FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. HOOVER EXCAVATING & TRUCKING, INC., and its successors, Respondent,	CIVIL PENALTY PROCEEDING Docket No. WEST 2019-0092 A.C. No. 35-03805-463667 Mine: Plant #2
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. REGINALD S. HOOVER, employed by HOOVER EXCAVATING & TRUCKING, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2019-0277 A.C. No. 35-03805-486106 A 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 Respondents.

Before: Judge Miller

These cases are before me upon petitions for assessment of a civil penalty 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 one citation and one order issued to Hoover Excavating & Trucking, Inc. pursuant to Section 104(d)(1) of the Act, with originally

proposed penalties totaling $110,400.00. The Secretary also seeks to impose individual liability pursuant to Section 110(c) of the Act, 30 U.S.C. § 820(c), against mine owner Reginald Hoover for the violations. The alleged violations relate to a blasting accident that occurred on December 11, 2017. The parties presented testimony and evidence regarding the citation and order at a hearing held in Eugene, Oregon on September 18, 2019.

Plant #2 is a surface crushed and broken stone mine located in Myrtle Point, Oregon. Hoover Excavating is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Thus, the mine is subject to the provisions of the Mine Act and the jurisdiction of the Commission. The mine consists of an open pit area where rock is blasted, crushed into aggregate, loaded, and hauled out of the mine.

On December 11, 2017, an accident occurred at the mine following a detonation of explosives by Reginald Hoover, the mine's owner. Three miners in the pit area were struck with flyrock and debris and seriously injured. MSHA conducted an investigation into the accident and as a result, a citation and order were issued to Hoover Excavating for failure to follow the manufacturer's instructions on the blast initiating device and for failure to effectively clear the blast area of all non-essential persons prior to attaching the initiating device. A section 110(c) case was assessed for the two violations against Reginald Hoover as an agent of the operator.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony.

On December 11, 2017, Hoover Excavating planned to perform blasting on the 50-60 foot highwall at Plant #2. The blast required several thousand pounds of explosives and was set to be detonated, as was the practice at the mine, by mine owner Reginald Hoover. A contractor worked to set up the area and Hoover, the blaster-in-charge, made preparations to initiate the blast.[1] Hoover was concerned about the design of the shot because there was an area of water, 40 feet by 50 feet nearby, but the drilling contractor did not deem it a factor in blast preparations. Tr. 69. For this blast, Hoover chose a non-electric EIT HR-1 Scorpion-style initiating device. The initiating device had a safety jack located at the top of the narrow area of the initiator that could be removed in order to safely test or repair the device. A warning label directing users not to connect the device until ready for detonation was stamped on the initiating device directly above the firing button. Sec'y Ex.4. Based upon his prior experience with this type of initiator, Hoover decided to test fit the shock tube by inserting the initiating device into the tube before detonating.

As Hoover handled the device, a miner began to record the process. Hoover stood off to the side with the device in hand, while a group of eight miners gathered in the pit area joked with

1. Hoover testified that he has years of experience with blasting and has a Federal permit issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives to possess explosives.

one another and took bets on how far the rocks would fly. The pit area was about 150 to 200 feet from the highwall and miners had warned Hoover that the highwall itself was unsafe, that they were too close to the highwall during blasts, and that the water in the area added an additional hazard. Tr. 39.

Just prior to the blast, the miners in the pit area moved to grab their hard hats and called out to Hoover to ask where they should stand, but Hoover did not respond. Tr. 27, 59-60. Hoover told investigators he failed to respond because he wanted to be certain that the shock tube fit the initiating device, and so there was no "sense in telling everybody to clear out of the area" until he was ready to detonate. Tr. 42. Nonetheless, miners began to move out of the pit.

Two miners made their way to the excavator located nearby and crawled under, while another moved next to a nearby pickup. Without first unplugging the safety jack, Hoover tried to "dry fit" the shock tube into the initiating device. Hoover told investigators that he had to whittle the shock tube down with a pocket knife in the past to make it fit and that he was aware that the safety jack could be removed, but he did not remove it so that he could more easily grip the device. While attempting to fit the initiating device with the shock tube, Hoover detonated the blast.

Softball-to basketball-sized rock shot outward from the face of the highwall and rolled through the pit area. The larger pieces of flyrock hit the front of the excavator where the two miners sought shelter, bounced, and rolled underneath. As a result, both of the miners were hit by the rocks and received serious injuries. The force of the blast was so intense that the miner standing next to the pickup truck's tailgate was blown nearly 30 feet past the truck and the truck itself was blown ahead 20 feet. The miner suffered severe injuries and was airlifted to a Portland hospital, where he underwent multiple surgeries to address a collapsed lung, crushed pelvis, crushed spinal cord, and several torn ligaments. Flyrock and debris also caused extensive damage to the body of the pickup truck, and buried the county road, an estimated 100 feet behind where the miners had taken cover. Tr. 28, 36, 62.

The following day Inspector Scott Amos, a certified accident investigator for MSHA, arrived at the mine, accompanied by Inspector Benjamin Burns, an MSHA inspector since 2007, along with two other MSHA inspectors. The inspectors examined the initiating device, the pit area, and spoke to the miners. Photographs taken during the investigation and entered into evidence depict the initiating device with the safety jack intact. Sec'y Ex. 4. A warning label stamped directly on the initiating device above the firing button reads "NEVER CONNECT UNTIL READY TO DETONATE." Sec'y Ex. 4. Inspector Amos explained that it would have taken the user only seconds to remove the safety jack to prevent accidental discharge while dry fitting. Tr. 24-25.

A photo of the pit area where the accident occurred, introduced as Secretary's Exhibit 3, depicts an overview of the accident scene and the red pickup truck that was in the pit area and severely damaged by flyrock and other debris. Sec'y Ex. 3, 61-62. The §103(k) order to secure the accident scene was terminated on December 20, 2017 and was not contested. Citation No. 8998987 and Order No. 8998988 remain at issue in this case.

A. WEST 2019-0092

Citation No. 8998987

As a result of the investigation into the December 11, 2017 accident, MSHA Inspector Amos issued a §104(d)(1) citation for a violation of 30 C.F.R. § 56.6308. The citation describes the violation as follows:

> The mine operator failed to follow manufacturer instructions on the EIT HR-1 Scorpion Style blast initiating device. The device was clearly marked "never connect until ready to detonate." The mine operator stated that he was "dry fitting" the initiating tube into the device and "he didn't want to bother with clearing people out" of the blast area, until he was sure the initiator would fit the NONEL type explosive initiating tube. Furthermore, the initiating device had a removeable [sic] plugin to "dry fit" the tubing, without being connected to the device. Reggie Hoover stated that he knew that the plugin should not be hooked to the device while dry fitting. Reggie Hoover stated he was aware of the manufacturer's warning written onto the device itself. Reggie Hoover engaged in more than ordinary negligence in that he was aware of the manufacturer's stated use of the device, and he chose not to follow written warnings. This violation stems from an unwarrantable failure to comply with a mandatory standard.

30 C.F.R. § 56.6308 requires that "[i]nitiation systems shall be used in accordance with the manufacturer's instructions." The Secretary alleges that the mine operator failed to follow the manufacturer's instructions on the EIT HR-1 non-electric blast initiating device in that the manufacturer's instructions warn the user not to connect the blasting device until ready to detonate. Hoover concedes that he was aware of the manufacturer's warning stamped on the device itself, but argues that it was difficult to read. Hoover argues that he did not knowingly initiate the blast but instead it was a premature detonation. The violation was designated as significant and substantial and as an unwarrantable failure, with high negligence. The Secretary specially assessed a penalty of $55,200.00.

To prevail on a penalty petition, the Secretary bears the burden of proving an alleged violation by a preponderance of evidence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989).

During the investigation, Inspector Amos examined the initiating device and observed that the label stamped onto the device above the fire button was clearly marked with a warning for the user not to connect until ready to detonate. Amos also noticed that the removable safety

jack had been left in the device but, in order to comply with the manufacturers' direction, it should have been unplugged and all miners cleared from the area. When asked about his use of the initiating device, Hoover replied that he was "dry fitting" the shock tube into the initiator because he had previously encountered fit issues with a similar device. He intended only to fit the two pieces together and did not intend to detonate the blast.

Inspector Burns also inspected the blast initiating device, and although he was not familiar with the specific device, he immediately found the manufacturer's warning label above the fire button. Sec'y Ex. 4. According to Burns, the label was obvious to the user and clearly warned that the initiating device should not be connected with the shock tube until the user was ready to initiate the blast. If the safety jack had been removed while Hoover was dry fitting the device, the blast would not have occurred. Tr. 56-57. Hoover, on the other hand, stated that the device should not have gone off even though he did not engage the safety device, and therefore, it must have malfunctioned. Tr. 72.

I find that the Secretary has demonstrated that Hoover did not use the initiating device in accordance with the manufacturer's instructions. Inspectors Amos and Burns were able to see clearly that the device was marked "NEVER CONNECT UNTIL READY TO DETONATE" just above the fire button. I credit Amos' testimony that it would have taken seconds to comply with the warning label and remove the safety jack so that Hoover could continue to dry fit the shock tube into the initiating device. While Hoover argues that the detonation was inadvertent, he clearly disregarded the warning label printed on the device, failed to remove the safety jack, and connected the shock tube to the initiating device, which triggered the blast. His actions, therefore, violated the mandatory standard.

Significant and Substantial

The Secretary alleges that the violation occurred, that any injury could reasonably be expected to be permanently disabling, and that the violation was significant and substantial. A significant and substantial ("S&S") 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 S&S "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.*, the Commission established the standard for determining whether a violation is 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.

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

The second element of the *Mathies* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, Newtown involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. The Commission determined that the hazard was a miner working on energized equipment. The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id.*; *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown*, 38 FMSHRC at 2038. Finally, the Commission has found that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

Having found the underlying violation of a mandatory safety standard, I find that this standard, which requires users to heed the manufacturer's warnings, is designed to promote safe use of a detonating device and prevent an unplanned detonation. Thus, the standard is designed to protect against misuse of blasting materials that could result in a premature detonation. Hoover, while ignoring the warning to not connect until ready to detonate, caused a premature blast and as a result miners were not prepared or in a safe area when the blast occurred. Given the conditions at this mine, the violation contributed to a hazard which was highly likely to occur. The premature blast caused large pieces of rock to be thrown into the area, striking miners and resulting in serious injury. Therefore, the hazard was reasonably likely to result in injury and any injury was reasonably likely to be serious, satisfying steps three and four of the *Mathies* test. I conclude that the violation is properly designated as S&S.

Negligence and unwarrantable failure

The Secretary alleges next that the violation was the result of high negligence and constituted an unwarrantable failure to comply with a mandatory standard. As the Commission has recognized, "[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*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37

FMSHRC 1687, 1702 (Aug. 2015). Commission judges are not limited to the negligence analysis contained in Part 100 and instead consider "the totality of the circumstances holistically." *Brody*, 37 FMSHRC at 1702-03.

Inspector Burns and Inspector Amos explained that Reginald Hoover, the blaster-in-charge, failed to follow the warning label on the initiating device. Hoover mentioned at hearing that he could not read the label on the device, but as a person experienced in working with explosives and initiating devices similar to the one used that day, he should have known the correct way to safely operate the device. By ignoring the warning label, his actions resulted in an early detonation and caused serious injuries to three miners in the pit area. A reasonably prudent operator would have followed the explicit manufacturer's instructions to "NEVER CONNECT UNTIL READY TO DETONATE" printed on the initiating device. In an attempt to test the device, a mine operator would have disconnected the removable safety jack from the initiation tube to prevent a connection to the firing mechanism. Hoover did neither of these things, demonstrating an aggravated lack of care constituting more than ordinary negligence.

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)) (citations 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.

There is generally a high degree of danger involved when handling explosives and initiating devices and that degree of danger was heightened here when Hoover ignored the warning label. The warning printed on the device, while stamped in small print, should have been obvious to a blaster-in-charge who had extensive experience blasting. Hoover knew or at least should have known the hazard associated with failing to use the safety jack as intended and should have known not to attempt to fit the shock tube into the initiator with the safety jack engaged until he was ready to detonate. The hazard was obvious, known to Hoover, and he did nothing to abate it. The extent of the violative condition was widespread, as the blast area comprised the entire pit area where miners were located when the explosives were detonated.

While the condition existed for a relatively short period of time, the Commission has recognized that a brief duration is not necessarily enough to remove a finding of unwarrantability. *Knight Hawk*, 38 FMSHRC at 2371. In *Midwest Materials Inc.*, 19 FMSHRC 30, 36 (Jan. 1997), the Commission reversed a finding of no unwarrantability and took issue with the judge's reliance on the brief duration of the condition in light of the condition's high degree of danger and obviousness. Similarly, in this case the duration was short due to the nature of the condition—it took only seconds for Hoover to ignore the instructions on the initiating device and trigger the blast without warning. Finally, there is no evidence that the mine was placed on notice that greater efforts were necessary or that the mine had previously been cited for similar violations. Taken as a whole, the factors analyzed here weigh in favor of an unwarrantable failure finding.

Order No. 8998988

Inspector Amos next issued a §104(d)(1) order alleging that the mine operator failed to clear the blast area of persons not essential prior to initiating the blast. In the citation, Amos described his findings as:

> The mine operator initiated a blast which injured three miners. The blast area had not been effectively cleared of persons not essential to blasting operations. Effective blasting shelters or safe locations were not utilized. Reggie Hoover, owner, stated that he was aware of safe blasting procedures. He stated that he "incidentally" initiated the blast early, while dry fitting NONEL shot tube into an initiating device. He stated he "didn't clear the area" before hooking up to the initiating device, because he "wasn't sure" that the initiating tube would fit the initiating device. No verbal warning was given prior to initiating the blast, giving the miners little time to prepare for the damage that unfolded shortly afterwards. Reggie Hoover engaged in aggravated conduct constituting more than ordinary negligence, in that he stated he was aware of safe blasting procedures, but knowingly failed to follow them. This violation is an unwarrantable failure to comply with a mandatory standard. Citations #8998987 and 8998989 are being issued in conjunction with this order.

The Secretary alleges a violation of 30 C.F.R. § 56.6306(e), which provides that "[i]n electric blasting prior to connecting to the power source, and in nonelectric blasting prior to *attaching an initiating device*, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases." 30 C.F.R. § 56.6306(e) (emphasis added). The violation was designated as S&S and as an unwarrantable failure, with high negligence. The Secretary specially assessed a penalty of $55,200.00.

In order to substantially comply with § 56.6306(e), an operator must determine the extent of the blast area. According to 30 C.F.R. § 56.2, "blast area" means "the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to

persons." In determining the blast area, the following factors must be considered: (1) geology or material to be blasted; (2) blast pattern; (3) burden, depth, diameter, and angle of the holes; (4) blasting experience of the mine; (5) delay system, powder factor, and pounds per delay; (6) type and amount of explosive material; and (7) type and amount of stemming. 30 C.F.R. §56.2.

The Secretary argues that because the blast area was not cleared prior to Hoover attaching the initiating device, a violation is shown. Amos and Burns agreed that in non-electric blasting, the person in charge of the blast is responsible for determining the blast zone and clearing the area or directing miners to seek shelter in a location that protects them from the effects of the blast. Here, Hoover failed to give a verbal warning and clear the blast area prior to utilizing the initiating device. Hoover contends that he told the miners present to get in a safe spot, which he evaluated based on past experience and previous shots. Hoover testified that although it was not on the video, he told all of the miners in the area to get in a safe place and cleared the area. Tr. 73. Later, Hoover explained that he did not call out to and warn the miners of a forthcoming explosion, as he normally does in a blast, because he was not in the initiating stage. Tr. 77. Given Hoover's contradictory testimony, I credit the inspectors' testimony that Hoover did not give a warning or otherwise cause persons to leave the blast area.

As the blaster-in-charge, Hoover did not correctly determine the blast area. Both of the inspectors explained that in the process of investigating the accident, they determined the blast area had not been cleared because the miners were not aware of the extent of the blast area and did not move to a safe location. Hoover failed to adequately take into account all of the factors articulated in 30 C.F.R. § 56.2. Hoover acknowledged only that he relied on past experience and "w[h]ere you're at and that kind of stuff" to determine the blast area. Tr. 81. He explained that he did not factor in the water and did not consider the specific factors enumerated in the MSHA standards with respect to this particular blast.

Hoover not only failed to adequately determine the blast area, he also failed to ensure miners were cleared or adequately sheltered to protect them from flyrock, gases, and other debris prior to connecting the initiating device. To shield themselves from the blast, two miners sought shelter underneath an excavator in the pit area. However, as Inspector Amos acknowledged, an excavator has no protection in the front and is not adequate shelter. Because of the lack of protection, large rocks from the blast flew under the excavator where the miners were sheltering and caused serious injuries. In addition, the miner who moved to the side of the pickup was thrown by the blast and suffered life-threatening injuries. I find that Hoover violated the mandatory standard when he did not adequately consider all factors in determining the range of the blast, did not warn miners to clear the area, and did not instruct miners to take adequate shelter from the blast.

Hoover insists that he was not required to take steps to see that the miners were in a safe location because he was not ready to blast; he was simply preparing to blast. However, he was in the process of attaching the initiating device and the standard requires the area to be cleared prior to attaching that device.

Significant and Substantial

The Secretary alleges that the violation occurred, was permanently disabling, and was S&S. As noted in the discussion above, I have found that there is a violation of a mandatory standard. The standard requires all persons to leave the blast area, or to be protected by adequate shelter, prior to the connection of the initiating device. The standard is meant to protect against the hazard of flyrock or other loose material striking miners who are not in a safe and protected area when a blast is detonated. A miner who either remains in the blast area, or is not in adequate shelter, will suffer a serious injury. Here, the miners were in the blast area, yet were not in an adequate shelter. Therefore, an injury was likely to and did occur. As Amos explained, miners remained in the pit area about 150 to 200 feet from the highwall when the initiating device was triggered. According to Burns, some miners had moved closer to the excavator in preparation for the blast, but they were still exposed to the blast area. Three miners were seriously injured either because of almost complete exposure to the blast and debris, or because of the inadequate shelter of the excavator. Finally, the resulting injury would be reasonably serious due in large part to the size of the flyrock and other debris blasted through the pit. Therefore the violation was properly designated as S&S.

Negligence and unwarrantable failure

I find that the high negligence is an appropriate designation. A reasonably prudent operator would have taken the steps outlined in 30 C.F.R. § 56.2 to determine the potential extent of the blast area instead of assuming that the blast area would be the same as previous shots. Likewise, a reasonably prudent operator would have cleared the blast area or ensured that all persons in that area were protected from flyrock and debris in a blasting shelter or other safe location prior to using the initiating device in any way. It was Hoover's responsibility as blaster-in-charge to determine the blast area and see that the area was clear, or that miners were in a safe place, before connecting the initiating device. He failed to do any of those things.

The Secretary has demonstrated that the violation was the result of an unwarrantable failure to comply. Here, the obviousness and high degree of danger are important aggravating factors. It should have been obvious to Hoover that miners must clear the area before he began using the initiating device, even if he was uncertain the device would work. The failure to clear or otherwise protect miners in the blast area constituted a high degree of danger and serious injuries resulted from the flyrock and debris that struck the miners.

The elements of knowledge, extent, and lack of abatement are also aggravating factors in this case. Hoover knew or reasonably should have known that the blast area needed to be cleared, or that an adequate blasting shelter needed to be in place prior to attaching the shock tube to the initiating device. An experienced blaster also should have known that the miners were not in a safe location. Hoover admitted to investigators that he knew he should have cleared the area, but he did not want to clear the area until he was certain the blast would detonate. The extent of the violation was widespread and the mine operator made no effort to abate the violation.

The length of time the condition existed was relatively brief but the condition involved a high degree of danger and was obvious to Hoover. The Secretary argues that the mine was on notice that the miners needed to be further away in order to be clear from the blast area. However, no evidence was presented that the mine had been cited for similar violations or otherwise been given notice prior to December 2017. Given the evidence as a whole, I find that the violation was a result of an unwarrantable failure to comply.

B. WEST 2019-0277

110(c) Agent Case Against Reginald Hoover

The Secretary seeks to impose personal liability pursuant to Section 110(c) of the Act against Reginald Hoover for his actions at the time of the accident on December 11, 2017. Section 110(c) provides that:

> [w]henever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [providing for assessment of civil and criminal penalties against mine operators].

30 U.S.C. § 820(c). The Commission has explained that an agent is liable under Section 110(c) when the agent "knew or had reason to know of a violative condition. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug. 2014). The relevant question is whether the agent knowingly acted; the Secretary need not prove that the individual knowingly violated the law. *Id.*; *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992).

The Commission has determined that "[a]n individual acts knowingly where he is 'in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" *McCoy*, 36 FMSHRC at 1996 (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998)) (alteration in original). Liability under Section 110(c) "is generally predicated on aggravated conduct constituting more than ordinary negligence" but "does not hinge on whether an agent engaged in 'willful' conduct. *Matney, employed by Knox Creek Coal Co.*, 34 FMSHRC 777, 783 (Apr. 2012). For the purposes of Section 110(c), "knowing" conduct includes deliberate ignorance and reckless disregard as well as actual knowledge. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997).

The Secretary asserts that Hoover is an agent of the mine because he is and was the owner and president of Hoover Excavating at the time the violations occurred. In addition, Hoover was the blaster-in-charge at the time of the blast. According to Section 3(e) of the Mine Act, agent means "any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). The Commission describes an agent as someone whose job function is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *See*

Ambrosia Coal & Constr. Co., 18 FMSHRC 1552, 1560 (Sept. 1996). Hoover agreed at hearing that he is the owner and operator of Hoover Excavating, and I find that he is an agent as described in the Act.

The Secretary argues next that Hoover, as the mine's agent, knowingly authorized, ordered, or carried out each of the violations of the mandatory standards at issue. Amos and Burns concluded that Hoover was responsible for detonating the blast, and clearing the blast area or ensuring that miners were in a blast shelter or other protective location prior to using the initiating device. Hoover argues that he did not knowingly authorize, order, or carry out the violations. He claims he did not know that the accident would result and would not have knowingly proceeded with the actions that resulted in the violations.

There is sufficient evidence to demonstrate that Hoover, acting as an agent of the mine, knew that he was not complying with the warning label on the initiating device on the day of the accident. Hoover's actions resulted in the findings of high negligence and unwarrantable failure for Citation No. 8998987, and can be attributed to Hoover as an agent of the mine. For example, Hoover had experience working with initiating devices similar to the EIT HR-1 device and knew that the safety jack should have been removed before attempting to dry fit. Hoover was aware of the manufacturer's warning, ignored it, and continued to tinker with the device until the blast went off prematurely. Experienced blasters and those experienced with explosives should understand the serious consequences of mishandling the devices they routinely use. While Hoover testified that he did not intend to initiate the blast, he also testified that he had many years of experience in blasting and in using similar types of initiators. Hoover knew or should have known of the manufacturer's instruction and that he had the option to utilize the safety device prior to dry fitting the shock tube.

Similarly, there is sufficient evidence to support the finding that Hoover knowingly failed to comply with 30 C.F.R. § 56.6306(e) as alleged in Order No. 8998988. Prior to attaching the initiating device, Hoover did not clear the blast area or see to it that miners were protected by an adequate blast shelter or other location. As Hoover was handling the initiating device, miners remained in the pit area and one questioned Hoover about what they should be doing. On one hand Hoover argued that he told miners to leave the area, but on the other hand, he said he did not "holler" as he usually does because he was not in that stage of initiating the blast, and was not certain the device would work. Tr. 73, 77. An experienced blaster should know and use all of the factors in the regulation to determine a blast area and then, before using the initiating device, be certain that all miners are clear of the hazards associated with the blast. Based on the record as a whole, I find Hoover individually liable for both violations pursuant to Section 110(c) of the Act.

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 or his special assessments. *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. The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990. However, the judge's assessment must be de novo based upon her review of the record, and the Secretary's proposal should not be used as a starting point or baseline. *Id.*

The Secretary has proposed a penalty of $55,200.00 for the violation cited in Citation No. 8998987, which alleges a failure to use the initiation device in accordance with the manufacturer's instructions. The proposed penalty was assessed as a special assessment, but in determining the penalty, I have considered and applied the six penalty criteria found in Section 110(i) of the Act. The history of assessed violations has been admitted into evidence and shows five violations by this operator in the 15-month period prior to the accident, none of which involve a similar standard. Sec'y Ex. 1. I have addressed the negligence and the gravity in the discussion above and have found that the violation was S&S and the result of high negligence and an unwarrantable failure to comply with a mandatory standard. Good faith abatement has been considered.

The mine has not properly raised the ability to pay argument, as "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017) (citing *Sellersburg Co.*, 5 FMSHRC at 294). Hoover argues that the penalties assessed were excessive but he could not provide financial information to support his claim, as he had not completed and filed taxes for a number of years. Tr. 121. Separate from ability to pay, the record demonstrates that Hoover Excavating is a small operator. The penalty reflects the gravity and negligence, but is mitigated by good faith abatement, history of similar violations, and the size of the operator. Therefore, I assess a penalty of $30,000.00.

The Secretary has proposed a penalty of $55,200.00 for the violation cited in Order No. 8998988, which alleges a failure to clear the blast area or provide adequate blast shelter prior to attaching the non-electronic initiating device. The proposed penalty was a special assessment. In assessing a penalty, I have considered and applied the statutory penalty criteria. The history of assessed violations shows no similar violations for this standard in the preceding 15-month period. Sec'y Ex. 1. Negligence and gravity are addressed in the discussion above, with findings of high negligence, unwarrantable failure, and S&S. I have considered the operator's history, good faith abatement and size as mitigation of the proposed penalty, and I assess a penalty of $30,000.00.

Reginald Hoover, as the agent named in this matter, has been assessed proposed penalties of $5,700.00 and $6,300.00 for his actions with respect to Citation No. 8998987 and Order No. 8998988. The same penalty criteria apply to Hoover as an agent and have been addressed above. Hoover has raised the issue of ability to pay but has provided no evidence in that regard. He does not have a history of violations as an agent of the mine. Therefore, I assess penalties of $5,000.00 for each violation.

Citation/ Order No.	**Originally Proposed Penalty**	**Penalty Assessed**
Docket No. WEST 2019-0092		
8998987	$55,200.00	$30,000.00
8998988	$55,200.00	$30,000.00
TOTAL	**$110,400.00**	**$60,000.00**

Citation/ Order No.	**Originally Proposed Penalty**	**Penalty Assessed**
Docket No. WEST 2019-0277		
8998987	$5,700.00	$5,000.00
8998988	$6,300.00	$5,000.00
TOTAL	**$12,000.00**	**$10,000.00**

III. ORDER

Respondent, Hoover Excavating & Trucking, Inc., is hereby **ORDERED** to pay the Secretary of Labor the sum of $60,000.00 within 30 days of the date of this decision.

Further, Reginald S. Hoover, as an agent of the operator, is **ORDERED** to pay the Secretary of Labor the sum of $10,000.00 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