18]

Agency Analysis

The dispute regarding both negligence and unwarrantable failure hinges largely on whether, at the time of the violations, Alvarado was charged with supervising other miners, and as such was Alcoa's agent.[19] This will be determined by examining Alvarado's title, function, responsibility, authority, and representations to MSHA regarding the flange break procedure on September 3, 2014.

Alcoa argues that Alvarado had not been designated as a supervisor on September 3, 2014, and as such, Alvarado was not responsible for the activities of Turner contractors. Resp. Br. 7. The Secretary asserts that Alcoa's failure to formally designate Alvarado as a supervisor is not determinative of Alvarado's role on the day of the violation. Sec'y Br. 20. On at least ten previous occasions, Alcoa management designated Alvarado as a Temporary Acting Supervisor ("TAS") for a shift. Tr. 449-51. This designation is given to an hourly employee before a full shift, when a regular supervisor is not available, and requires paperwork be filled out. Tr. 449. Alvarado receives a pay increase when he serves as TAS. Tr. 451. Alvarado had never been designated as a TAS for a partial shift before, and on September 3, 2014, he was the only Alcoa employee on the crew who had acted as a TAS. Tr. 449, 451. Barrick testified that he had no evidence that Alvarado was acting as a TAS on the day of the accident. Tr. 305-06. By all accounts, Alvarado was not named a supervisor after McCaskill left for the day.

The Commission looks to the miner's function to determine agency status, regardless of formal title or lack thereof. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009); *Martin Marietta*, 22 FMSHRC 633, 637-38 (May 2000). The Commission examines whether the miner's function involved responsibilities normally delegated to management. *REB Enters.*, 20 FMSHRC 203, 211 (Mar. 1998). The Secretary alleges that Alvarado's function was to supervise Turner contractors during the blind swap, in McCaskill's absence. Sec'y Br. 19.[20] Alvarado told Barrick during the investigation, that he was asked to "keep an eye" on the Turner contractors. Tr. 309.

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[18] The Secretary also alleges that Alcoa was highly negligent because it violated its own safety policies in favor of saving time by not requiring PPE for the flange break, not establishing a barricade, failing to flush verifying the piping, by failing to properly maintain the pipe system, and not requiring contractors to safe use safe means of access while working. Sec'y Br. 24-28, 34-36. Since the Secretary's negligence and unwarrantable failure arguments are specific to each citation, they will be addressed separately. Alvarado's role will be discussed first, as the dispute regarding his level of responsibility is common to all three violations.

[19] The Mine Act defines an agent as any person charged with the operation of all or part of a mine, or the supervision of the miners. 30 U.S.C. § 802 (e).

[20] The Secretary states that Alvarado admitted he was responsible for overseeing another Turner crew working on the top floor of the Press Building. Tr. 462-63. The Secretary's argument is misplaced, as Alvarado admits that he was assigned to "lock out" a job for Turner contractors, not that he was assigned to direct them or supervise them. Tr. 462-63.

Barrick conceded that it would not be unusual for an operator to ask its hourly employees to keep an eye on contractors. Tr. 337-40. Further, Barrick testified that all miners have the obligation to stop others from doing something unsafe, even without reaching the threshold of being a supervisor or an agent. Tr. 311. Alvarado testified that he was present during the flange break because he had to do a task once the blind swap was complete. Alcoa maintains that there would have been no need to designate Alvarado as a supervisor. Resp. Br. 8. Maly testified that Alcoa did not normally directly supervise contractors, contractors generally supervise their own work crews. Tr. 486-87. Maly also testified that Alvarado reported to Robert Clark in McCaskill's absence, and that in addition to Robert Clark, two other supervisors were present in the clarification department during the blind swap. Tr. 485-87.

Next, Alvarado's responsibilities will be analyzed, including whether Alvarado exercised managerial responsibilities at the time of his alleged negligent conduct. *Martin Marietta Aggregates Inc.*, 22 FMSHRC 633, 638 (May 2000). The Secretary notes that Alvarado had "tagging authority" over the blind swap and flange break, and that this authority militates towards Alvarado being a supervisor. S. Br. 20, Tr. 401, 443.[21] Turner contractors did not have the authority to conduct a lockout/tagout on Alcoa equipment. Tr. 130. Alvarado had Level 2 tagout authority, which allowed him to lock out certain equipment and hang work permits. Tr. 402. The Secretary failed to show how this authority differed from that of other rank and file miners, or that only supervisory personnel had tagout authority.

In the absence of actual authority, the Commission also looks to apparent authority, or how a miner was treated by those with whom he worked, to determine whether a miner was an agent of the operator for negligence and unwarrantable failure purposes. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 (Sept. 1996). The Secretary alleges that Turner contractors reasonably believed Alvarado was an Alcoa supervisor for purposes of the flange break and blind swap. Sec'y Br. 19-21.

Morales testified that during the job walkout McCaskill informed him (Morales) that Alvarado would oversee the remainder of the job that day. Tr. 158.

> Q. [Lindsay Wofford] And how did you get that understanding that his [Alvarado's]—his role was to supervise the work being conducted?
>
> A. [Rusty Morales] Jeff McCaskill told me that he would be over the job that we would be doing and that he would be there.

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[21] Alcoa has a lockout/tagout policy that dictates what needs to be done to isolate a system before maintenance is performed. Tr. 31. With tagging, after a system is mechanically closed and isolated, a "tag" is hung on a valve or section of piping as a visual aid to show it has been properly isolated and to indicate that individuals are working on the system. Tr. 86, 210. An individual with tagging authority has the authority to isolate a system, to identify which components in the system need to be closed off. Tr. 31. Alcoa has various levels of "tagging authority" to indicate what each employee is permitted to do in the tagging process. Tr. 401-02. These levels are achieved through training and certification. Tr. 401. For example, a Level 2 tagout authority would allow someone to lock out equipment for general mechanical work. Tr. 401. A Level 3 authority would allow an individual to have the same duties as Level 2, in addition to being allowed to perform a confined space lockout. Tr. 401.

Tr. 158.

Morales also testified that he knew Alvarado "was in charge of the press building." Tr. 160. Alcoa notes that Morales was likely being untruthful in his testimony regarding Alvarado being in charge of the job. Resp. Br. 9. Alcoa points out that Morales has filed a lawsuit against Alcoa and Alvarado for the injuries he sustained. Resp. Br. 9; Tr. 164. Barrick testified that he did not think Morales was credible. Tr. 294. Barrick was unable to interview Morales during his investigation, but witnessed his testimony at a deposition and then at trial. Tr. 294. Barrick said that Morales's statements were contrary to those of three other witnesses- two Turner miners and Alvarado. Tr. 294. Morales's testimony that he believed Alvarado to be in charge is not credible, based on Barrick's observation on the inconsistencies among witnesses and Morales's possible motivation to place blame on Alvarado for his injuries. Barrick testified that the documentation that Turner gave him after the incident seemed suspect and inconsistent. Tr. 298-99. In the past when Barrick dealt with Turner, he "found them at times to not be very credible." Tr. 298.

Leo Gaytan, one of the Turner contractors present during the incident, testified that he believed Alvarado was in charge because Alvarado was tagging the job with Morales. Tr. 355. Gaytan testified that a supervisor from Alcoa generally watched the flange break. Tr. 363. Gaytan also noted that Alvarado told him to clean the scale and reassemble the system. Tr. 384-85. It is important to note that this is the only thing Alvarado said to Gaytan, and Gaytan already knew he was going to be jackhammering the scale. Tr. 384-85. Gaytan admittedly knew what his tasks would be before Alvarado's alleged statements. This testimony does not weigh in favor of Alvarado being classified a supervisor.

Finally, neither Alcoa nor Alvarado ever made any representations to MSHA that Alvarado was a supervisor during the flange break. Tr. 302, 305. During the investigation Alvarado told Barrick that on the day of the incident he was "on tools," and that he was "[w]atching Turner to assist." Tr. 248. Barrick testified that Kelly Grones, Alcoa's health and safety manager, gave him the investigation report Alcoa compiled after the incident. Tr. 82, 296. Barrick believed it was very candid, although he disagreed with Alcoa's belief that the maintenance was done properly. Tr. 296-97.

Alvarado's tagging authority and assignment to "keep an eye" on Turner contractors are not sufficient to find that he was a supervisor or an agent of Alcoa on September 3, 2014. The unwarrantable failure and negligence classifications of the individual citations will be discussed, with Alvarado's role in each being that of a rank and file miner.

A. Citation No. 8778037, Blocking Against Hazardous Motion (Lock Out/ Tag Out)

On September 16, 2014, Barrick issued Citation No. 8778037 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.14105, a mandatory standard requiring that machinery or equipment must be powered off and blocked against hazardous motion before repairs on machinery are conducted.[22]

[22] The standards states:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or

The Citation alleges:

> An accident occurred on September 3, 2014, when a contractor's supervisor working on the 25 press riser was struck in the back and upper arm by approximately 220 degree caustic liquor. Two contract employees had removed a 4 inch tee off of the riser and observed scale buildup. They then began chipping at the hydrated scale buildup in the 4 inch opening with a 30 lb. jackhammer. When the bit was removed from the hydrated scale hot liquor sprayed out of a hole. The contractor's supervisor was standing near the miner that was scaling the opening. It has been determined that the No. 30 Mud Floor Valve which is a part of the mechanical means of blocking the liquor['s] movement was not seated completely and allowed liquor to re-enter the riser from below the drain filling the riser back up after it had been drained. The one inch drain line failed to show any drainage at the time indicating that it had scaled up. Failure to stop all motion of hot liquor in this equipment resulted in the contractor's supervisor receiving second and third degree burns to his back resulting in lost work days. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that they did not verify that the system was completely blocked against movement of liquor. This is an unwarrantable failure to comply with a mandatory standard.

Ex. S-18.

The citation was designated as reasonably likely to be permanently disabling, with one person affected, S&S, and the result of Alcoa's high negligence. *Id.*

The Secretary alleges that Alcoa violated 30 C.F.R. § 56.14105 because the flange break was "maintenance" as anticipated by the standard, the liquor was not completely removed or blocked from moving through the piping, and it subsequently sprayed out, injuring a miner. Sec'y Br. 22-23. Alcoa does not contest the fact of the violation.

1. S&S

Although Alcoa does not dispute the S&S designation, the S&S nature of the citation will be discussed briefly. The first prong of *Mathies* is satisfied because Alcoa failed to properly drain the pipes, thus the liquor was not blocked from moving through the pipes during maintenance, in violation of Section 56.14105.

> equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105

Next, the second step of *Mathies* requires me to determine whether the hazard the cited standard was designed to prevent was reasonably likely to occur. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). Section 56.14105 requires that equipment be blocked against hazardous motion. 30 C.F.R. § 56.14105. As applied to this violation, the pipes should have been drained or blocked to prevent the corrosive and heated liquor from moving through the pipes and potentially escaping while maintenance (i.e. the flange break) was performed. Tr. 203. The failure to drain the lines resulted in the liquor escaping and burning a miner. The second step of *Mathies* is satisfied. Tr. 203.

The third *Mathies* criterion focuses on gravity. Generally a judge is to assume the hazard has been realized and then consider whether it is reasonably likely to result in injury. Once again, an injury occurred in this case, as Morales was burned by the spewing liquor during the flange break process. The fourth step of *Mathies* looks to whether there is a reasonable likelihood that the injury in question would be of a reasonably serious nature. Morales sustained severe burns on his back, arm, and face from contact with the liquor. Tr. 162. These burns required hospitalization and skin grafts, and have kept Morales out of work. Tr. 115-16, 162. Based on these facts, the resulting injury was serious in nature. The citation was properly designated S&S.

2. Negligence

The Secretary argues that the high negligence level for Citation No. 8778037 is appropriate because Alcoa failed to follow its own lockout/tagout procedures and work instructions by omitting a flush verification and not isolating the pump system before performing a flange break, in an effort to save time. Sec'y Br. 25. According to the Secretary, flush verification was critical in this case because the drain lines were not properly maintained and thus clogged with scale. Sec'y Br. 26-27; Tr. 79-81. Alcoa counters that a classification of "no negligence" is appropriate for the citation because the accident was unforeseeable, the operator was diligent in ensuring that the 30 valve that allegedly caused the leak was completely sealed, and the omission of flush verification is irrelevant because it would have been futile. Resp. Br. 32-33.

The Secretary alleges that the flush verification was omitted only because Alcoa was in a rush to get the system back on line. Sec'y Br. 28. Flush verification can take quite a bit of time: 45 minutes to fill the system with water, and another 45 to allow it to drain. Tr. 496. The job was a top priority, but McCaskill was leaving early that day. Tr. 106, 361, 422. Moreover, the Secretary alleges that the accident was caused by Alcoa's improper maintenance of the drain line. Alcoa designed three-inch by two-inch ("3x2") drain lines to be installed on risers. Tr. 79-80. These large diameter drains are angled in such a way as to allow discharge to flow away from the miner and are less susceptible to plugging, clogging, and scaling than a 1-inch drain line opening. Tr. 80. At the time of the accident Alcoa was using 1-inch ball valves hooked to a hose to drain the lines rather than maintain the 3x2 drain lines. Tr. 80-81. The 1-inch valve can clog and prevent liquor from draining. This means that when liquor stops draining from the system, it may be due to a clog, not an empty system. Flush verification then becomes more important. Sec'y Br. 27.

Alcoa maintains that there were no aggravating factors to support a negligence finding. Resp. Br. 24. Alcoa contends that the Alcoa never communicated that the job was to be rushed; rather Morales told his crew that the job needed to be completed promptly. Tr. 379-80.[23] Gaytan said that

the job was a priority because Alcoa wanted the system back in service, but did not testify that anyone from Alcoa specifically told him to rush the job. Tr. 364.

> Q. [Maria Rich] Could you describe this job in terms of priority?
>
> A. [Leo Gaytan] Yes, ma'am.
>
> Q. Okay. Could you describe it for me? What priority was this job?
>
> A. Because they want the unit back in service, that's the priority.
>
> Q. Is it important to get these pipes back in production?
>
> A. Yes, ma'am.
>
> Tr. 364.

Later, Gaytan testified that Morales told him to jackhammer despite seeing liquor leaking because the job needed to be done. Tr. 379-80.

> Q. [Christopher Bacon] Okay. And you told Mr. Morales "there's liquor coming out of that?"
>
> A. [Gaytan] We told Mr. Morales and Mr. Alvarado knew about it.
>
> Q. You said Mr. Alvarado knew but you didn't tell Mr. Alvarado; he was standing off to the side?
>
> A. He was on the side.
>
> Q. Yeah. And you were jackhammering?
>
> A. I told Mr. Morales that and Mr. Morales
>
> Q. He said, "It doesn't matter, keep doing it"?
>
> A. He said, "The job needs to be done," he said, "They want it done, Alcoa wants it done."
>
> Q. Okay. So Mr. Morales said, "Just keep the job -- just do the job even though that's coming out"?
>
> A. Mr. Morales and Mr. Alvarado was rushing it.
>
> Q. Mr. Alvarado was rushing you?

A. Yeah, it needs to be done.

Q. Okay. But Mr. Alvarado didn't tell you? He -- he didn't say anything?

A. Not that I know of.

Q. Okay. So how -- why do you say -- if you don't know he say anything, then what makes you say that –

A. Because Mr. Morales -- is what he told me, "the job needs to be done."

Q. Okay. So the person who told you that the job needed to be done, the person who communicated that there was a rush was Mr. Morales?

A. I don't know about that one.

Q. Okay. But the person who was talking -- you-- you spoke to Mr. Morales about the liquor; you saw the liquor; am I right?

A. Yes, sir.

Tr. 379-80.

In sum, Gaytan did not testify that Alvarado knew there was a leak in the line; he only stated that Alvarado was nearby.

In response to the Secretary's allegations that Alcoa did not verify isolation, Alcoa argues that it did verify that the system was completely blocked against the hazardous movement of liquor because it closed the 30 valve and verified that the system was completely drained. Resp. Br. 22; Tr. 420-21. Alcoa contends that flush verification was not necessary because the flush verification process is meant to ensure that caustic does not remain in the pipe after a caustic wash, and in this case liquor was in the pipe. Resp. Br. 23; Tr. 454-55, 474. Alcoa also posits that flush verification is generally used for horizontal piping, which is more likely to contain residue after a caustic wash, and the piping at issue was vertical. Tr. 454-55, 474.

Alcoa claims that the cause of the incident was likely the failure of valve 30 during jackhammering, and as such performing a flush verification would not have indicated a problem. Resp. Br. 23. Dwayne Maly, the training superintendent at Alcoa, testified that the spraying liquor was caused by the 30 valve. Tr. 477-79.[24]

[24] Dwayne Maly has been the training superintendent at Alcoa for about six years. Tr. 471. His responsibilities include recording and directing employee MSHA training and reviewing SWI's. Tr. 471. Before this he spent 22 years in various roles at Alcoa, including serving as the

Barrick testified that he could not be sure of what caused the leak, but testified, "I truly believe in my heart of hearts flush verification may not have solved this..." Tr. 505. When Barrick began his investigation, Grones gave Barrick an email that the plant manager, Ben Kahrs, had sent out to many people at Alcoa the day after the incident, stating that "flush verification was not done correctly." Tr. 296; Ex. S-11. Barrick agreed that one of the reasons he issued the lockout/tagout citation was this e-mail. Tr. 301. Maly stated that he did not agree with Kahrs' email, because he did not believe flush verification would have made a difference. Tr. 499, 500. This assertion, coupled with Barrick's admission regarding flush verification, indicated that it is objectively reasonable to believe flush verification was not necessary, and may not have prevented the liquor leak.

Low negligence is the appropriate designation for the citation. There was negligence on the part of Alcoa, because the lines were not adequately maintained. The testimony indicates that Alcoa could have used the specially designed 3x2 lines, which may have prevented the scaling, and that the 1-inch drain lines were more likely to give a false indication of a de-energized system. Moreover, flush verification could have been performed as an additional step, even if it was not deemed necessary.

Likewise, there were no aggravating factors to support a high negligence finding. The flush verification would likely not have prevented this issue, and Alcoa's decision not to perform one does not rise to the level of high negligence. Alcoa bypassed the flush verification because it reasonably believed that flush verification was not necessary. There is no indication that Alcoa was rushed and omitted flush verification to save time. Morales and Gaytan indicated that the job was a priority, but did not credibly testify that they were told by Alcoa to rush the maintenance.

3. Unwarrantable Failure

The Secretary alleges that the unwarrantable failure designation is proper for Citation No. 8778037 because the facts demonstrate aggravated conduct on the part of Alcoa. Sec'y Br. 29-30. Alcoa disputes the designation and asserts that the Secretary did not establish aggravated conduct on the part of any Alcoa employee. Resp. Br. 2.

a) Length of Time

The Secretary alleges that the violative condition existed for an hour because Gaytan testified that he saw liquor coming from the hose before the blind swap started. Sec'y Br. 29; Tr. 361, 388, 390.[25] In response, Alcoa notes that work ceased as soon as Alvarado saw liquor seeping through the

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superintendent in the clarification, digestion and precipitation areas and as a process engineer in digestion. Tr. 471. Maly assisted in drafting Alcoa's flange break SWI. Tr. 472. Maly has a bachelor's degree in Chemical Engineering from Texas A&M University. Tr. 472.

[25] Gaytan testified that he saw the hose draining, and reported to Morales that he saw the hose was still draining. Tr. 388-90. Barrick testified that Gaytan told him [Barrick] during the investigation that Gaytan saw fluid leaking from the drain line. Tr. 332. At another point during Gaytan's testimony he states that he never looked at the hose, but then states he saw the hose draining before he began working. Tr. 388. Maly stated that Gaytan has a "safety conscious" attitude, and it seems unlikely he would see a leak without speaking up about it. Tr. 483-85.

pancake, and that the valve believed to have become unseated, causing the leak, only became unseated after jackhammering began, lessening the amount of time the condition existed. Resp. Br. 24.

Gaytan did not credibly testify that Alvarado, an Alcoa employee, knew that a persistent leak existed during the jackhammering. Gaytan testified that Alvarado was three or four feet away when Gaytan told Morales about the leak, but did not offer testimony that Alvarado heard the statement or acknowledged it in any way. Tr. 396. Moreover, Alvarado testified that he called on the Turner contractors to stop work the moment that he witnessed liquor seeping from system, which was almost the same time that Morales was struck by the liquor. Tr. 431. The length of time that the condition existed was brief, and as such does not weigh in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

The Secretary believes the violation's extensiveness is supported by Alcoa's failure to follow its own flush verification guidelines. Sec'y Br. 30. Alcoa notes that it verified the system twice, so the extent of the condition does not justify an unwarrantable failure finding. Resp. Br. 24.

The extensiveness of the condition does not support unwarrantable failure, as this leak existed in one area of the facility, for one task, and exposed the only the miners working in the area at the time.

c) Notice

The Secretary alleges that Alcoa had notice that greater efforts were needed to comply with Section 56.14105, because MSHA cited Alcoa for an injury sustained during a flange break a year prior to this incident. Tr. 343; Ex. S-23. Alcoa alleges that there was insufficient evidence that the prior citation was similar in nature to the citation at hand. Resp. Br. 25. Alcoa notes that the prior citation involved a high pressure screen, unlike the machinery at issue here, and that it was located in the clarification department. Tr. 343-44.

Without additional testimony regarding the previous violations, it is difficult to determine whether the prior citations were sufficient to put Alcoa on notice of the violative condition. On balance, the evidence that the prior citation involved a different piece of machinery is stronger. There is insufficient evidence to find that Alcoa was on notice for unwarrantable failure purposes.

d) Failure to Abate

The Secretary states that the disregard of the flush verification step before the flange break, and permitting it to be ignored, demonstrated Alcoa's failure to abate the violative condition. Sec'y Br. 30. Alcoa counters that it did all it could to reasonably abate the violation because Alvarado called the Turner contractors to stop working immediately upon seeing liquor seeping through the pancake. Resp. Br. 25; Tr. 360.

The Secretary does not meet his burden of showing that Alcoa's decision to omit flush verification amounted to a failure to abate. Additionally, by all accounts, the work ceased when Alvarado witnessed liquor seeping through the pancake. This does element does not support a finding of unwarrantable failure.

e) Obviousness and High Degree of Danger

Alcoa admits that the conditions leading to the accident posed a high degree of danger, but argues that the condition was not obvious because there was no way to tell that the 30 valve would fail after having been verified to be closed twice. Resp. Br. 25. Alcoa disputes the obviousness of the condition by noting that Barrick testified, "if I walked up on it, would I say it was obvious that something bad's going to happen here? No, it's not – it's not going to be obvious in that manner." Tr. 251. According to Alcoa, any problem with scale breaking loose would be undetectable until jackhammering started. Tr. 479.

The corrosiveness of the liquor and possibility of a leak did present a high degree of danger, albeit not an obvious one.

f) Operator's Knowledge

Similarly, the Secretary contends that Alcoa had knowledge that liquor was flowing from the line because Gaytan mentioned it, and Alvarado was nearby when he did so. Tr. 361, 390, 396-97. McCaskill also had difficulty seating the 30 valve before he left for the day and Peña had been injured at one point already. Tr. 412, 414.

Alcoa did not have sufficient knowledge of the violative condition to warrant a finding of unwarrantable failure. The failure to flush verify alone was does not rise to the level of reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Brody Mining*, 37 FMSHRC 1687, 1691 (Aug. 2015). The leak did not exist for a significant amount of time; by all accounts the flow of liquid from the pipe was sudden. Tr. 182, 431. It was not established that Alvarado knew that the system was not properly verified. Gaytan vacillated when asked about observing the pipe leak, so it is difficult to say with certainty whether Alcoa had knowledge of the leaking pipe.

In sum, the high degree of danger of leaking liquor, alone, does not support an unwarrantable failure finding. There is insufficient evidence to show that Alcoa was on notice, had knowledge that the system was not properly isolated, that the condition was obvious, or that Alcoa did not attempt to abate the violative condition.

4. Gravity

Alcoa does not dispute the gravity of the violation. The condition was dangerous, as Alcoa concedes, and the fact of the accident and extent of injuries are undisputed. One person, Morales, was injured severely, justifying the gravity designations.

B. <u>Order No. 8778038, The PPE Violation</u>

On September 16, 2014, Barrick issued Order No. 8778038 to Alcoa's Bayer Alumina Plant for an alleged violation of 30 C.F.R. § 56.15006, a standard that requires that special protective equipment and clothing be worn by miners whenever a hazardous condition is encountered.[26] The order alleges:

[26] 30 C.F.R. § 56.15006 reads:

> An accident occurred on September 3, 2014 when the contractor's area supervisor failed to use special protective equipment provided by the contractor to protect him from known chemical and thermal hazards in the area in which he was working. The supervisor was providing oversight for two contract miners on the No. 25 riser drain located on the mud floor of the press building. The two miners were de-scaling the riser with a 30 lb. jack hammer at a 4 inch flange opening. Personal protective equipment (PPE) had been established by the contractor in their job safety analysis review and is described in the mine operator's safe work instruction procedure[s] which was provided to the contractor prior to the work being done. The PPE required to be worn for the work is a chemical suit, face shield, chemical gloves, and rubber boots. The contractor['s] supervisor was working in the area wearing a hard hat, monogoggles, hearing protection and leather work boots. During the maintenance on the line the miners knocked an approximately 1.25 inch hole into the hydrated scale buildup. The approximately 220 degree liquor contained in the line shot out of the hole striking the supervisor in the back and upper right arm about 8 feet away resulting in second and third degree burns to the areas affected. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that a competent person/agent was present during the work and observed the supervisor not wearing the proper equipment. The competent person/agent failed to wear the required PPE as well and was in the immediate area of the release. Failure to use PPE that has been prescribed through job analysis and historical injury information in the mine increases the potential for miners being severely burned. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-19.

The Order was designated as reasonably likely to be permanently disabling, a significant and substantial ("S&S") violation, with one person affected as a result of "high" negligence. *Id.* The Order was later modified to a 104(d)(1) Order. Tr. 8.

Section 56.15006 requires that special protective equipment and clothing shall be provided, maintained and used if chemical or other hazards that could cause injury are encountered. 30 C.F.R. § 56.15006. The Secretary does not alleged that PPE was not provided or maintained, but rather that on the date of the accident it was not being used by a Turner employee and an Alcoa employee. Ex. S-19; Tr. 256. Barrick testified that he issued the PPE

> Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment.

citation because Alcoa permitted Morales to enter the "line of fire," or area where a caustic spray could occur, without adequate protective equipment. Tr. 256. Morales admitted that he was not wearing the PPE required for a flange break, as outlined in Alcoa's SWI. Tr. 135.[27] The Secretary further alleges that Alcoa did not establish a barricade to protect miners from possible caustic spray, as required by Alcoa's own SWI. Sec'y Br. 32-33; Ex. S-12.

1. S&S

The S&S nature of the citation is not in dispute, but will be addressed briefly. The fact of the violation was established, satisfying the first prong of the *Mathies* test. Alcoa does not dispute the fact of the violation. Morales admits that he was not wearing the PPE required for a flange break at the time of his injury. Tr. 135.

The hazard contributed to by the violation (i.e. the failure of miners to wear required PPE and establish a barricade) was a miner being struck by the corrosive 220 degree Fahrenheit liquor. Tr. 34, 112-13; Ex. S-20. Section 56.15006 seeks to protect miners from being injured by various aspects of a process or system, in this case contact with heated, corrosive liquor. It is likely that a miner in the line of fire without protective equipment would be injured if he came into contact with a dangerous substance. The third *Mathies* criterion is satisfied because the liquor, and the failure to wear protective clothing to protect his skin, caused Morales to be injured. Tr. 116, 162. These injuries were serious as they required a miner to undergo extensive hospitalization, skin graft procedures, and time out of work, satisfying the fourth prong of the *Mathies* test. Tr. 116, 162.

2. Negligence

Alcoa argues that the PPE citation should be modified from "high" negligence to "low" negligence, because it could not have predicted Morales would walk into the line of fire or would forego donning the PPE. Resp. Br. 32. The Secretary contends that there are no mitigating factors to justify reducing the level of negligence, and that Alvarado had the authority to require PPE, establish a barricade, and prevent Morales from entering the line of fire, but failed to do so. Sec'y Br. 33.

The Secretary alleges that Alvarado ordered the Turner miners to remove the pancake in Riser 25 and observed the subsequent jackhammering, but did not verbally stop Morales from entering the line of fire without PPE. Sec'y Br. 33; Tr. 356, 362-63, 432. Barrick testified that Alvarado was in close proximity to the jackhammering, although Barrick did not know exactly where. Tr. 269. Alvarado conceded that if he saw any unsafe behavior or conditions, he would be able to call it out and stop work. Tr. 452. There is no proof that Alvarado saw and condoned Morales's lack of PPE. Morales should have worn the extra PPE as a safe measure, since he had the potential to walk into the line of fire (and ultimately did).

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[27] Alcoa's Standard Work Instruction for a flange break outlined the PPE required to complete the task. In addition to the hardhat, google, long sleeve shirt, and hearing protection, the SWI requires the wearing of a chemical suit, face shield, chemical gloves and rubber boots. Ex. S-12. The SWI also instructs that the area of the flange break be barricaded. Ex. S-12.

The Secretary notes that Alvarado did not establish a barricade, although that step is outlined in the flange break SWI. Sec'y Br. 33; Ex. S-12. Alvarado testified that a barricade should have been put up, but he did not put one up because he did not start the work, and he thought Turner contractors should have done it. Tr. 453.

Alcoa argues that the negligence should be modified to low because Morales signed off on the job safety sheet that required PPE, but did not wear it, so he was ultimately responsible. Resp. Br. 32. Moreover, the violation occurred in a short period of time, and Alcoa had no way of knowing that Morales would walk into the line of fire without PPE. Resp. Br. 32.

Alcoa's culpability should be modified to "low" negligence, as Morales was supervisor and contract miner, who knew he should have worn PPE, but did not. There is insufficient evidence to indicate that Alvarado was aware of the failure. Additionally, the standard for setting up a barricade for a flange break was not cited, and seems to be the result of a misunderstanding of the need for a barricade, and which individuals were tasked with setting it up.

3. Unwarrantable Failure

The Secretary alleges that the facts surrounding the PPE violation support a finding of aggravated conduct sufficient to justify an unwarrantable failure finding. According to the Secretary, the violative condition existed for a significant period of time, Alcoa was aware of the condition, did not mitigate the hazard, knew greater efforts were needed to comply with the PPE standard, and that the condition posed a high degree of danger. Sec'y Br. 32. Alcoa notes that Morales's decision to walk into the line of fire without proper PPE cannot be imputed on the operator because Morales was a supervisor who knew of the risk, was responsible for his safety, and that of his crew, but chose to forego donning additional PPE, and that Alcoa could not have stopped him. Resp. Br. 18. These arguments are discussed further below.

a) Length of Time

The Secretary contends that although Morales's injury occurred quickly, the failure to wear PPE was present from the time the T pipe was removed at 1:00 p.m., until the time the ambulance was called at 1:53 p.m. Sec'y Br. 34; Ex. S-10. Alcoa notes that Morales was only in the line of fire for a short period of time before being struck by leaking liquor. Resp. Br. 18; Tr. 260, 359. Alvarado testified that he was not aware that Morales was in the line of fire, until the moment Morales was injured, and Alvarado yelled for the workers to stop. Resp. Br. 19, Tr. 432. The short length of time weighs against an unwarrantable failure finding.

b) Extent of Violative Condition

Alcoa notes that only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45. Alcoa argues that this indicates the violative condition was not extensive, and only Morales was in danger, not the other Turner contractors who were all wearing the appropriate PPE. Resp. Br. 19. The extent of violative condition factor does not support an unwarrantable failure finding.

c) Notice

The Secretary contends that an injury occurred during a previous flange break, resulting in a citation being issued to Alcoa, putting Alcoa on notice that greater efforts were needed to comply with the PPE standard. Sec'y Br. 35. Alcoa states that it was not on notice of the condition, regardless of the prior PPE citation, because only Morales was in the line of fire without adequate protection. Resp. Br. 20; Tr. 344-45.

Based on the facts at hand, Alcoa was not on notice of the condition. The previous citation was issued more than a year before, based on another process, and involved a different piece of mine equipment.

d) Failure to Abate

According to Alcoa, it put forth an effort to abate the condition by providing PPE to the Turner contractors. Resp. Br. 32. This factor bears little weight in the present unwarrantable failure analysis.

e) Obviousness and High Degree of Danger

Alcoa does not dispute that the violation presented a high degree of danger, but once again notes that the risk was not obvious, because they could not have anticipated Morales's actions. Resp. Br. 20-21. Morales indicated on the job safety form that he was wearing PPE, and by all accounts Alvarado was not closely watching the contractors. While the condition was dangerous, it was not obvious.

f) Operator's Knowledge

Alcoa also denies that it had knowledge of the violative condition. Alcoa notes that there was no agent present to whom to impute knowledge. Resp. Br. 21. Alcoa maintains that Alvarado was not an agent of the operator, and even if he were, he did not see and could not anticipate Morales walking into the line of fire without adequate protection. Resp. Br. 21-22. The operator did not have sufficient knowledge of the condition to rise to the level of unwarrantable failure.

In sum, the dangerousness of the condition alone, does not justify the unwarrantable failure designation.

4. Gravity

The gravity designations are not in dispute. One miner was seriously injured because he was not wearing the proper PPE. This resulted in the miner being hospitalized, missing work, and requiring surgical procedures.

C. <u>Order No. 8778039, The Safe Access Violation</u>

On September 16, 2014, Barrick issued Order No. 8778039 to the Alcoa's Bayer Alumina Plant because a miner was performing maintenance on a riser drain line while kneeling on a pipe, rather than executing the task from a safer location, in violation of the safe access standard, 30 C.F.R.

§56.11001, which requires that the operator provide and maintain a safe means of access to all working places. [28]

The order alleges:

> An accident occurred on September 3, 2014 when the contractor's supervisor was burned by spraying liquor on this job. Safe access was not provided to a 4 inch caustic line on the No. 25 press riser drain on the mud floor of the press building. Miners had been instructed to remove the 4 inch tee from the riser and remove the hydrated scale out the 4 inch opening flange with a 30 lb. [j]ack hammer affixed with a 12 inch bit. A miner gained access to the scaled up line by climbing on top of the No. 27 side of the manifold by setting on top of a 12 inch line. The line is approximately 4 feet from the concrete floor, and is located directly in the line of fire of the 4 inch opening. An Alcoa competent person/agent was present during the de-scaling operation and at no time instructed the miner or the contractor['s] supervisor to get the miner down from the pipe and provide him with a safe means of accessing the work outside of the line of fire. This condition exposes the miner to falling from the pipe to the concrete floor as well as a sudden release of hot liquor from the scaled up line resulting in serious injuries. Alcoa's management engaged in aggravated conduct constituting more than ordinary negligence in that the competent person/agent observed the practice and failed to act. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-20.

The order was designated as reasonably likely to be permanently disabling to one miner, S&S, and the result of high negligence. *Id.* The order was modified from a 104(d)(2) Order to a 104(d)(1) order. Tr. 8.

The Commission has held that the term "maintain" in Section 56.11001 imputes an ongoing responsibility on the operator to uphold, continue, preserve, or keep up a safe means of access to a working place, and to ensure that the means are utilized, rather than passively supplying the safe access. *Lopke Quarries Inc.*, 23 FMSHRC 705, 708 (July 2001). At a minimum, the standard requires that operators maintain the safe working place and require other miners to do so as well, the operator must take measures to ensure safe access is utilized. *Lopke Quarries Inc.*, 23 FMSHRC 705, 709 (July 2001).

The Secretary argues that Section 56.11001, a mandatory safety standard, requires an operator to provide *and* maintain safe access to working places. Sec'y Br. 36 (emphasis added). A Turner contractor, Cano, was kneeling on a pipe four feet above the ground while

[28] 30 C.F.R. § 56.11001: "Safe means of access shall be provided and maintained to all working places."

jackhammering a pancake on the 25 riser, rather than using a work stand to reach the area to reach the work area. Tr. 273-74, 279. This exposed the miner to the line of fire, the area directly in front of the flange opening. Tr. 274. Barrick issued the citation because Alvarado was nearby but did not stop Cano from unsafely accessing the area. Tr. 275. Alcoa does not dispute the violation or the S&S designation, but contends that the violation was not an unwarrantable failure, and should be modified from "high" to "moderate" negligence. Resp. Br. 26, 32.

1. S&S

Alcoa admits to the violation alleged in Order No. 8778039. Thus, the first step of *Mathies* is satisfied.

The second *Mathies* element is also met, because the hazards Section 56.11001 seeks to prevent were likely to occur. Alcoa was cited for violating the safe access standard because a Turner miner had climbed on a pipe to access a working area, exposing himself to both fall and burn hazards. Sec'y Br. 36-37; Tr. 273-74, 279. The area was four feet above a concrete floor, and the miner could have fallen while either climbing up, or while operating a 30 pound jackhammer. Sec'y Br. 37; Tr. 279. The Secretary also alleges that the miner could have been burned because he put himself in the line of fire in front of a Riser opening while using a pipe, rather than a work stand. Sec'y Br. 37; Tr. 273. A burn injury is reasonably likely, as Morales's injuries on September 3, 2014 indicate.

A fall or burn would be reasonably likely to injure a miner. Being in the line of fire could put a miner at risk of being burned by liquor. This is reasonably likely to occur, particularly in light of the leak on September 3, 2014, and the injuries Morales sustained. This meets the likelihood test of the third *Mathies* step. The injuries from a burn would be reasonably serious, as liquor burns required Morales to be hospitalized, be out of work for a significant period of time, and undergo skin grafts. A four foot fall onto concrete is likely to cause serious injuries as well, including head injuries and/or broken limbs. The fourth prong of *Mathies* is satisfied.

2. Negligence

The Secretary defends the high negligence classification assigned to Order No. 8778039 because Alvarado knew Cano was working on top of a pipe, rather than from a stand, but Alvarado did not stop him. Sec'y Br. 37; Tr. 429.

Alcoa states that although Alvarado knew Cano was working while kneeling on a pipe, he did not know that Cano was in the line of fire, and that from his vantage point the situation was not unsafe. Resp. Br. 33. Alcoa further contends that Alvarado believed that fall protection would not be required because MSHA's guidance indicates that fall protection be used at six feet and above, and Cano was only four feet from the ground. *Id.* Stands were readily available to Turner employees, and Gaytan, the Turner contractor who took over the job for Cano, used a

work stand to perform the task. *Id.*; Tr. 104. Alcoa argues that Cano or his supervisor, Morales were in the best position to set up a stand. Resp. Br. 33.

I find that Alcoa demonstrated moderate, rather than high, negligence. There are several factors that mitigate Alcoa's negligence. The Secretary did not offer evidence that Alvarado was aware that Cano was in the line of fire. While Alvarado admitted to seeing Cano work from a pipe, he believed that the distance from the ground did not pose a hazard. This is reasonable in light of MSHA's guidance regarding fall protection. Cano worked from the pipe for a short period of time. Stands were available to Turner employees. Alcoa, however, could have and should have been more proactive in requiring that contract employees use safe means to access work sites.

3. Unwarrantable Failure

The Secretary alleges that Alcoa's conduct in regards to Order No. 8778039 was aggravated, justifying the unwarrantable failure designation. Sec'y Br. 38.

a) Length of Time

The condition lasted for 20 minutes, as that is the amount of time that Alvarado knew that Cano was working while kneeling on a pipe, instead of a work stand. Barrick testified that the duration of the violation didn't concern him, and that the potential for injury only occurred for a short period of time. Tr. 282. I find, however, that this is a significant period of time, and weighs in favor of an unwarrantable failure finding.

b) Extent of Violative Condition

Only one miner was exposed to the violative condition, as only Cano was kneeling from a pipe to work. Gaytan, who took over the task for him, used a work stand. Cano was the only individual in the line of fire, and the only one exposed to a fall hazard. The violation was not particularly extensive, as one miner in one location was exposed to the hazards alleged.

c) Operator's Notice that Greater Efforts Were Necessary for Compliance

The Secretary also notes that Alcoa had been cited eight times in a 15 month period before the accident for violations of 30 C.F.R. § 56.11001. Sec'y Br. 38; Ex. S-24. Alcoa counters that that the only citation the Secretary testified about was issued for build up along a walkway, a different condition that cited. Resp. Br. 28. The Secretary failed to show how the past citations for violations of Section 56.11001 put Alcoa on notice regarding Order No. 8778039. While Alcoa had been cited previously for the same standard, the safe access standard covers a multitude of situations. As applied to the unwarrantable failure analysis, Alcoa did not have sufficient notice that greater compliance efforts were necessary.

d) Efforts in Abating the Violative Condition

Alcoa also notes that it took efforts to abate the condition, because it provided platforms to contractors to use while jackhammering, and that only one contractor worked from the pipe. Resp. Br. 28; Tr. 98, 104. Alcoa's routine of providing work stands to contractors is an effort to abate the violative condition. This element will not weigh into the unwarrantable failure analysis

e) Obviousness and High Degree of Danger

Alcoa denies that the violation was extensive, although Alcoa admits it was dangerous, because only one miner was exposed by the violation. Resp. Br. 29, 37. The violative condition was obvious to Alvarado, but he testified that he thought the kneeling was acceptable and was unaware that Cano was in the line of fire. The degree of danger posed by allowing a miner to work while standing or kneeling on a pipe is high. This militates toward an unwarrantable failure finding.

f) Operator's Knowledge

Alcoa concedes that Alvarado was present but contends that he could not have seen that Cano was in the line of fire. Resp. Br. 29. Alvarado also believed that Cano did not need any special equipment because he was not six feet above the ground. Resp. Br. 29. Finally, Alcoa notes that it could not anticipate that Cano would work from a pipe instead of using the work stands provided to the contractors. Turner was the responsible party, namely Morales, who was supervising the task. Alvarado's knowledge that Cano worked from the pipe rather than a stand is not imputable to Alcoa.

Alvarado knew Cano worked from a pipe, but was merely a rank and file miner, who should have said something, but did not believe the condition to be unsafe. The violation posed a high degree of danger and lasted for 20 minutes, but those factors alone do not justify an unwarrantable failure finding.

4. Gravity

I find the gravity designations for Order No. 8778039 are appropriate. It is reasonably likely that one miner could have been seriously injured if he fell from a pipe while jackhammering. The stands would have provided more support and allowed a miner to avoid exposing himself to the line of fire. A fall onto the concrete floor below, or a burn from being in the line of fire while maintaining a pipe, would likely have resulted in hospitalization, time out of work, and could have been disabling. Exposure to the same line of fire resulted in Morales being severely injured, which demonstrates the hazard is likely, and that any resulting injury would be serious.

III. Civil Penalty

The parties stipulated that the Secretary's proposed penalties, if affirmed, would not affect Alcoa's ability to remain in business. Alcoa is large operator, and the Point Comfort Facility is a large plant. The Secretary did not present evidence that Alcoa failed to abate the violations in good faith. The gravity of all three violations was serious as I discussed above. I found that they are all reasonably likely to result in permanent injury to one miner.

Citation No. 8778037

The Secretary proposed a civil penalty of $8,209 for Citation No. 8778037. I assess a penalty of $1,112 for the violation because Alcoa's negligence was low and the violation was not an unwarrantable failure.

Order No. 8778038

The Secretary proposed a $9,122 penalty for Order No. 8778038.

I assess a $1,112.00 civil penalty for the violation. The negligence was low, rather than high, as the Secretary alleges. I also find that the unwarrantable failure categorization was inappropriate.

Order No. 8778039

The Secretary specially assessed a $52,500 civil penalty for Order No. 8778039. Tr. 284. Barrick testified that he did not calculate the penalty, but suggested that it be specially assessed. Tr. 284. Barrick testified that he supported the special assessment because he believed two supervisors witnessed the violation, and he wanted to "get Alcoa's attention." Tr. 284. The Secretary argues that special assessment is justified because Alvarado was complicit in watching Cano work, and that Alcoa had eight safe access violations in the 15 months preceding the accident. Sec'y Br. 39. The Secretary asserts that the size of the specially assessed penalty will "serve notice to Alcoa that its efforts to protect miners are lacking." Sec'y Br. 39.

I decline to accept the Secretary's specially assessed penalty, as I find that the negligence was moderate, not high, that the violation was not the result of unwarrantable failure, and that Alvarado was not an Agent of Alcoa. Moreover, the Secretary provided scant support for its assessment. Only one previous safe access violation was mentioned at hearing and entered into evidence, and it involved accumulations rather than the use of work stands. The Secretary argues that the size of the penalty will put Alcoa on notice. Sec'y Br. 39.

I find that Alcoa does have a history of previous violations of Section 56.11001. S. Ex. 24. Additionally, Alcoa demonstrated moderate negligence. For these reasons, I assess a civil penalty of $4,000.00

Order No. 8856305

At the hearing, the parties agreed to settle Order No. 8856305 for the originally assessed amount of $4,000.00, without any modifications. I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

IV. ORDER

Order No. 8856305 is **AFFIRMED** as written.

It is **ORDERED** that Citation No. 8778037 be **MODIFIED** to reduce the level of negligence from "high" to "low."

It is **ORDERED** that Order No. 8778038 be **MODIFIED** to reduce the level of negligence from "high" to "low" and to change the classification from a 104(d)(2)Order to a 104(d)(1)Order.

It is **ORDERED** that Order No. 8778039 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8778037 and Order Nos. 8778038 and 8778039 be **MODIFIED** to delete the unwarrantable failure designations.

WHEREFORE, it is **ORDERED** that Alcoa pay a penalty of $10,224.00 within thirty (30) days of the date of this order.[29]

L. Zane Gill
Administrative Law Judge

Distribution:

Lindsay Wofford, Esq., U.S. Department of Labor, Office of the Solicitor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Ms. Maria C. Rich, CLR, U.S. Department of Labor, MSHA, 1100 Commerce Street, Room 462, Dallas, TX 75242

Christopher Bacon, Esq., Vinson & Elkins L.L.P., 1001 Fannin Street, Suite 2500, Houston, TX 77002

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[29] 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.