FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2014-0108 A.C. No. 36-01761-340312
v.	Docket No. PENN 2014-0109 A.C. No. 36-01761-340312
LEHIGH ANTHRACITE COAL, LLC, Respondent	Mine: Tamaqua Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. PENN 2016-0135 A.C. No. 36-01761-402886A
v.	
SHANE T. WETZEL, EMPLOYED BY LEHIGH ANTHRACITE COAL, LLC, Respondent.	Mine: Tamaqua Mine

DECISION AND ORDER

Appearances: Jennifer L. Bluer, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA for Petitioner;

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondents.

Before: Judge L. Zane Gill

These proceedings arise under the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 801 et seq. (1994). This case involves two citations issued by the Secretary of Labor ("Secretary") to Respondent Lehigh Anthracite Coal, LLC ("Lehigh") pursuant to sections 104(a) and 104(d)(1) of the Act, 30 U.S.C. § 814(a), 814(d)(1), and a civil penalty issued to Respondent Shane Wetzel pursuant to section 110(c), 30 U.S.C. § 820(c). The Secretary seeks to impose a total penalty of $23,514.00 against Lehigh for two alleged violations of health and safety standards and an individual civil penalty of $2,900.00 against Shane Wetzel

in his capacity as an employee and agent of Lehigh for his involvement in one of the alleged violations.

The sole matter at issue in Docket No. PENN 2014-108 is Citation No. 8000958, which alleges that Lehigh violated 30 C.F.R. § 77.1006(a) by allowing an employee to work near or under a dangerous highwall and bank. The Secretary seeks a $23,229.00 penalty against Respondent Lehigh for this alleged violation. In addition, the Secretary seeks a $2,900.00 penalty against Respondent Wetzel in Docket No. PENN 2016-135 for his involvement in this alleged violation. In the sole matter at issue in Docket No. PENN 2014-109, Citation No. 8000959, the Secretary seeks a $285.00 penalty for Lehigh's alleged violation of 30 C.F.R. § 77.1710(g), which requires employees to wear safety belts and lines in situations where there is a danger of falling.

Counsel for Respondent initially filed a motion to dismiss the 110(c) proceeding for delay and prejudice, which I denied on April 8, 2016. The matter proceeded to hearing, and the parties presented testimony and evidence on April 12-13, 2016, in Allentown, Pennsylvania.

For the reasons discussed below, after considering all the evidence, I conclude that:

- For Citation No. 8000958, Lehigh violated Section 77.1006(a), injury was highly likely, the injury could reasonably be expected to be a fatality, the violation was significant and substantial and the result of the operator's unwarrantable failure to comply with the mandatory safety standard, one person was affected, and there was high negligence. I assess a penalty of $6,996.00 against Lehigh for the violation and a penalty of $1,000.00 against Wetzel for his knowing authorization of the violation.
- For Citation No. 8000959, Lehigh violated Section 77.1710(g), injury was reasonably likely, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person was affected, and there was moderate negligence. I assess the proposed penalty of $285.00 for the violation.

I. STIPULATIONS

The parties have entered into the following stipulations of law and fact, which were listed in the parties' Joint Prehearing Statement:

1. At all relevant times, Lehigh Anthracite is/was an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as "the Mine Act"), 30 U.S.C. § 803(d), of the Tamaqua Mine.
2. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
3. The individual whose name appears in Block 22 of the citations in contest was acting in an official capacity and as an authorized representative of the Secretary of Labor when the Citations were issued.

4. The Citations were served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of Respondent on the date and place stated therein.
5. Shane T. Wetzel was the second-shift foreman at the times relevant to these matters.
6. The assessed penalties, if affirmed, will not impair Lehigh Anthracite's ability to remain in business.
7. The assessed penalty, if affirmed, will not affect Shane Wetzel's personal financial obligations.
8. In 2014, Lehigh Anthracite Coal, LLC, produced 705,963 tons of coal, of which 212,922 tons were produced from the Tamaqua Mine.
9. The penalty, if any, should be based in part upon the violation history summarized in Exhibit A to the penalty petitions in these dockets.

Jt. Prehearing Statement at 2-4.

II. FACTUAL BACKGROUND

The Mine and the Extraction Process

Lehigh's Tamaqua Mine is a 9000 acre open pit anthracite coal mine in Tamaqua, Pennsylvania, with several distinctive and noteworthy features. (Tr. 368:17-20) The pit that is the subject of these proceedings resembles the shape of a modified "V." (Tr. 26:16-17) On the north side there is a nearly vertical highwall, roughly 55 feet deep – but only 40 feet deep at the time of the cited conduct due to the presence of coal in the pit. (Tr. 26:16-17; 45:6-16; 48:22-24; 78:4 - 79:19) On the south side, forming the other side of the V, there is a coal seam and bottom rock (where the coal lies) at a slope of 50 degrees. (Tr. 26:18 - 27:11) The distance between the walls of the pit at the top is approximately 50-60 feet, but the distance narrows considerably further down such that the floor of the pit is only 10-30 feet wide. (Tr. 45:8-12; 469:9-17) Unlike a typical open pit mine containing a flat bed of coal extending out horizontally, there is not a large open area at the bottom of this pit capable of safely accommodating large vehicles and regular traffic in and out. (Tr. 159:5-17) Accordingly, the mine's ground control plan prohibits haulage roads from traveling through the pit.[1] (Tr. 222:20-23)

In order to extract coal, the company first blasts open the pit with explosives, mucks out overburden (rock covering the coal) to expose the coal seam, and digs out the coal from the pit with an excavator, which gradually increases the depth of the high wall. (Tr. 26:9-13; 357:25 - 358:3; 365:3-6) All loose rock dug from the pit is deposited in a spoil pile at the top found on both the north and south sides. (Tr. 29:6-14; 52:7-13) Coal, some of which falls from the

[1] The mine's safety director, John Hadesty, testified that he believed this ground control provision was intended to protect vehicles from being struck by the dragline boom above, rather than any highwall or bank hazards. He also noted that the ground control plan does not explicitly prohibit miners from entering the pit, and that the mine does have roads that travel near bottom rock that is much higher than the southern coal seam in this pit. (Tr. 377:18 - 378:22)

southern seam, is then collected and retrieved at the bottom of the pit with the use of a dragline when the high wall becomes too unstable to keep an excavator in the pit. (Tr. 357:25 – 358:4)

The dragline is a track-mounted vehicle situated at the top of the pit — in this instance, on the west side — with a boom crane that extends out and a bucket attached to the boom which is lowered into the pit. (Tr. 25:25 - 26:15) A lift line moves the bucket closer or farther away from the crane operator. The operator drops the bucket down into the pit and then pulls it back with the dragline so that the bucket digs into and scoops up coal as it scrapes across the floor. (Tr. 26:3-6) Eventually, the bucket is lifted and withdrawn horizontally out of the pit area. The coal is ultimately deposited into a collection pile at the side of the pit. (Tr. 26:6-7) The bucket for the dragline involved in this matter is approximately nine feet long, six feet wide, four feet deep, and capable of holding seven cubic yards of material. (Tr. 345:8 - 346:2)

The Alleged Violations

On the night of June 19, 2013, in the middle of the process described above, a dragline operator stepped out of his cab briefly while the dragline was extended and the bucket was resting at the bottom of the pit. Conditions being dark at that time of the night, the dragline operator paused his work and exited the vehicle in order to replace a dying light bulb on the boom. While he was out of the cab, he felt a vibration which indicated that coal had fallen off the face of the seam and struck the bucket. On his way back to the cab, he felt a second vibration. By the time he returned to the cab, enough coal had fallen off the face to bury the entire bucket. This presented a problem for the company because the dragline operator was no longer able to retrieve the bucket through the normal operation of the dragline. The bucket would not budge as the operator attempted to raise or move it. (Tr. 60:14-20; 108:17-22; 110:11 - 111:7; 344:17 - 345:1; 431:8-16; Sec'y Ex. 10)

Mine management, specifically second-shift foreman Shane Wetzel, and hourly personnel arrived on the scene and (after trying again unsuccessfully to remove the bucket with the dragline) had an extended discussion regarding how to retrieve the bucket. (Tr. 431:17 - 433:16) One option was to abandon the bucket and sacrifice production for the day. Other options involved creating a new road to access the bucket, but such options were dismissed as infeasible or requiring too much time and loss of production. (Tr. 86:20 - 87:24; 433:21 - 434:7) Another option, which was apparently not considered initially but which eventually succeeded the following day, was to use another drag bucket to scoop down and unbury the first bucket. All of these options had the advantage of not placing any miners in harm's way. (Tr. 73:4-8; 206:2-210:15)

Instead, the company decided to allow an hourly employee, Erik Osenbach, to descend by foot, unsecured, down a steeply inclined path into the bottom of the pit from the southwest side to hook a chain around the "crow's foot" attached to the buried bucket. (Tr. 330:17 - 331:5; 335:3-13; 348:9-17) The crow's foot was the point at which the two control chains for the dragline attached to the bucket converged. (*See* Sec'y Ex. 11; Resp't Ex. 3) The company then attempted to use an excavator to pull the bucket out from under the muck using the chain it had attached to the crow's foot. However, the chain broke when the excavator attempted to pull it. (Tr. 59:17-19) Osenbach went down into the pit a second time and hooked a cable to the buried

bucket's control chains in order to carry out the same plan. This attempt was equally unsuccessful. (Tr. 59:19-22)

Foreman Wetzel initially volunteered to enter the pit and carry out the attempt. (Tr. 331:6-10) However, Osenbach, an hourly employee, told Wetzel, "[You have] a wife and kids," and volunteered to go in his place.[2] Wetzel accepted Osenbach's suggestion and, Osenbach ended up going into the pit on both attempts instead. (Tr. 82:12-20; Sec'y Ex. 4 at 2) Osenbach was not provided with standard fall protection, but he did hold on to the drag rope as he descended. (Tr. 65:12-16) Lehigh turned on the dragline lights and provided the dragline operator with a horn to monitor conditions in the pit and to alert Osenbach if hazards developed. (Tr. 398: 17-20) As a part of the retrieval plan, Osenbach attempted to stay close to the side of the pit with the coal seam and tried to keep his distance from the highwall for his own safety. (Tr. 399: 1-4) The highwall contained cracks from prior blasting and a recent rock fall that indicated the possibility of additional rock falls. (Tr. 272:13 - 273: 24) Since the bucket was at the bottom of the pit and closer than the crow's foot to the most severe highwall hazard, the miners involved recognized that Osenbach should not venture past the crow's foot as far as the bucket. (Tr. 398: 22:25) Whether Osenbach actually did avoid travelling to the bottom of the pit is disputed by the parties. *See* Resp't Br. at 3; Sec'y Reply Br. at 3.

There is conflicting testimony about whether the company took any other safety precautions before sending Osenbach into the pit. Wetzel told an MSHA inspector that the area where Osenbach entered the pit was "benched," that is purposefully filled with material, to decrease the slope of the path down to the pit. (Tr. 38:14 – 39:19) In contrast, another employee told the inspector, and Osenbach testified at hearing, that the area was filled in to allow the excavator tasked with pulling out the bucket room to move closer to the buried bucket so that the chain attached to the excavator could reach the bucket. (Tr. 40:1-5; 344:10-13) And Osenbach and the excavator operator on the scene at the time, Richard Rudinsky, both informed MSHA, and testified at hearing, that the area was not benched until Osenbach had already descended into the pit once. (Tr. 103:4-16; 240:10-15; 340:16-25; 361:19 - 362:1)

An unidentified individual called MSHA on June 24 to report the hazardous condition described above.[3] (Tr. 22:20 - 23:3) That same day, MSHA supervisor Tom Yencho called the mine and issued a verbal imminent danger order over the phone, and then MSHA Inspector David Labenski traveled out to the mine and conducted interviews with Lehigh employees primarily to discover whether the situation still posed an imminent danger to anyone at the mine. (Tr. 31:6-16; 67:18-21; 183:1 - 185:9) When Labenski arrived, he learned that the situation had actually occurred five days earlier, on June 19, and that the bucket had been successfully removed from the area on June 20, four days earlier. (Tr. 67:18-19; 71:3-5) This was

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[2] Osenbach and Wetzel testified that the "wife and kids" comment was made in jest in reference to the number of children Wetzel has. (Tr. 331:11-16; 449:6-15)

[3] Pursuant to section 103(g) of the Act, miners may call MSHA anonymously to report a hazardous condition, and if it is determined that a miner has reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists, or that an imminent danger exists, MSHA will send an inspector immediately to the mine to investigate the complaint. 30 U.S.C. § 813(g)(1).

accomplished by first detaching the buried drag bucket from the dragline machine, attaching another bucket from another dragline machine to the dragline over the pit, and using that bucket to scoop down and unbury the bucket. (Tr. 72:19-25; 246:11-17) Further, during that time, the company had conducted its own thorough investigation into the matter, which included photographing the condition and taking statements from the individuals involved. Indeed, much of the evidence at hearing derived from this investigation. (Tr. 138:11-14) At the conclusion of its investigation, the company sanctioned and gave written counseling to four individuals involved in the situation, including Wetzel.[4] (Tr. 73:12 - 74:6)

After informing Lehigh that there was no imminent danger at the mine, Labenski returned to the mine with MSHA supervisors Tom Yencho and George McIntyre, and MSHA continued its investigation over the next several days. (Tr. 67:9-69:6) MSHA ultimately concluded that the company had violated multiple surface coal health and safety standards in sending Osenbach into the pit under or near dangerous highwalls and banks without sufficient fall protection. MSHA also determined that Wetzel should be held individually liable for knowingly authorizing Osenbach's entry into the pit.

III. LEGAL PRINCIPLES

Section 110(c) Liability

Section 110(c) of the Mine Act 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" as the corporate operator. 30 U.S.C. § 820(c).

Thus, as a threshold matter, section 110(c) requires a showing that the individual respondent is a director, officer, or agent of a corporate operator. A necessary predicate for 110(c) liability is a finding that the operator violated the Mine Act. *Kenny Richardson*, 3 FMSHRC 8, 9-11 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983).

Importantly, section 110(c) also requires a showing that the individual respondent knowingly authorized, ordered, or carried out the violation. The Commission has construed "knowingly" to include both actual and constructive knowledge, explaining that 110(c) liability is triggered whenever a person "in a position to protect employee safety and health fails to act on the basis of information that gives him *knowledge or reason to know* of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 15-16 (emphasis added); *accord Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1299-1300 (11th Cir. 2014); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). Specific intent is not required. The Secretary must prove only that the individual knowingly acted, not that the individual knowingly violated the law. *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1996 (Aug.

[4] The citing inspector claimed that these disciplinary actions played no part in his own decision making in this proceeding, and likewise I will not rely on those actions for my own findings. (Tr. 74:18-21)

2014) (citing *Warren Steen Constr. Co.*, 14 FMSHRC 1125, 1131 (July 1992)). Although a showing of willfulness is not required either, "section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); *see also Freeman United*, 108 F.3d at 360.

Whether conduct is "aggravated" is determined by looking at all the facts and circumstances of the case to see if any aggravating or mitigating factors exist. *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include: (1) the extent of the violative condition; (2) the length of time that the violative condition existed; (3) whether the violation posed a high degree of danger; (4) whether the violation was obvious; (5) the respondent's knowledge of the existence of the violation; (6) the respondent's prior efforts in abating the violative condition; and (7) whether the respondent had been previously placed on notice that greater efforts were necessary for compliance. *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan. 2015); *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637 (Oct. 2014); *Manalapan*, 35 FMSHRC at 293; *IO Coal*, 31 FMSHRC at 1351-57; *Consolidation Coal*, 22 FMSHRC at 353; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *see also Ernest Matney*, 34 FMSHRC at 783-87 (analyzing aggravated conduct in 110(c) case by discussing unwarrantable failure factors).

Assuming that 110(c) liability applies, the gravity of the violation and negligence must also be evaluated in accordance with the Commission's well-established legal principles, summarized below, in order to determine the appropriate penalty.

Significant and Substantial (S&S)

Two of the citations at issue in this case have been designated by the Secretary as significant and substantial ("S&S"). 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). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Res., Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.").

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

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

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

The second prong addresses the extent to which the violation contributes to a particular hazard, and is primarily concerned with the "*likelihood* of the occurrence of the hazard...." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 162 (4th Cir.)) (emphasis added). By contrast, the third prong is "primarily concerned with *gravity* –the seriousness of the expected harm." *Knox Creek Coal Corp.*, 811 F.3d 148 at 162. The 'hazard' at issue is the relevant concept tying together the second prong's "likelihood" analysis and the third prong's "gravity analysis." *Newtown Energy, Inc.*, 38 FMSHRC at 2037. The Commission has made explicit that an ALJ must "adequately define the particular hazard to which the violation allegedly contributes." *Id.* at 2038. The 'hazard' must be "clearly defined" and defined in terms of "the prospective danger the cited safety standard is intended to prevent." *Id.*

After first "[h]aving clearly defined the hazard," the ALJ's next task at the second prong is to assess "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* If the Judge concludes, based upon the evidence, that the violation sufficiently contributes to the 'hazard' defined in the second prong, the Judge then *assumes* the occurrence of the hazard in analyzing the third prong. *Id.* (citing *Knox Creek Coal Corp.*, 811 F. 3d at 161-62; *Peabody Midwest Mining, LLC*, 762 F.3d at 616; *Buck Creek Coal*, 52 F.3d at 135).

In the third prong of the *Mathies* test, the Judge must assess whether the assumed hazard would be reasonably likely to result in an injury. The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run*

Coal Co., 27 FMSHRC at 905; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). In its recent *Knox Creek* opinion, the Fourth Circuit also found that "[e]vidence of intended but not-yet begun abatement efforts ought not be considered when making an S & S determination." 811 F.3d at 166.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Negligence

"Negligence" is not defined in the Mine Act. The Commission, has, however,

> 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, we 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. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Brody Mining, LLC, 37 FMSHRC 1687, 1702 (Aug. 2015); *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). "Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly 'mitigating' circumstances. Instead, the Judge may consider the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC at 1702.

Indeed, the Part 100 regulations "apply only to the *proposal* of penalties by MSHA and the Secretary of Labor; under both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings." *Id.* at 1701-02 (citing *Jim Walter Res., Inc.*, 36 FMSHRC at 1975 n.4, and *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)

("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."), *aff'g* 5 FMSHRC 287 (Mar. 1983)). Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This may include actions taken by the operator to prevent or correct hazardous conditions.

Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

> (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637,

(Oct. 2014); *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813; *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Penalties

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 the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28. Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52; *American Coal Co.*, 35 FMSHRC 1774, 1819 (June 2013) (ALJ Zielinski).

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

These six criteria also apply, with appropriate revisions, to the assessment of penalties against individuals under section 110(c). *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1764 (Aug. 2012). Specifically, the Commission has indicated that judges should consider the following criteria when assessing a penalty against an individual: (1) the individual's history of previous violations; (2) the appropriateness of the penalty to the individual's income and net worth; (3) the effect of the penalty on the individual's ability to meet his financial obligations; (4) whether the individual was negligent; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. *Id.*; *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 823-24 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g.*, *Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See* 30 C.F.R. Part 100, Final Rule, 72 Fed. Reg. 13592-601, 13621.

IV. FINDINGS AND DISCUSSION

Citation No. 8000958

MSHA Inspector David Labenski issued Citation No. 8000958 to Lehigh at its Tamaqua mine on July 3, 2013. It alleges a violation of 30 C.F.R. § 77.1006(a). The regulation states: "Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks." 30 C.F.R. § 77.1006 (a). Section 77.1006 is a mandatory safety standard. The citation narrative alleges:

> The second shift foreman knowingly allowed a miner to enter into the westerly end of Bank #8 Pit to attempt to retrieve the [. . .] bucket on the [. . .] Dragline [. . .] stuck in the pit on 6/19/2013 at approximately 2300 hrs. The bucket [. . .] was buried when the coal slid down the pitch to the bottom of the pit. The miner accessing the dragline bucket at the bottom of the pit was situated between an undercut highwall which consisted of previously shot, unconsolidated rock on the north side of the pit, and an undercut spoil pile on top of the south side of the pit. The highwall measured 55 ft. in height on the north side of the pit and 70 ft. high at the spoil pile on the south side. Miners, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks. Contact with falling and or sliding material would result in fatal injuries. The foreman engaged

> in aggravated conduct constituting more than ordinary negligence by allowing the employee to enter the pit and work under a dangerous highwall and spoil bank without the hazardous conditions being corrected. This violation is an unwarrantable failure to comply with a mandatory standard.

Sec'y Ex. 5. The violation was designated as significant and substantial, highly likely to lead to a fatal injury to one person, and the result of the operator's reckless disregard for the safety of miners. The violation was abated on July 8, 2013, when the mine's safety director conducted a safety talk with miners and discussed the new procedure for retrieving a buried dragline bucket, which had been successfully implemented on June 20. The company also incorporated this new procedure into its Ground Control Plan. *Id.*

Violation

Citation No. 8000958 alleges that Lehigh violated 30 C.F.R. § 77.1006(a) by allowing an employee to work near or under dangerous highwalls and banks. While section 77.1006(a) is inapplicable in situations where it is necessary for a miner to subject himself to danger in order to correct unsafe conditions, Inspector Labenski determined that this exception did not apply to the cited condition because leaving the dragline bucket buried would not endanger miners' safety. (Tr. 164:10 - 166:2) Labenski then concluded that Osenbach's entry into the pit subjected him to multiple hazards contemplated by the standard. I agree with the inspector's conclusions on both of these points.

Based on Labenski's credible testimony, which was supported by photographic evidence and testimony from Lehigh employees, I find that the northern highwall, the spoil piles at the top of the pit, and the loose coal on the south side of the pit presented multiple hazards for any miners working in the pit, even briefly.[5] The highwall was cracked and contained unconsolidated material that could fall at any time on a miner below. (Tr. 100:25 - 101:4; 107:10-12; 194:20 - 195:11; 273:5-18; Sec'y Exs. 7, 12) The spoil banks at the top of the pit on the south side were undercut, meaning over-steepened, and also posed a falling hazard. (Tr. 98:24 - 99:4; 107:16-21; 274: 7-17; Sec'y Exs. 8-9) The coal seam on the south side was cracked and fractured, and coal had fallen twice a few hours before Osenbach entered. (Tr. 98:15-23; 108:3-7; Sec'y Exs. 8-9) This collapse not only indicated a high risk of further collapse, but also removed much of the lateral support for the remaining coal and spoil pile that had yet to fall and therefore increased the risk of a repeat fall. (Tr. 202:8-13)

Not only did the pit's highwall and banks pose a serious danger to Osenbach upon his entry, but the limited space for safe travel in the pit ensured that he would inevitably be "near" if

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[5] In *Secretary v. Diamond May Mining*, 20 FMSHRC 1050, 1054 (Sept. 1998) (ALJ), the Administrative Law Judge noted that the term "bank" is broadly defined within the industry to mean "a usually steeply sloping mass of any earthly or rock material rising above the digging level from which the soil or rock is to be dug from its natural or blasted position in an open-pit mine or quarry." Consistent with this definition, I find that the south side of the pit containing loose coal and an undercut spoil pile above constituted a "bank" for the purposes of the standard.

not "under" those dangerous conditions at some point in his attempt to retrieve the buried bucket. According to Labenski's credible testimony, the crow's foot that Osenbach reached was within 10 feet of both the northern highwall and southern bank hazards. (Tr. 167:6-17) Osenbach entered an area of the pit where a coal collapse had already occurred hours earlier. Photographs taken by Lehigh during the course of the company's investigation into the matter confirm that Osenbach was subsequently under or near the cracked highwall. (Sec'y Exs. 6-7)

The Respondent argues that the inspectors' findings were colored by their incorrect assumption that any entry into the pit would have given rise to a violation. Resp't Br. at 18-19. Although I cannot envision many circumstances in which entry by foot into this particular steep and narrow pit would ever be safe, my findings are based on the specific conditions and numerous hazards in the pit at the time of the retrieval effort. Conditions were especially hazardous immediately after a collapse of the coal seam and shortly after blasting that had left cracks in the highwall.

For the reasons above, I find the Secretary has established a violation of the standard.

S&S and Gravity

Inspector Labenski marked this violation as S&S and highly likely to result in a fatal injury to one miner. (Sec'y Ex. 5) Labenski's S&S and elevated gravity findings were based not only on the highwall and bank hazards establishing a violation of the standard, but also on the surrounding conditions and circumstances. These included the inadequate lighting at night, Osenbach's multiple trips into the pit, and the steep and uneven terrain of the pit which posed tripping hazards that could further prolong exposure to dangerous highwall and bank conditions. (Tr. 116:3 – 120:12)

I have already found a violation of the mandatory safety standard at section 77.1006(a), satisfying the first element of the *Mathies* test for S&S.

The second *Mathies* element, as clarified by *Newtown*, requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. The discrete safety hazard against which section 77.1006(a) is directed is the possibility of a rock fall or a collapse of material from a highwall or bank directly above a working miner. In this case, I find it more than reasonably likely that material could have fallen from the highwall, spoil bank, or coal seam while Osenbach was down in the pit, directly below those hazards, retrieving the dragline bucket.

My findings are based on both photographic evidence and witness testimony. First, photographs of the pit confirm the presence of highwall cracks, loose coal, undercut spoil banks, and Osenbach's likely presence underneath these hazards. (Sec'y Exs. 7-9) Although the photographs do not indicate whether the crow's foot to which Osenbach attached a chain and cable was directly below a hazard, they indicate enough hazards in a narrow area to persuade me that Osenbach would have likely passed underneath one during his retrieval effort. Second, all witnesses agreed that the highwall contained unconsolidated material that posed a danger to

miners standing underneath. Wetzel himself believed that the highwall posed a "moderate risk" or "somewhat likely possibility [. . .] of some rocks coming down into the pit if someone was in there." (Tr. 461:3-12) The narrow dimensions of the pit and diminished lighting would have made it difficult to avoid the highwall hazard, and indeed first shift foreman Lou Mitchalk concluded that Osenbach would have been exposed to that hazard.[6] (Tr. 238:17-19; 239:18-21) Third, all MSHA personnel present at the hearing testified to the severe coal and spoil hazards on the south bank. (Tr. 98:15 - 99:4; 107:16 - 108:7; 274:7-17) Lehigh agents Hadesty and Wetzel agreed that Osenbach was under the southern spoil pile. (Tr. 420: 21-23; 458:4-10) Mitchalk also agreed that Osenbach was exposed to the remaining coal on the southern bank that had not yet fallen. (Tr. 238:13-16) I find that Osenbach's multiple trips into the pit, each one lasting at least two minutes, created a high likelihood of exposure to these numerous hazards.

The Respondent argues that the crow's foot was only a short distance down the western wall, far enough from the hazards at the bottom of the pit to protect a miner sent in to attach a chain. Resp't Br. at 19-20. However, Osenbach testified that he went all the way down to the bottom of the pit. (Tr. 348:15-17; 349:7-9) Hadesty and Wetzel agreed that Osenbach reached the bottom of the pit, which Hadesty added was a dangerous area. (Tr. 413:8-21; 458:8-10) Photos of the crow's foot appear to confirm that it was situated at the bottom of the pit, close enough to both the highwall and south bank hazards to pose a high safety risk. (Sec'y Ex. 6; Tr. 468: 5-24) Consequently, I find that Osenbach did venture to the bottom as a part of his retrieval effort.

Next, the Respondent contends that the highwall was scaled by the dragline in order to prevent rock from contaminating the coal below, that the upper part of the highwall was sloped back, and that the coal that had fallen from the south bank hours earlier would have subsequently buttressed the south side of the pit. Resp't Br. 20-23. Combined, these facts indicate to the Respondent that any loose material from the highwall and coal seam would have either remained in place or not made it very far down and would not have reached Osenbach. *Id.* In that vein, the Respondent also highlights testimony from Lehigh personnel denying the presence of falling or trickling highwall material or undercut spoil piles, arguing that if they were truly undercut they would have fallen already. *Id.* However, I credit the testimony of MSHA inspectors and first-shift foreman Mitchalk in identifying the numerous hazards in the pit and Insepctor Labenski's testimony explaining that the only reason that the undercut spoil bank had not already resulted in falling material was that the bank was being precariously supported by coal seams that had already proved unstable immediately prior to the retrieval attempt. (Tr. 141:10-14; 157:11 - 158:7)

While conditions in the pit were hazardous enough on their own, I note that the retrieval effort occurred at night, with insufficient lighting, increasing the likelihood that Osenbach and Lehigh personnel would fail to observe developing hazards in the area as Osenbach descended into the pit. (Tr. 115:11-15) Although the Respondent notes that light bulbs on the dragline boom did provide some lighting, MSHA personnel credibly testified that they would be inadequate for

[6] Even though Mitchalk did not directly observe the initial retrieval effort, I credit his testimony on this point based on his knowledge of the pit and the conditions in the area at the time. (Tr. 247:25 – 248:12)

illuminating large portions of the pit. (Tr. 90:6-25; 117:12 - 118:6; 216:1-24; 277:4-14) Given these factors, I find that this violation contributed to a discrete safety hazard. Accordingly, the second Mathies element is satisfied.

The third and fourth *Mathies* elements inquire into whether the hazard would be reasonably likely to result in a reasonably serious injury. As noted above, the hazard presented by this violation was the possibility of a rock fall or a collapse of material from a highwall or bank directly above a working miner. If rock or coal had fallen from above while Osenbach was working below, I find it highly likely that an injury would have occurred. This is due to the height and slope of the walls and banks from which material would have fallen, along with the inadequate lighting, narrow dimensions, and steep and uneven terrain of the pit that would have made it extremely difficult to promptly exit the area once material began falling. (Tr. 118:16-20; 120:3-12) Consistent with Inspector Labenski's testimony, I find that even a small rock falling from the wall of a pit of this height could reasonably be expected to injure a miner. (Tr. 102:4-22) I also find that coal or spoil sliding down a steeply sloped bank would be equally likely to injure a miner below.

Further, any injury resulting from a rock fall on the north highwall or a collapse on the south bank could have reasonably been expected to be fatal to Osenbach. (Tr. 198:1-8) This conclusion is supported not only by common sense but also by the fact that the previous collapse of coal into the pit was sufficient to bury a large bucket capable of holding seven cubic yards of material. (Tr. 345:8 - 346:2) Inspector Yencho testified that there was somewhere between a few hundred pounds and 10 tons of coal still hanging on the south bank when Osenbach descended the pit. (Tr. 200:17-25) This amount of coal could easily crush and kill a miner standing below. Therefore, the Secretary has satisfied all the elements necessary for an S&S finding.

Based on my findings above, I also find that the gravity of this violation was serious because it was highly likely to result in a fatal injury to a miner.

Unwarrantable Failure

Unwarrantable failure requires a showing of aggravated conduct - significantly more than ordinary negligence - characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987). Relevant factors to consider in determining whether the operator is guilty of aggravated conduct include the extent of the violative condition, the length of time a violating condition has existed, the operator's efforts to abate the condition prior to a citation, whether the operator has been placed on notice that greater efforts are necessary to assure compliance, the operator's knowledge of the violating condition (or lack thereof), and whether the violation is obvious and poses a high degree of danger. *Consolidation Coal Co.*, 23 FMSHRC at 593; *IO Coal*, 31 FMSHRC at 1351.

The Secretary and the Respondent both focus much of their attention on one factor in particular: the degree of danger posed by the highwall and south bank when Osenbach entered the pit. For the reasons discussed in my S&S and gravity analysis, I find that the cited conduct posed a high degree of danger. This finding also has important implications for how I evaluate

the duration and extent of the violating condition in my unwarrantable failure analysis. In this case, Osenbach was exposed to the hazard for at least four minutes over the course of two separate trips into the pit, and the hazard was confined to a single pit. (Tr. 119:2-16) This would be a relatively short duration of time and a limited extent for a condition posing *little* danger. However, the Secretary correctly notes that the Commission has relied on the high degree of danger posed to support an unwarrantable failure finding even when the duration of the exposure was relatively short. Sec'y Br. at 24 (citing *Lafarge Construction Materials and Theodore Dress*, 20 FMSHRC 1140, 1145-48 (Oct. 1998)). Accordingly, I find the high degree of danger to be an aggravating factor, even considering Osenbach's limited exposure to the pit hazards, and I do not find the limited duration or extent of the hazard to be mitigating factors.

I also find, based on the photographic and testamentary evidence, that these dangers were obvious and known to the company. Hadesty, the safety director at the mine, conceded that the two retrieval attempts were "dangerous" and that because of that danger it should have been common knowledge not to go down into the dragline pit. (Tr. 411:2 - 412:9; 413:2-7) Lehigh and Wetzel were both aware that a coal collapse had occurred in the pit just hours earlier, and nearly all witnesses including Wetzel acknowledged the hazards in the northern highwall due to blasting which had left cracks in the wall. (Tr. 85:16 - 86:12; 461:3-12) The highwall, spoil bank, and coal seam hazards were all clearly visible in the photos submitted into evidence and all MSHA witnesses credibly testified to their obviousness. The narrow dimensions of the pit would have also been visibly obvious to all miners working in the area and would have consequently made the risks of entering the pit under or near the above hazards obvious as well. Additionally, the company's own incident report at the conclusion of its investigation into the matter identified "two risky attempts" and "unsafe acts" warranting discipline, and this conclusion was supported by the testimony of first shift foreman Mitchalk, who said that the dangers were obvious and that all involved should have known not to enter the pit. (Tr. 247:8-13; Sec'y Ex. 20 at 11)

As a supervisor, Wetzel's involvement in the decision to send Osenbach down into the pit not only establishes the company's knowledge of the violation but constitutes in itself an aggravating factor that weighs in favor of an unwarrantable failure finding. *Newtown Energy, Inc.*, 38 FMSHRC at 2046. Wetzel was specifically alerted to the danger by Osenbach, who told him not to enter the pit because he had a wife and children. (Tr. 82:12-20; Sec'y Ex. 4 at 2) While the statement may have been made half in jest as the Respondent argues, I find that it was also in part a recognition of the high level of danger associated with the retrieval effort and that Wetzel should have understood this.

Lehigh was not necessarily placed on notice of the need for greater compliance efforts largely because bucket retrieval efforts are rare; Wetzel had not attempted anything of the sort before and therefore would not have been previously sanctioned by MSHA for similar conduct. (Tr. 249:14-21; 251:9-15; 379:19-25) I find this to be an insignificant mitigating factor. Although MSHA had not alerted Lehigh to the risks of the cited conduct, it had never condoned such behavior either, and the obviousness of the hazard by itself should have been enough to put the operator on notice that greater efforts at compliance were needed.

Additionally, I do not find that Lehigh engaged in any effort to abate the violative condition that could be deemed a mitigating factor for an unwarrantable finding. Lehigh violated

the act by sending Osenbach into the pit to retrieve the buried bucket, and then repeated the violative conduct when the first retrieval effort failed. Osenbach was permitted to complete both attempts without any intervening effort to abate the violation.

In summary, I find that the violation was obvious, directly involved a supervisor's knowing conduct, posed a high degree of danger, and that these are aggravating factors for an unwarrantable failure finding. I also do not find the extent and duration of the violation, the operator's abatement efforts, or the lack of notice of greater efforts necessary for compliance to be significant mitigating factors. Such factors could be relevant aggravating or mitigating factors for a violative condition that developed over time and could have escaped the notice of management personnel, and where the danger to miners would depend on lengthy and pervasive exposure to hazards. However, I find these factors to be less relevant in a case such as this where a supervisor directed a miner into a situation that posed an immediate and appreciable risk to the safety of that miner. Therefore, I find that the Secretary has met his burden for establishing an unwarrantable failure.

Although the Commission has found that an operator's good faith and reasonable belief that it engaged in the safest means of complying with a standard does not support an unwarrantable failure finding, I do not find this exception applicable in this case. *See Consolidation Coal Co.*, 23 FMSHRC at 594. My finding that the danger was obvious undermines the Respondent's claim that its belief in the safety of its conduct was reasonable. Furthermore, I find that the Respondent considered several safer alternatives for complying with the standard but dismissed them because they would have taken too long and forced the company to sacrifice production. (Tr. 86:20 – 87:24) Therefore, I do not find that Lehigh genuinely believed it had chosen the safest means of complying with the standard.

Negligence

For many of the reasons stated above, I also find that both Lehigh and Wetzel were negligent in allowing Osenbach entry into the pit near or under dangerous highwall and bank conditions. Once again, Wetzel was aware of the numerous hazards in the pit and should have been aware of the risks in permitting Osenbach near those hazards. This failure of judgment from a supervisory official is imputed to the company and establishes an aggravated lack of care. *Wilmont Mining Co.*, 9 FMSHRC 684, 687 (Apr. 1987) (holding that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator), *aff'd in part*, 848 F.2d 195 (6th Cir. 1988). However, I do not find that Wetzel's actions, and Lehigh's by extension, rise to the level of reckless disregard designated by MSHA on the face of the citation.

The Commission has stated that "'reckless disregard' is often provided as a definition of unwarrantable failure," which equates to "aggravated conduct constituting more than ordinary negligence," *Sierra Rock Products, Inc.*, 37 FMSHRC 1, 4-6 (Jan. 2015) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-03 (Dec. 1987)), but that "high negligence [also] suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1703 (Aug. 2015) (quoting *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Therefore, "reckless disregard" and "high negligence" are closely related concepts. However, "reckless disregard" is the highest level of negligence that MSHA may attribute to an

operator for the purpose of assessing a penalty under the Secretary's Part 100 regulations, and the Commission has likewise recognized reckless disregard as the highest degree of negligence the judge can take into account when assessing a penalty. *See Brody Mining*, 37 FMSHRC at 1703 n.17 ("When a Judge finds an operator negligent, the Judge would take the degree of negligence, which would be on a scale between low negligence and reckless disregard, into account in assessing an appropriate penalty.") MSHA defines "reckless disregard" to mean that the "operator displayed conduct which exhibits the absence of the slightest degree of care."[7] 30 C.F.R. § 100.3.

Wetzel's initial willingness to enter the pit to retrieve the bucket before Osenbach intervened indicates that his decision to send Osenbach into the pit was not the product of reckless indifference to the safety of Lehigh employees. (Tr. 449:2-5) Instead it reflected poor judgment and a failure to properly evaluate the obvious health and safety risks around him. As Wetzel stated, he would not have initially volunteered to enter the pit if he had felt that it was dangerous. (Tr. 457:5-11) While he recognized some of the hazards in the pit, he failed to grasp the extent of the risk involved in his plan. Accordingly, he testified that he believed the southern slope did not pose any hazard because the soil was strong enough to support itself and that likewise the hazardous portion of the northern highwall was far enough from Osenbach's intended route and destination not to pose any risks either. (Tr. 438: 2 - 440:9; 443:24 - 444:1; 445:1-9) While I do not find this belief to be reasonable, I credit from his testimony that his misunderstanding was genuine. Further, the efforts taken to ensure that Osenbach stayed away from the northern highwall and did not linger in the pit , while wholly inadequate, do demonstrate some degree of care to comply with the standard. (Tr. 437:4-9; 448:12-23) Again, I find it credible from witness testimony that these efforts were undertaken in good faith. Therefore, I find Lehigh's and Wetzel's negligence to be "high" rather than "reckless."

Respondent Wetzel's Individual Liability and Negligence

Wetzel may be held individually liable for a penalty under section 110(c) if he is found to be a "director, officer, or agent" of a "corporate operator," and if he is found to have "knowingly authorized, ordered or carried out" a violation. As a preliminary matter, I find that Lehigh is a "corporate officer." Lehigh is a Limited Liability Corporation ("LLC"), and the Commission has held that LLC's are "corporate operators" for purposes of section 110(c) of the Act. *Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 550-51 (Mar. 2012). Further, I find that Wetzel was an agent of Lehigh at all times relevant to this matter. Wetzel was the "second-shift foreman" at the Tamaqua Mine, responsible for assigning work and enforcing safety during his shift. (Tr. 455:23 - 456:9; 457:16-19) This type of managerial responsibility has been held by the Commission to establish agency status for the purpose of section 110(c). *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009).

Next, I find that Wetzel authorized the violation for which Lehigh was cited, since Wetzel admitted to Inspector Labenski that it was ultimately his decision to send Osenbach into the pit. (Tr. 84:12-16). Most importantly, I find that Wetzel knowingly authorized this violation.

[7] While MSHA's negligence definitions are not binding on the Commission, they do help me to understand and evaluate the Secretary's rationales for his elevated penalty assessments.

The Act's "knowing" standard does not require intent to violate the standard, knowledge that the standard was being violated, or willfulness. *See Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997) (actual knowledge or specific intent not required); *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (willfulness not required). Instead, it is sufficient to find that Wetzel acted or failed to act "on the basis of information that [gave] him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 15-16. I have already found that the hazards in the pit were obvious, and that Wetzel was aware of the dangerous northern highwall cracks and the recent southern bank collapse. Wetzel even recognized that there was a "moderate level of risk" involved in sending Osenbach into the pit because of the "somewhat likely possibility . . . of some of the rocks coming down into the pit if someone was in there." (Tr. 461:3-12) These facts gave Wetzel more than sufficient reason to know that sending Osenbach into the pit was a violation.

Although a showing of willfulness is not required, "section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence." *Ernest Matney*, 34 FMSHRC 777, 783 (Apr. 2012) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992)); see also *Freeman United*, 108 F.3d at 360. The same factors that are relevant to an aggravated conduct finding in the context of an unwarrantable failure are equally applicable here. For the reasons stated in my unwarrantable failure analysis, including the obvious and high degree of danger involved in the retrieval attempts, I find aggravated conduct on Wetzel's part constituting more than ordinary negligence. However, for the same reasons mentioned in my analysis of Lehigh's negligence, I find that Wetzel's level of negligence was "high" instead of "reckless."

Penalties

The Secretary proposes a penalty of $23,229.00 against Respondent Lehigh and $2,900.00 against Wetzel for these violations.

The first penalty criterion considered when assessing a penalty is the history of previous violations. Wetzel does not have a prior history of 110(c) violations. Exhibit A of the Secretary's penalty petition indicates that Lehigh's violation history is quite clean.

In the case of Respondent Lehigh, the parties have stipulated that the penalty will not affect its ability to remain in business. Exhibit A shows that Lehigh is a moderately large operator and that the Tamaqua Mine is a moderately large mine. In the case of the individual penalty assessed against Respondent Wetzel, the comparable penalty criteria are intended to account for factors such as the Respondent's income and family support obligations, the appropriateness of the penalty in light of his job responsibilities, and his ability to pay. *Sunny Ridge*, 19 FMSHRC at 272. The Commission has encouraged ALJs to make specific findings as to the Respondent's net worth and income and the nature and extent of his financial obligations. *Ambrosia*, 19 FMSHRC at 824. In this case, the parties have stipulated that the proposed penalty will not affect Wetzel's personal financial obligations. (Stip. 7) I also find the proposed penalties appropriate in light of Wetzel's job responsibilities as a second shift foreman, which included assigning work and enforcing safety during his shift.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. The citation states that the violation was promptly abated in good faith when the mine's safety director conducted a safety talk with miners and discussed the new procedure for retrieving a buried dragline bucket, which had been successfully implemented and incorporated into the company's Ground Control Plan. My findings on gravity and negligence are discussed at length above. While I found the gravity of the violation to be serious based on the high likelihood of a fatal injury, I found the negligence for both Lehigh and Wetzel to be "high" rather than "reckless," as designated on the face of the citation. After considering the statutory penalty criteria, I find that $1,000.00 is an appropriate penalty to assess against foreman Wetzel for this violation, and that $6,996.00 is an appropriate penalty to assess against Respondent Lehigh.

Citation No. 8000959

MSHA Inspector David Labenski issued Citation No. 8000959 to Lehigh at its Tamaqua mine on July 3, 2013. It alleges a violation of 30 C.F.R. § 77.1710(g). The regulation states: "Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: (g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." 30 C.F.R. § 77.1710(g). Section 77.1710 is a mandatory safety standard. The citation narrative alleges:

> [A] miner descended into the Bank #8 Pit to attach a chain to the [. . .] dragline bucket from the [. . .] Dragline. [. . .] The miner who climbed down the western end of the pit was not provided with any means of fall prevention equipment when climbing into the pit. The pit measured 55 ft. deep from top of the northerly highwall to the pit floor. [. . .] Employees working in a surface coal mine shall be required to wear safety belts and lines where there is danger of falling.

Sec'y Ex. 15. The violation was designated as significant and substantial, reasonably likely to lead to lost workdays or restricted duty, and the result of the operator's moderate negligence. The violation was abated on July 8, 2013, when the mine's safety director conducted a safety talk with miners and "discussed the proper use of Personal Protective Equipment when working where there is danger of falling." *Id.*

Violation

Citation No. 8000959 alleges that Lehigh violated 30 C.F.R. § 77.1710(g) by not providing Osenbach with sufficient fall prevention equipment when he entered into the pit. Since it is undisputed that Osenbach was not wearing a safety belt and line when he entered the pit, the primary dispute among the parties is whether the situation at issue posed the sort of "danger of falling" contemplated by the standard. *Id.* The Respondent argues that this type of standard is "generally considered to address the hazard of falling from a height," while the hazard in this

case was Osenbach losing his footing on the sloped, uneven terrain, and fall protection would do nothing to address or mitigate that risk. Resp't Br. at 25. While the Respondent appears to be arguing that fall protection is only required when there is a risk of falling from a purely vertical drop, I find that fall protection may be just as necessary on a sufficiently steep slope descending to sufficient depths.

In this case, the western bank descended to depths of at least 40 feet on a slope containing unconsolidated material. (Tr. 134:14 - 135:3) While the inspector could not measure the exact angle of the slope because it was no longer present when he arrived on the scene, he concluded that it was steeper than the angle of repose based on Osenbach telling him that rock had slid down to the bottom of the pit from the top. (Tr. 144:15-23) Additionally, Danny Baer, the dragline operator at the time, told the inspector that he would not walk down that slope because it was too steep to go down. (Tr. 77:4-15) And in a deposition, the mine's lead foreman Lou Mitchalk acknowledged that he believed fall protection was required in this situation. (Tr. 241:18 – 242:6) Photographic evidence also appears to depict a dangerously steep slope on the west side of the pit. (*See* Sec'y Ex. 16.) I find these facts and the inspector's reasonable conclusions to be sufficient to trigger the requirements of this standard. Whether Osenbach had been standing near the vertical highwall or the sloped western bank, he would have been at risk of dangerously falling or tumbling to the bottom of the pit without sufficient fall protection. (Tr. 144:11-14)

For the reasons above, I find the Secretary has established a violation of the standard.

Gravity and S&S

Inspector Labenski designated this violation as S&S and reasonably likely to result in lost workdays or restricted duty. (Sec'y Ex. 15) I have already found a violation of the mandatory safety standard at section 77.1710(g), satisfying the first element of the *Mathies* test for S&S.

Regarding the second *Mathies* step, Labenski concluded that the violation contributed to the hazard of a fall, and I agree. Without fall protection, Osenbach was reasonably likely to fall down a steep slope containing unconsolidated material. (Tr. 129:11-18; 134:10-21) While a miner could still lose his footing and hit the ground with fall protection, he would not roll to the bottom of the pit. (Tr. 144:11-14) Additionally, the fact that Osenbach's attempts were conducted at night with inadequate lighting increased the likelihood of a fall.

Under the third and fourth *Mathies* elements, I find that, assuming the occurrence of the fall hazard, a reasonably serious injury such as a sprain or broken bones was reasonably likely to result from Osenbach's unsecured entry into the pit. (Tr. 134:10-13) This is primarily due to the 40 foot height of the pit and the steepness of the slope.

Based on my findings above, I find that the gravity of this violation was moderately serious because it was reasonably likely to lead to a bruise or sprain for Osenbach.

Negligence

I find Lehigh's negligence to be moderate based on foreman Wetzel's direct knowledge and authorization of the violation. (Tr. 136:8-10) Inspector Labenski did not assess the level of negligence any higher than that because Lehigh provided Osenbach with a rope to assist him in his descent. (Tr. 136:24-25) While Labenski found that the rope was insufficient to satisfy the fall protection requirements, he concluded that it did mitigate the company's negligence slightly by demonstrating some effort to meet the necessary standard of care. I agree with Labenski's finding and affirm the moderate negligence designation.

Penalty

The Secretary requests that I assess a penalty of $285.00 against Respondent Lehigh for this alleged violation.

Exhibit A of the Secretary's penalty petition indicates that Lehigh had a minor history of violations. The exhibit also indicates that Lehigh is a moderately large operator and that the Tamaqua Mine is a moderately large mine. The parties have stipulated that the penalty will not affect the operator's ability to remain in business.

The remaining penalty criteria are negligence, gravity, and good faith abatement efforts. The evidence shows that the violation was promptly abated in good faith when the mine's safety director conducted a safety talk with miners discussing the proper use of fall protection when working where there is a danger of falling. My findings on gravity and negligence are discussed at length above. I found the gravity and negligence to both be moderate. After considering the statutory penalty criteria, I find that $285.00 is an appropriate penalty to assess against Respondent Lehigh for this violation.

ORDER

In view of the above findings, conclusions, and settlement approval, within 30 days of the date of this decision the Secretary **IS ORDERED** to modify Citation No. 8000958 to reduce the level of negligence from "reckless disregard" to "high."

WHEREFORE, it is **ORDERED** that Lehigh pay a penalty of $7,281.00 and that Wetzel pay a penalty of $1,000.00 within thirty (30) days of the filing of this decision.[8]

L. Zane Gill
Administrative Law Judge

[8] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

Jennifer L. Bluer, Esq., U.S. Department of Labor, Office of the Solicitor, 170 South Independence Mall West, Suite 630E, The Curtis Center, Philadelphia, PA 19106

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1500, Pittsburgh, PA 15222