FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

November 13, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. HOOVER EXCAVATING & TRUCKING, INC., and its successors, Respondent,	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2019-0268 A.C. No. 35-03805-485254 Docket No. WEST 2019-0269 A.C. No. 35-03805-485254 Mine: Plant #2

DECISION AND ORDER

Appearances: Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;

Reginald S. Hoover, *pro se*, Coquille, Oregon, for Respondent.

Before: Judge Miller

These cases are before me upon petition for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These cases involve two citations issued pursuant to Section 104(a) and one order issued pursuant to Section 104(d)(1) of the Act, with originally proposed penalties totaling $6,421.00. The parties presented testimony and evidence regarding the violations at a hearing held in Eugene, Oregon on September 18, 2019. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I find the violations have been established and uphold the penalties as assessed.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hoover Excavating & Trucking, Inc. ("Hoover Excavating") operates Plant #2, a surface crushed and broken stone mine located in Myrtle Point, Oregon. (Tr. 12). Hoover Excavating is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and thus the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission.

The three violations at issue in these cases arise from two separate inspections of Plant #2. Both inspections were conducted by Inspector Jed McGinnis, who has worked for MSHA for three and a half years as an inspector and also has 13 years of experience working in a copper and gold mine. (Tr. 83–84). I found Inspector McGinnis to be credible and thorough in his description of the events. Mine owner Reginald S. Hoover represented Hoover Excavating at the hearing, and I found him to be less credible.

Because the facts associated with each inspection differ significantly, I analyze the violations below in accordance with their corresponding inspection date, rather than by docket number.

A. January 29, 2019 Inspection

a. Factual Background

Prior to the January 29, 2019 inspection at issue here, Inspector McGinnis conducted two pertinent inspections of Plant #2 in late 2018. The first occurred on November 27, 2018. On that date, McGinnis traveled to Plant #2 for a spot inspection and issued Citation No. 9376035 for a violation of 30 C.F.R. § 56.3131. That regulation mandates that "loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall" in places where people work or travel in performing assigned tasks. 30 C.F.R. § 56.3131. The citation described the condition at the mine as follows:

> The loose and unconsolidated material along the perimeter of the high wall was not sloped to the angle of repose or stripped back ten feet, other conditions existed that created a fall of material hazard to miners. Large rocks had fallen on the drill area where work had recently been completed. Unconsolidated material was witnessed falling from the top of the high wall during the inspection and a large boulder was witnessed falling from the second bench during the inspection. Other areas on the high wall were undercut creating a fall of material hazard to miners. The pit was accessed daily to mine rock for the crusher. A fatal injury could result if a miner was struck by the falling material. The owner had cut a tree from the top of the high wall where the material was not stripped back or sloped to the angle of repose.

McGinnis determined that a fatal injury was reasonably likely to occur, that one person would be affected, and that the operator's negligence was high. Though Hoover Excavating initially contested this citation, it was assessed as issued pursuant to settlement in Docket No. WEST 2019-0204. It is therefore admitted and unreviewable here.

On December 10, 2018, Inspector McGinnis returned to Plant #2 to conduct a follow-up inspection of the mine. While there, he issued Section 104(b) Withdrawal Order No. 9376048. Section 104(b) provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation

> issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(b). The order described the continuing violation:

> The loose and unconsolidated material had not been removed from the face of the high wall and a berm had not been established at the base of the high wall on the "bench" that had been cleared for drilling and blasting. Work had been started to strip the top of the pit back ten feet, weather conditions prohibited any further work until conditions improved.

McGinnis explained at hearing that he issued the withdrawal order because, although some work had begun on the high wall, "no work had been started (to abate the violation) and no scaling had been done" on the bench section. (Tr. 85). The order required that a specific section of the high wall be removed from operation until the underlying violation was abated by the operator. Sec'y Ex. 6. McGinnis served a copy of the withdrawal order on Hoover Excavating foreman Casey Sabin, explained the scope of the order to him, and determined that he understood the scope and implications of the order. (Tr. 86). Hoover Excavating did not contest the withdrawal order and it is thus admitted and unreviewable.

b. Citation No. 9376074 (Docket No. WEST 2019-0268)

On January 29, 2019, McGinnis again traveled to Plant #2 , and observed that Hoover Excavating had continued to work on the high wall in the face of the 104(b) withdrawal order. As a result, he issued Citation No. 9376074 for a violation of Section 104(b) of the Act. The citation, as modified, described the condition as follows:

> The "bench" section of the high wall was not removed from operation as required by Order of Withdrawal No. 9376048 dated 12/10/2018. The mine operator had continued to work on the "bench" preparing the area to be drilled and blasted. The area where work had been performed was below loose and unconsolidated material. The operator had not taken any action to mitigate the hazards on the high wall before working on the "bench". The Order has not been modified, vacated, or terminated. This condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

Because this is a violation of the Act, rather than of mandatory health and safety standards, gravity and significant and substantial designations do not apply. McGinnis determined that the negligence level was high.

McGinnis explained at hearing that he observed a shock tube which had not been present when the 104(b) order was issued on December 10. A shock tube is used only for the purpose of blasting. McGinnis stated that he discussed the hazardous condition with Hoover, who confirmed that he had in fact drilled and blasted the bench. (Tr. 87). Photos taken during this inspection and admitted into evidence at the hearing show the still-present hazardous unconsolidated material as well as the white detonating cord and shock tube that had been placed in the area at some point after the 104(b) order was issued. Sec'y Ex. 5.

Hoover, on behalf of Hoover Excavating, explained at hearing that his understanding was that he could drill on the bench as long as he was 15 feet away from the high wall. (Tr. 109). He admitted that he was on the area of the bench that was subject to the withdrawal order in order to drill, and that he did drill, because he "didn't feel that there was adequate enough material up there" to build a berm. (Tr. 109). He did this "to create some material to build a berm . . . not realizing [he] was in direct violation of the order." (Tr. 109). According to McGinnis's credible testimony, there was plenty of material available to build a berm without the need to drill and blast in the unsafe area. (Tr. 95–96).

It is evident from the testimony of both parties and from the photos taken on January 29, 2019, that the company continued to blast and work in the area in the face of the withdrawal order. Sec'y Ex. 5. Therefore, I find the violation has been established.

The Secretary alleges that this violation was the result of high negligence. The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Newtown Energy Inc.*, 38 FMSHRC 2033, 2047 (Aug. 2016); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

In this case, Hoover Excavating should have known of the unsafe condition even prior to the first citation. Nevertheless, the company was put on definitive notice of the condition on November 27, 2018, when McGinnis issued the first citation for a violation of 30 C.F.R. § 56.3131. During the follow-up inspection on December 10, 2018, when it became obvious that the mine had done nothing to abate the violation, the company was reminded of the hazardous condition and ordered to remove the area from operation until the predicate violation was abated. Though Hoover himself was not served with the order of withdrawal, he nevertheless should have known that blasting in the withdrawn (and previously cited) area was prohibited.

Mitigating circumstances sufficient to reduce the negligence level of this citation are not present in this case. In *Jeppesen Gravel*, the Commission Judge modified the negligence level of a number of citations issued for working in the face of a failure to abate order where the Secretary acknowledged that the mine had put forth effort toward compliance. 37 FMSHRC 2319, 2326 (Oct. 2015) (ALJ). In that case, the operator had fully abated four and partially

abated another three violations before MSHA issued citations for working in the face of failure to abate orders. *Id.* Regarding those citations, the judge found that a high negligence designation was inappropriate. *Id.* However, she determined that, for several other citations at issue in the case where the operator had not partially or fully abated violations, high negligence was appropriate. *Id.* at 2329.

In this case, I remain unconvinced that Hoover was blasting in the withdrawn area in order to abate the dangerous condition. As McGinnis stated at trial, "that's not customarily how you do mining. You actually build the berm before you drill and blast. You don't drill and blast to build a berm." (Tr. 96–97). Hoover has ample experience with mining and with MSHA compliance, and I find his testimony concerning this violation untenable. I accordingly find that the violation had not been either partially or fully abated at the time McGinnis issued this citation, and that high negligence is appropriate.

B. February 5, 2019 Inspection

On February 5, 2019, Inspector McGinnis, along with his supervisor, Randy Cardwell, returned to Plant #2 to conduct another inspection of the mine. Upon arriving at the mine, McGinnis noticed that blasting had occurred recently and developed concerns regarding Hoover Excavating's transportation of explosives. He asked Hoover a few questions, which Hoover refused to answer. McGinnis then asked if he could inspect the back of Hoover's truck, and Hoover said that he could not. (Tr. 98).

McGinnis then explained to Hoover that if he did not allow the inspection he would be issued a citation. Hoover then got in the truck and drove it across the street. In McGinnis' opinion, Hoover did this in order to prevent inspection of the truck. (Tr. 99). Photos entered as exhibits at hearing show Hoover getting in the truck to drive it off of the mine site and the truck parked across the street from the mine. Sec'y Ex. 7. Cardwell then received instruction from his district manager to inform Hoover that local authorities would be contacted about Hoover's possible transportation of explosives in the truck. After being so informed, Hoover allowed inspection of the truck. (Tr. 102).

Two violations issued during this inspection are under consideration here. One is a Section 104(a) citation issued for a violation of Section 103(a) of the Act, and the other is a Section 104(d)(1) order issued for a violation of 30 C.F.R. § 56.6202(a). Each violation is discussed in turn below.

a. Citation No. 9376080 (Docket No. WEST 2019-0268)

After Hoover had driven his truck off mine property, McGinnis issued Citation No. 9376080 for a violation of Section 103(a) of the Act. Section 103(a) directs authorized representatives of the Secretary to conduct inspections of mines and declares that representatives conducting such inspections "shall have a right of entry to, upon, or through any coal or other mine." 30 U.S.C. § 813(a).

The citation described the violation as follows:

> Mr. Reggie Hoover, owner of Hoover Excavating & Trucking Inc., refused to allow inspection of the box in the back of the truck that was used to transport explosives to the mine site and used on the day of the inspection. He would not open the box on the back of the truck and would not answer questions regarding the transportation of the explosives to the mine site. Reggie Hoover, owner, drove the truck off the mine site and parked it across the street from the mine to avoid having to open the box. This condition has not been designated as "significant and substantial" because the conduct violated a provision of the mine act rather than a mandatory safety or health standard.

At hearing, Hoover admitted that he moved his truck to a parking area across the street. He claimed that the parking area was still on mine property, but also stated that he did not feel that inspection of the truck "was pertinent to the bench thing that they were there for." (Tr. 111, 123). He went on, however, to assert that he moved his truck in order to "g[et] it out of the way of what was going on in the pit." (Tr. 113). Hoover's tenuous and inconsistent account of these facts leads me to find that he is not a credible witness.

I credit McGinnis' testimony concerning the facts surrounding this citation. Moreover, whether the truck was driven off of or remained on mine property is not dispositive of whether a violation occurred. Hoover refused to answer questions and then drove the truck away from MSHA inspectors who were actively attempting to inspect the vehicle in the course of their inspection of the mine. The Act specifically grants inspectors the right to conduct inspections of mines, and Hoover's truck, used to transport explosives to the site, was unquestionably subject to this inspection. I find that in refusing to answer questions, refusing to open the box, and finally, moving his truck, an act to which Hoover admitted at trial, Hoover violated Section 103(a) of the Mine Act.

The Secretary alleges that the violation was the result of high negligence. McGinnis testified that Hoover's action were intentional. I agree. The Commission has held that "an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (*citing Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)). Hoover intentionally impeded an inspection of the truck and I find the high negligence determination appropriate.

b. Order No. 9376082 (Docket No. WEST 2019-0269)

After Hoover was informed that authorities would be contacted if he continued to impede the inspection, he returned the truck and allowed McGinnis and Cardwell to inspect it. (Tr. 102). Based on this inspection, McGinnis issued Order No. 9376082 pursuant to Section 104(d)(1) of the Act for a violation of 30 C.F.R. § 56.6202(a).

Section 104(d)(1) orders are only issued after 104(d)(1) citations, which are assessed if an inspector finds a violation that is both significant and substantial and results from an unwarrantable failure by the operator to comply. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622

n.7 (Aug. 1994). "If, during the same inspection or a subsequent inspection within 90 days of [issuing the 104(d)(1)] citation, another violation resulting from unwarrantable failure is found, a withdrawal order is issued under section 104(d)(1) of the Act." *Id.*

30 C.F.R. § 56.6202(a) sets standards for vehicles containing explosives for use at surface metal and nonmetal mines. In part, it states as follows:

> Vehicles containing explosive material shall be— (1) Maintained in good condition and shall comply with the requirements of subpart M of this part; (2) Equipped with sides and enclosures higher than the explosive material being transported or have the explosive material secured to a nonconductive pallet; (3) Equipped with a cargo space that shall contain the explosive material (passenger areas shall not be considered cargo space); (4) Equipped with at least two multipurpose dry-chemical fire extinguishers or one such extinguisher and an automatic fire suppression system; (5) Posted with warning signs that indicate the contents and are visible from each approach . . .

30 C.F.R. § 56.6202(a). McGinnis, in the citation, described his findings concerning Hoover's truck:

> The truck used to transport explosives to the mine site did not have warning signs indicating the contents and did not have two multipurpose dry-chemical fire extinguishers. Additionally the container used for the explosives was not approved for explosives and had exposed metal in the container. The improper transportation of explosives created an explosion hazard to miners and others. The truck was used on the day of the inspection for a blast that was completed prior to arrival. A fatal injury could occur if the explosives were to detonate. The owner has held a blasting license and ATF permit for approximately twenty years and knows the requirements for transporting explosives. Citation 9376080 was issued for the owner not allowing MSHA to inspect the truck. This violation is an unwarrantable failure to comply with a mandatory standard.

McGinnis determined that an injury was not likely, that an injury resulting from the violation would be fatal, that one person would be affected, and that the negligence was high. First, at hearing, Hoover testified that he did in fact have two fire extinguishers in the truck at the time of inspection. However, no evidence presented or testimony suggests he attempted to show them to McGinnis at the time of the inspection. His invitation, at the *hearing*, to "walk down to my pickup in front of this building" to see the two fire extinguishers in the truck leads me to believe that, at the time of the *inspection*, two fire extinguishers were not in the truck. (Tr. 111).

Next, Hoover admitted at hearing that his truck did not have placards signifying that the vehicle was used to transport explosives. That fact alone is sufficient to find a violation of 30 C.F.R. § 56.6202(a). Because I find that a violation of the cited standard has been established based on the lack of fire extinguishers and placards, I do not reach the issue of whether the truck's box used to transport explosives was a violation.

I find high negligence an appropriate designation for this violation. Hoover has been hauling explosives for his blasting operations for many years. If he did not know the mandatory standards applicable to doing so, he should have. At hearing, he made it clear that he knew the standard for the placards, and stated "I know that I'm supposed to have placards." (Tr. 111).

In *Lhoist North America of Virginia, Inc.*, another judge similarly affirmed a high negligence designation for an operator's failure to equip a truck transporting explosives with two dry-chemical fire extinguishers. 36 FMSHRC 2413, 2428 (Sept. 2014)(ALJ). Here, the truck not only did not have adequate fire extinguishers, but it was not marked to signify that it contained explosives. I find Hoover Excavating was highly negligent in allowing the condition to exist, especially given Hoover's longtime familiarity with blasting.

i. Unwarrantable Failure

Order No. 9376082 was designated as an unwarrantable failure to comply with a mandatory standard. 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. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citation omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include:

> the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation.

IO Coal Co., 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol.*, 22 FMSHRC at 353.

I find that Hoover Excavating made no efforts to abate the violative condition. A lack of abatement efforts may be excusable if the operator had a reasonable, good faith belief that the condition did not exist. *See IO Coal*, 31 FMSHRC at 1356. Here, Hoover explicitly recognized that he was in violation, at least concerning the placards. He never intended to abate the violation, and instead expressed his reasons for purposefully violating the standard. (*See* Tr. 111). I find that the lack of fire extinguishers and placards posed a high degree of danger. I further find that the violation was obvious—it was Hoover's personal vehicle which he controlled. Finally, the operator's knowledge of the existence of the violation has been established. I find that there was no evidence that Hoover had been placed on notice that greater efforts were necessary for compliance and that the violative condition was extensive. Nonetheless, based on these findings, I find the unwarrantable failure designation appropriate.

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). Commission Judges are not bound by the Secretary's penalty regulations. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge 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 explained 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); *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). 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 purpose underlying the Act's penalty assessment scheme." *Sellersburg Stone*, 5 FMSHRC at 294. *See also Am. Coal*, 38 FMSHRC at 1993 (when assessing a penalty, Commission Judges must make findings of fact under each of the statutory penalty criteria); *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-68 (Aug. 2012) (deterrence is a central tenet of the Mine Act and its penalty provisions). The Commission has also explained that a judge may consider additional relevant facts outside of the six statutory penalty criteria when assessing a penalty. *Am. Coal Co.*, 40 FMSHRC 983, 989 (Aug. 2018) (when considering a proposed settlement, a judge may consider facts that fall outside of the section 110(i) factors, but that support settlement).

The history of assessed violations has been admitted into evidence and shows a reasonable history for this mine. Hoover Excavating is a small operator, but was highly negligent, as discussed above. Hoover stated at hearing that he thinks the "fines are a little extravagant." (Tr. 119). However, he did not put forth any evidence to demonstrate that the penalties will affect his ability to continue in business. When asked about the ability to pay, Hoover indicated that he had not prepared tax returns for many years, but was now working on it, so had nothing to show. Furthermore, Hoover Excavating did not abate these violations in good faith.

Based upon the penalty criteria, I uphold the penalty amounts as assessed by the Secretary, which are as follows:

Citation/ Order No.	Originally Proposed Penalty	Penalty Assessed
Docket No. WEST 2019-0268		
9376074	$2,000.00	$2,000.00
9376080	$2,000.00	$2,000.00
Docket No. WEST 2019-0269		
9376802	$2,421.00	$2,421.00
TOTALS	**$6,421.00**	**$6,421.00**

III. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $6,421.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (Certified U.S. First Class Mail)

Rebecca W. Mullins, U.S. Department of Labor, Office of the Solicitor, Division of Mine Safety and Health, 201 12th Street, Suite 401, Arlington, VA 22209

Reginald S. Hoover, Hoover Excavating & Trucking, Inc., P.O. Box 309, Coquille, OR 97423