FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

November 2, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. KOPPER GLO MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2014-403 A.C. No. 40-03365-352685 Mine: Double Mountain Mine

DECISION

Appearances: Jennifer Booth Thomas, United States Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

Melanie J. Kilpatrick, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor in accordance with section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves one citation issued pursuant to section 104(d)(2) of the Act with a proposed penalty of $35,500.00. The parties presented testimony and evidence regarding the citation at a hearing held in Knoxville, Tennessee, on September 1, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Double Mountain Mine is an underground bituminous coal mine located in Claiborne County, Tennessee. The parties have stipulated to the jurisdiction of the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Commission. The parties also entered a number of stipulations related to the penalty criteria which are discussed below. Jt. Stip. ¶¶ 3-4.

Citation No. 8365728 was issued by Inspector Jim Lundy on May 2, 2013, pursuant to section 104(d)(2) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1), a failure to follow the roof control plan. The citation alleges that the operator failed to implement the rib control measures in its approved roof control plan, including either removing loose ribs or supporting them with fencing and steel posts. The failure to follow the plan led to unaddressed sloughing and unsupported brows. Lundy determined that the condition was highly likely to result in a permanently disabling injury, was S&S, affected two people, and was a result of high negligence and the mine's unwarrantable failure to comply with the mandatory standard. The Secretary proposed a civil penalty in the amount of $35,500.00 for this alleged violation. The

citation was terminated when MSHA determined that the loose ribs had been scaled and chain link fencing with steel jacks had been installed around all pillars to within forty feet of the working faces, and rib bolts had been installed as required by the roof control plan.

Based upon the parties' stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the post-hearing briefs, I find that the violation and S&S designation are appropriate and that the negligence is high, as alleged. However, I do not find the violation to be the result of an unwarrantable failure to comply.

A. The Violation

Roof, face, and rib falls have historically been one of the leading causes of injuries and death in underground coal mines. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998). To combat these hazards, Congress directed that mine operators develop and follow roof control plans "suitable to the roof conditions and mining system of each coal mine." 30 U.S.C. § 862(a). The Commission has stated that the intent of the roof control provision is "to afford comprehensive protection against roof collapse." *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005) (quoting *UMWA v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989)).

In promulgating the current version of the roof control standard, the Secretary explained that roof control plans are intended to offer flexibility in order to address each mine's unique conditions. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2369 (Jan. 27, 1998). The rule requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. § 75.220(a)(1).

In order for the Secretary to prove a violation of § 75.220(a)(1), he must establish, first, that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998); *JWR*, 9 FMSHRC at 907. "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement." *Harlan,* 20 FMSHRC at 1280.

In this case, the parties agree that pages 16 and 16a of the approved roof control plan for this mine are the provisions at issue. Therefore, the focus must be on whether the conditions observed by the MSHA inspector constituted a violation of those provisions.

The provisions of the roof control plan at issue relate to the support of ribs, specifically ribs that are inby. Sec'y Ex. 2 at 16, 16a. The provisions on page 16 have been in effect since the plan was adopted. When the mine received a citation involving rib control in August 2012, it discovered that its interpretation of page 16 was different than MSHA's and began the process to amend the plan. The focus of the plan negotiations was on the provisions regarding control of the brows and ribs near the face. At hearing, witnesses for the mine explained that their goal

during the negotiations was to clarify what conditions must be present to require extra rib control measures. Shortly after the negotiations began, there was a roof fall at the mine that resulted in a fatality, which caused MSHA to examine other provisions of the plan, as well. As a result of the negotiations, page 16a was added to the plan. It included a clarification of the rib conditions requiring additional control measures, a definition of the term "brow," and several new rib control requirements that would apply in certain situations. Sec'y Ex. 2 at 16a. The original page 16 of the plan was not removed, but it was amended in some respects by the addition of page 16a.

The central issue in this case is what conditions trigger the rib control requirements on pages 16 and 16a. The Secretary asserts that wire fencing and metal support must be installed when sloughing occurs and brows as defined in 16a are created. Bolting must be done if the height of the area is above 6.5 feet. Timbers may be used for support only in outby areas. The mine asserts that support measures are only required if the brows are cracked or there is some other indication of instability, and that sloughing is not a sign of instability.

MSHA's Inspection

Jim Lundy is a mine inspector who has been with MSHA since May 2006. He is a health specialist and has worked in the coal mining industry since 1973, including as an assistant manager of safety. He holds a number of mine certifications and degrees as well as a nursing license. Lundy went with a team to Kopper Glo's Double Mountain mine on May 2, 2013, to conduct a health inspection. Prior to conducting the inspection, Lundy reviewed the mine's roof and ventilation plans as well as the weekly and shift examination books. The examination books revealed that there had been problems with sloughing ribs in an area of the mine for nine shifts over the three previous days, and that action had been taken to pull down some of the problem ribs. During his underground inspection of the mine, Lundy observed the loose ribs. A photo produced at hearing shows the roof, the ribs, and the support in place. Ex 6. An overhanging brow can be seen in the top of the photos. There is also sloughage—loose material that has come down from the sides—on the ground between two wooden roof support posts.

Lundy observed rib sloughage and overhanging brows in the five inby headings he inspected, all of which were within 40 feet of the face. In three areas, Lundy measured that the height of the brows was more than six and a half feet from the floor. In most areas, the brows exceeded the minimum dimensions given in the definition of a brow on page 16a of the roof control plan. While it is unclear whether Lundy observed cracks on the brows, he believed that the sloughage and overhanging brows were indicative of instability and constituted adverse rib conditions triggering additional support requirements under the roof control plan. No steel posts, plates, fencing, bolts, or brackets had been installed in any of these areas, nor had the ribs been pulled down. Instead, wooden timbers had been set between the brows and the mine floor or bottom rock ledge. Additionally, Lundy observed that the mine did not have a supply of steel pipes or fencing in the area, as was required by the roof control plan. *See* Sec'y Ex. 2 at 2. He thus issued Order No. 8365728 for a violation of 30 C.F.R. § 75.220(a)(1) for failure to implement the rib control measures in the mine's approved roof control plan.

MSHA and Kopper Glo offered differing interpretations of the rib conditions at the mine, particularly the sloughage. Inspector Lundy explained that sloughage occurs when pressure from the overlying rock in a mine increases as coal is removed. Because the coal is a softer material than the rock, it is compressed outward. Since the coal is not elastic enough to absorb the pressure, the edges of the rib crumble under the pressure. The rock left above the sloughing coal is known as a brow. Inspector Lundy testified that when a rib starts to slough, the area is compromised, because the brow is left without support. Additionally, sloughing decreases the size of the coal pillar leaving less to support the roof, which can cause the roof to sag. These conditions could lead the rib to crack, which would be a sign of instability. In Lundy's opinion, though, instability could also exist where there was sloughing but no visible cracking. A witness for the mine, Patrick Slone, who assisted the mine in developing its roof control plan, disagreed. He testified that while sloughing results from excess pressure, it does not necessarily mean the ribs are unstable. Slone also testified that brows are sometimes created not from sloughing but rather through intentional mining activity when more height is needed in the mine. Slone seemed to indicate that instability was unlikely to occur in the Double Mountain Mine because the coal seam was only thirty-six inches high, and he testified that the sloughage observed by Lundy at the mine was not a sign of instability.

The Roof Control Plan

The roof control plan for Double Mountain Mine creates requirements for rib control for "all areas on the working section (MMU) where rib conditions warrant." Ex. 2 at 16. The supplement on page 16a expands on when the rib control methods are required: it explains that an "adverse rib/brow ... will be pulled down or adequately supported," and explains that an adverse rib or brow is one with "visible cracks or signs of instability." Ex. 2 at 16a.

When adverse ribs or brows are present, the mine is given options for how to address them. First, miners may pull or remove the loose rib. Ex. 2 at 16, 16a. But because sometimes the rib cannot be pulled down or continues to slough after it is pulled down, the plan offers alternatives. Page 16 provides that the mine may install steel pipe and wire fencing. Ex. 2 at 16 ¶¶ 2, 3. In "short" areas, where only a portion of the pillar is affected by sloughing, the mine is directed to install the pipe "after the normal roof bolting cycle." Ex. 2 at 16 ¶ 2. In areas where the entire pillar is sloughing, the mine is to install the pipe "as soon as practicable." Ex. 2 at 16 ¶ 3. The supplement creates additional requirements for rib support in certain areas. For adverse ribs and brows in the face area, the mine is to install angle brackets and cable lashing. Ex. 2 at 16a. For outby areas, the mine is given the option to install timbers. *Id.* The supplement also provides a definition of a brow: a brow is "an area that is created from sloughing of coal ribs. This area is 12 inches wide, 24 inches long and 4 inches in height and thickness (minimum)." *Id.* It goes on to require that brows "shall be supported." *Id.* Finally, the supplement requires that if there are adverse ribs or brows "above 6.5 feet in height, bolting will be done to secure the affected ribs/brows." *Id.* The requirement that sloughing pillars must have additional support was not removed from page 16, and remained in effect even with the addition of page 16a. If the brow is cracked or shows other signs of instability, then further support, beyond the pipe required for sloughage, must be installed. The only additional support observed by Lundy was timbers, most often used for roof support and not approved for additional rib and brow support inby.

In his inspection, Lundy observed rib sloughage and overhanging brows in five inby headings. The Secretary argues that these were "adverse ribs/brows" that required rib control measures under the plan, including bolting in areas over 6.5 feet high and angle brackets and steel posts and fencing in all of the areas. The mine had not implemented any of those measures, but rather was using timbers as roof support. Kopper Glo argues that because there were no visible cracks in the ribs and brows, there were no "adverse ribs/brows," and that therefore no rib control methods were required under the plan. The question, then, is whether sloughage and overhanging brows with no visible cracking must be supported as stated on page 16, and whether they constitute "adverse ribs/brows" requiring the support listed on page 16a of the plan.

The Commission has explained that plan provisions are enforceable as mandatory standards. *Martin Cty. Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ); *Energy W. Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987) ("*JWR*"); *see also UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989). When interpreting a plan provision, a judge should thus apply the principles governing the interpretation of regulatory standards. *Martin Cty. Coal,* 28 FMSHRC at 255 (citing *Energy West,* 17 FMSHRC at 1317). Accordingly, when the language of the plan provision is clear, the provision should be enforced as written "unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results." *Id.* As a part of the inquiry, "in ascertaining the plain meaning of the statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a provision's text and legislative history, may be employed to determine whether the drafters "had an intention on the precise question at issue." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

Here, I find that the plan was clear, and that sloughing of the ribs required fencing under page 16 of the plan. I also hold that sloughing of the ribs constituted an "adverse" condition requiring additional support under page 16a. "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The plan indicates that ribs and brows are "adverse" when there are "visible cracks or signs of instability." Ex. 2 at 16a. "Instability" in ordinary usage is "the state of being likely to change." Merriam-Webster Dictionary (2015). The Dictionary of Mining, Mineral, and Related Terms defines "slough" as "fragmentary rock material that has crumbled and fallen away from the sides of a borehole or mine working." Am. Geological Inst., Dictionary of Mining, Mineral, and Related Terms 515 (2d ed. 1997). It defines "sloughing" as "minor face and rib falls." *Id.* These descriptions are suggestive of changing conditions in the mine and thus instability. The descriptions of sloughing provided by Lundy and Slone are also characteristic of instability: they explain that sloughing is caused by the pressure of rock on the soft coal. Lundy describes sloughing as "the loose material coming down from the coal rib from its natural state." Tr. at 30. In other words, the coal is changing from its natural state in reaction to the pressure created by mining.

This interpretation is consistent with language used elsewhere in the plan. Page 12, which involves refuge chambers, lists sloughing as a possible defect in roof and rib conditions.

Ex. 2 at 12. Additionally, this interpretation is consistent with Judge Maurer's decision in *Harlan Cumberland Coal*, in which he held that "heavy rib sloughage" along with other conditions created an "adverse roof condition" triggering a provision of a mine's extended cut plan. 17 FMSHRC 1342, 1351-52 (Aug. 1995) (ALJ).

Kopper Glo argues that the mine's intent in negotiating the supplement to page 16 was for the rib control measures to be required only where there were visible cracks in the ribs or brows. Resp. Br. at 2-3. The operator argues that there was sloughage throughout the mine, and it would not have agreed to the additional measures if they were required wherever there was sloughage. However, I do not find that the testimony at hearing clearly established that intent, nor do I find that it was expressed in the final language of the plan amendment. Thus I find this argument unpersuasive.

Kopper Glo also asserts that because its interpretation differed from Lundy's, it was not provided fair notice of the standard to be applied under the plan. Resp. Br. at 9-10. However, I find that the plan was clear and that there is not sufficient evidence to support an argument that the mine did not have fair notice of the requirements of the plan. When evaluating a party's fair notice argument, the court should first look to see if the language of the standard "provides clear and unambiguous notice of its coverage and requirements[.]" *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014). If the language is clear and unambiguous, then "no further notice is necessary." *Id.* If the standard is ambiguous, the court generally will defer to the Secretary's reasonable interpretation of the standard. *See e.g. Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994)). As discussed above, the roof control plan provides clear notice to a reasonably prudent person familiar with the mining industry and the protective purposes of the plan. After negotiating the plan, the mine should have recognized the specific prohibitions and requirements of the plan. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

For these reasons, I find that the sloughing observed by Lundy was a "sign of instability" in the ribs under page 16a of the plan. The plan is clear that adverse conditions exist when there are "visible cracks *or* signs of instability." Ex. 2 at 16a (emphasis added). I therefore find Kopper Glo's argument that the requirements were only triggered by cracking to be without merit. I also find that sloughing is a rib condition "warrant[ing]" the rib control measures required under page 16. Consequently, the mine was required to install the additional support described in the plan. Ex. 2 at 16. Kopper Glo argues that it had not yet completed roof bolting in some of the inspected areas and so was not required to have begun the rib control measures. Resp. Br. at 7-8. However, the evidence shows that at least some of the areas had been roof bolted. The mine was required to begin rib control measures in those areas. Because the operator had not implemented the rib control measures required by the plan, it violated the plan. The Secretary has established a violation of 30 C.F.R. § 75.220(a)(1).

B. Gravity and S&S

The Secretary asserts that Kopper Glo's violation was highly likely to cause a permanently disabling injury and that it was significant and substantial ("S&S"). A "significant

and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "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)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial":

> 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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the 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.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal,* 33 FMSHRC 2357, 2365 (Oct. 2011).

The Commission has acknowledged the high degree of danger posed by roof control plan violations. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994). In *Harlan Cumberland Coal*, 17 FMSHRC 1342, 1352 (Aug. 1995) (ALJ), Judge Maurer upheld an S&S designation for a roof control plan violation involving rib sloughing.

In designating the violation S&S, Inspector Lundy explained that given the sloughage and unstable conditions he observed, it was likely that rock would fall from the brow or the ribs. He noted that numerous miners worked on foot and operated mobile equipment in the areas he observed, and thus a falling rock could hit a miner and cause a permanently disabling injury.

Kopper Glo argues that the violation was not S&S because there were timbers in place in the areas cited to help support the roof and brows. Resp. Br. at 15. The Secretary argues that the timbers would have been ineffective to prevent an injury because they did not provide lateral support. Sec'y Br. at 5. Kopper Glo counters that the primary danger was not from a lateral rock burst because of the narrow height of the coal seam. Resp. Br. at 15. Rather the primary danger was of a falling rock from the roof, which the timbers would address adequately. *Id.* However,

Lundy observed that the operator had not fastened the timbers to the roof, so they could easily come dislodged and would fail to protect against a rock falling from the roof. Additionally, the falling timber itself would present a hazard. I find that the amount of sloughing indicates that a lateral force dislodging a timber was likely to occur and therefore the timbers did not adequately address the hazard.

Applying the elements of the *Mathies* test, I have found that there was a violation of the roof control plan, and hence a violation of a mandatory standard. This violation contributed to the hazard of inadequately supported brows and sloughing ribs, which could lead to a fall of the ribs or an outburst of coal. The hazard of falling ribs or coal from the brow would be reasonably likely to lead to a miner in the area being hit by the falling material, resulting in serious injury or death. Therefore, I find the violation to be S&S.

C. Negligence

Each mandatory standard carries with it a duty of care to avoid violations of that standard and, if a standard is violated, a finding of negligence is made. *A. H. Smith Stone Co*, 5 FMSHRC 13, 15 (Jan. 1983). In this case, MSHA determined that the negligence was high. The Secretary, by regulation, defines negligence under the Act 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. Under the Mine Act, an operator is held to a high standard of care." 30 C.F.R. § 100.3(d). High negligence, according to the Secretary's regulations, occurs when the operator knew or should have known of the violative condition and there are no mitigating circumstances. *Id.*

In *Consolidation Coal Co.,* 36 FMSHRC 615, 637-38 (Feb. 2014) (ALJ), Judge Barbour upheld a finding of reckless disregard of 30 C.F.R. § 75.202 involving sloughing ribs in a lunch area. The judge relied on the facts that the sloughage was visibly obvious and ongoing, that the area was heavily used, and that the mine had had recent fall-related accidents. *Id.*

Here, Inspector Lundy cited the operator for high negligence. He noted that the rib sloughage had been listed in the mine books as a hazard to be corrected for nine shifts, and that while some of the ribs had been pulled down and timbers had been set, the operator had taken none of the measures required by the roof control plan to further support the ribs. In addition to these factors, the sloughage was obvious, especially given that it was occurring in numerous locations in the working areas where miners and management were continuously present. Further, the mine had a responsibility to understand the requirements of the roof control plan and to have the materials necessary to comply with the plan readily available. I thus do not find the operator's misunderstanding of the plan requirements to be a mitigating factor. Finally, in the twenty-four months preceding the citation, the mine had five violations of the roof control plan as well as a fatality involving a roof fall. For these reasons, I find that the high negligence assessment was appropriate for this violation.

D. Unwarrantable Failure

The Secretary argues that the violation was the result of the operator's unwarrantable failure to comply with safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). The Commission has held that in determining whether a violation is an unwarrantable failure, the judge should consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Based upon the following analysis of the factors enumerated by the Commission, I find that there is not adequate evidence to support a finding of unwarrantable failure in this case.

Extent of the violative condition. In *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009), the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." The purpose of considering this factor is to "account for the magnitude or scope of the violation." *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010)). Relevant facts the judge may consider include "the extent of the affected area as it existed at the time the citation was issued[,]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging,* 36 FMSHRC at 3079-80; *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Here, the violative condition existed in all five of the inby headings Lundy inspected, a significant portion of the mine. At hearing, the inspector acknowledged that some of the crosscuts did not have brows of the dimension requiring support under page 16a of the plan. However, the inspector observed brows and sloughing in many of the areas he observed. However, he indicated that only two persons were affected by the violation. I find that the violation was extensive in the amount of area affected.

Length of time that the violation has existed. In *IO Coal*, the Commission emphasized that the duration of time that the violative condition exists is a "necessary element" of the unwarrantable failure analysis. 31 FMSHRC at 1352. Here, the pre-shift examination books indicated that the condition had existed for at least nine shifts prior to the citation being issued. The operator had attempted to address the issue by setting timbers and pulling down some of the ribs. I find that the length of time is significant in this case.

Whether the operator was placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated, similar violations and past discussions with MSHA about a problem may serve to heighten the awareness of the operator that increased efforts to comply are necessary. *IO Coal,* 31 FMSHRC at 1353. Prior violations may establish notice even though they did not involve precisely the same activity, cited standard, or area of the mine and were not the result of unwarrantable failure. *Id.* at 1353-54; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012). In this case, there were five substantiated violations of the roof control plan at the mine in the two years preceding the citation at issue. One of the five violations involved a fatality caused by an unsupported roof.

However, the mine's citation record for roof control violations was below the national average. While the operator should have been familiar with the requirements of its roof control plan, I cannot find that the mine was placed on notice that greater efforts were needed.

Operator's efforts in abating the violative condition. The Commission has explained that the abatement efforts relevant to the unwarrantable failure analysis are those that were made prior to the issuance of the citation or order. *Consol. Coal,* 35 FMSHRC at 2342. Here, the examination books indicated that the mine had attempted to pull down the sloughing ribs. The witnesses agree that the first step in controlling ribs is to take them down. The mine had also installed timbers to support the brows, though they had not installed them in compliance with the roof control plan. I find that the mine had taken efforts to abate the condition.

Whether the violation posed a high degree of danger. The Commission has found the high degree of danger posed by a violation to be an aggravating factor supportive of an unwarrantable failure finding. *IO Coal,* 31 FMSHRC at 1355-1356. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). A fatal accident occurring as a result of the cited condition or practice is compelling evidence of a high degree of danger. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997). Kopper Glo argues that the sloughing ribs are not unusual in this mine and do not pose a high degree of danger. While the violation is S&S and could lead to a rib fall and subsequent injury, the Secretary has not shown that the degree of danger supports an unwarrantable failure finding.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. This factor is discussed in the negligence analysis above. I find that the condition was obvious.

Operator's knowledge of the existence of the violation. The Commission has held that an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal,* 31 FMSHRC at 1356-57. In this case, the operator's actual knowledge is difficult to discern. While the evidence shows that the operator knew that the sloughing ribs and overhanging brows were a problem, it is not clear that they knew they were violating the roof control plan. While I find that the plan was clear and that the mine operator should have known what its plans required, I nevertheless credit the testimony of the mine's witnesses that they did not understand that they were violating the plan. The safety personnel, the consultant, and certainly the general manager should have known what the plan required and I do not find that their misunderstanding negates the violation. However, I find it relevant that Inspector Lundy himself was not entirely confident about the requirements of the plan at first. When the mine informed Lundy they were using timbers as brow support, he suspected that was inadequate, but went to the surface to check the plan and speak to a roof control specialist before making his final decision whether to issue a citation. Given that there was some uncertainty regarding the plan, I do not find that the operator's knowledge was an aggravating factor here.

While the analysis is very close in this case, I am not persuaded that the violation was the result of an unwarrantable failure to comply. A finding of unwarrantable failure does not require

that all of the factors be present. However, in light of the evidence presented here, I do not find that there were sufficient aggravating factors to demonstrate an unwarrantable failure.

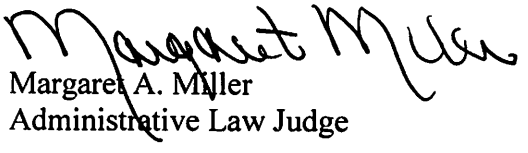
II. PENALTY

The principles governing the authority of Commission administrative law 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 "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated 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 the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a medium-sized operator. The parties have stipulated that the penalties as proposed will not affect the operator's ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity and negligence are discussed above. Given all of the evidence in this case, and particularly the finding of high negligence, I find that a penalty of $20,000.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C.§ 820(i), I assess a penalty of $20,000.00 for Citation No. 8365728. Kopper Glo Mining, LLC, is **ORDERED** to pay the Secretary of Labor the sum of $20,000.00 within 30 days of the date of this decision.



Margaret A. Miller
Administrative Law Judge

Distribution:

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

Melanie J. Kilpatrick, Rajkovich, Williams, Kipatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513