FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. N.J. WILBANKS CONTRACTOR, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2012-275-M A.C. No. 09-01204-278900 (W276) Mine: Warren County Quarry

DECISION AND ORDER

Appearances: Jean C. Abreu, Esq., Shelly Anand, Esq., and Sophia Haynes, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Petitioner;

Douglas Flint, Esq., and Kristyn Atkinson, Esq., Flint, Connolly & Walker, LLP, for Respondent.

Before: Judge L. Zane Gill

This proceeding is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815. This case involves one section 104(d)(1) citation and two section 104(d)(1) orders issued by the Secretary to Respondent N.J. Wilbanks Contractor, Inc. ("N.J. Wilbanks").

I. STATEMENT OF THE CASE

On August 25, 2010, the Secretary issued Citation No. 8546331 and Order Nos. 8546333 and 8546335 following MSHA's investigation into a hazard complaint lodged against N.J. Wilbanks. Citation No. 8546331 and Order Nos. 8546333 and 8546335 each allege a violation of 30 C.F.R. § 56.14101(a)(1) for failing to have a functioning service brake system on three separate Caterpillar 631E scrapers.[1] The Secretary proposed a specially-assessed penalty of $26,600.00 for each violation for a total combined proposed penalty of $79,800.00.

[1] Section 56.14101(a)(1) provides that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(1).

On April 15, 2016, the Secretary filed a Motion for Adverse Inference and Exclusion of Testimony Due to Respondent's Spoliation of Evidence. (Mot. at 1–14) The Secretary alleges that Respondent failed to produce and possibly destroyed inspection logs noting the condition of the mobile equipment involved in this matter. (*Id.* at 2) The Secretary states that the company's superintendent showed the inspection logs to MSHA Inspector Raymond Dubics at the time of the inspection. (*Id.* at 3) The Secretary requests that an adverse inference be drawn against Respondent with respect to the content of the inspection logs and that any testimony from Respondent's witnesses regarding the condition of the mobile equipment on or before the date of the inspection be excluded from the record. (*Id.* at 4) Respondent offered its response to the motion at hearing, asserting that Respondent was unaware of the existence of such logs, that the Secretary delayed in requesting these logs, and that the adverse inference requested by the Secretary would actually support Respondent's case. (Tr. 14:8–16:9) At hearing, I informed the parties that I would issue my ruling on the motion with the decision. (Tr. 22:8–24:15) For the reasons provided below, the Secretary's motion is **DENIED**.[2]

I held a hearing on April 19, 2016, in Atlanta, Georgia. The Secretary presented testimony from N.J. Wilbanks President Chris Wilbanks and MSHA Inspector Raymond Dubics. Respondent presented testimony from Chris Wilbanks and former N.J. Wilbanks Project Manager Justin Crowe. The parties each submitted post-hearing briefs and reply briefs.

II. ISSUES

For each of the three violations, the Secretary asserts that N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) by failing to have functioning service brakes on three Caterpillar 631E

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[2] Spoliation refers to "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Oil Equipment Co. v. Modern Welding Co.*, 661 F. App'x 646, 652 (11th Cir. 2016) (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)). Sanctions for spoliation of evidence are intended "to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). When a party does not preserve evidence in its control, a judge can draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009). Excluding evidence is an extreme sanction not to be imposed absent a showing of willful deception or flagrant disregard. *Gray v. N. Fork Coal Corp.*, 35 FMSHRC 2349, 2360 (citations omitted). To determine what sanctions are warranted for spoliation of evidence, factors to consider are the extent of prejudice caused by the spoliation based on the importance of the evidence, whether that prejudice can be cured, and the culpability of the spoliator. *Oil Equipment Co.*, 661 F. App'x at 652.

Here, because the condition of the mobile equipment was the subject of MSHA's inspection and alleged violations, I find that N.J. Wilbanks had a duty to preserve the inspection logs in anticipation of litigation. However, because the MSHA inspector can testify to the content of the inspection logs, the prejudice suffered to the Secretary can be cured and does not warrant the severe sanctions requested. Respondent's inability to produce the inspection logs may be factored into my weighing of the evidence and assessing credibility in the final decision. Accordingly, the Secretary's motion is **DENIED**.

scrapers. (Sec'y Br. at 10–11) The Secretary asserts that the violations were significant and substantial ("S&S"), inasmuch as they were highly likely to result in a fatality, and a result of the operator's reckless disregard and unwarrantable failure. (*Id.* at 12–17) In contrast, Respondent argues that the work site where MSHA issued the violations was not subject to MSHA's jurisdiction. (Resp't Br. at 8–11) Respondent further asserts that the scrapers were equipped with functioning brakes and challenges the Secretary's negligence and gravity determinations. (*Id.* at 3–8, 12–15)

Accordingly, the following issues are before me: (1) whether MSHA had jurisdiction over the work site where MSHA cited N.J. Wilbanks; (2) whether N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) as alleged in Citation No. 8546331 and Order Nos. 8546333 and 8546335; (3) whether the Secretary's gravity determinations are properly designated for the three violations, including the S&S designations; (4) whether Respondent's negligence for the violations is properly designated as "reckless disregard" and constitutes an unwarrantable failure; and, (5) whether the proposed penalties are appropriate.

III. FACTUAL BACKGROUND

A. N.J. Wilbank's Work at APAC Mid-South Project

On June 21, 2010, N.J. Wilbanks entered into a subcontract with general contractor Brasfield & Gorrie to perform site development work at a site owned by APAC Mid-South in Camak, Georgia. (Tr. 41:12–20, 44:15–45:9; Ex. S–3) The project was listed as the "APAC Plantation Quarry" project per Brasfield & Gorrie's contract with N.J. Wilbanks. (Ex. S–3) The location, now known as Warren County Quarry,[3] would eventually be used to extract and process granite. (Tr. 64:20–65:18) Hence, owner APAC Mid-South was issued a state surface mining permit on December 15, 2009, and an MSHA Identification Number on August 25, 2010, for the site. (Exs. S–4, S–5)

N.J. Wilbanks commenced work at the Warren County Quarry site on August 15, 2010. (Tr. 45:10–21; Ex. S–3) The contracted project involved N.J. Wilbanks performing tasks such as site grading, drilling and blasting rock, and constructing dams, as well as laying down belt structures, crushers, and shakers, and hauling clean rock to designated locations. (Tr. 65:1–18; Ex. S–3) The work took approximately two years to complete. (Tr. 171:6–8)

B. MSHA Inspection: August 25, 2010

In August 2010, MSHA received a telephone complaint alleging several safety issues at the Warren County Quarry, including a broken air conditioner, defective equipment brakes, document falsification, and inadequate employee training. (Tr. 54:21–55:11) MSHA assigned Inspector Raymond Dubics to investigate the allegations. (Tr. 55:19–24) Dubics traveled to the mine on August 25, 2010, to perform an inspection and found subcontractor N.J. Wilbanks working on the property. (Tr. 55:19–56:9; Exs. S–7, S–8, S–9, S–10) Upon arriving at the site, Dubics asked for a supervisor and was directed to plant supervisor Steve Bishop. (Tr. 56:10–24)

[3] In addition to Plantation Quarry, Warren County Quarry has also been referred to as Camak Quarry. (Tr. 53:23–54:2, 206:11–207:4)

Dubics explained to Bishop that MSHA received a hazard complaint and would need to inspect the site. (Tr. 57:2–12) Dubics then traveled with Bishop around the site and observed some equipment moving dirt in addition to foot traffic in the area. (Tr. 57:10–64:19; Ex. S–6) Dubics asked Bishop about their activities at the site and testified that Bishop explained that N.J. Wilbanks was building a plant to be used for mining and processing granite, which would go into operation approximately three years later. (Tr. 64:20–65:18)

Dubics informed Bishop that he needed to test the brakes on the site's mobile equipment. (Tr. 57:5–6) Bishop allowed, but informed Dubics beforehand that he would find that the brakes on some of the equipment did not work. (Tr. 65:19–22, 66:3–5) Dubics tested all the mobile equipment on site in a slightly downhill gully, which Dubics estimated to be at a one percent grade. (Tr. 66:6–16, 68:3–23) The rest of the work site was relatively flat. (Tr. 127:21–25, 202:3–5; Ex. S–6) Dubics tested the mobile equipment empty because he was told the brakes did not work and did not want to create an additional hazard by adding a load. (Tr. 66:17–24) To conduct the tests, Dubics asked each equipment operator to apply the equipment's brakes at the top of the gully to see if the brakes would hold the equipment on the grade. (Tr. 66:8–13)

One type of mobile equipment Dubics tested was the Caterpillar 631E scraper. (Tr. 67:1–14; Ex. S–7) N.J. Wilbanks used Caterpillar 631E scrapers to perform cut and fill operations on the land. (Tr. 171:18–23) A scraper (also called a "blade") works by moving forward and scraping dirt inside its bowl. (Tr. 172:1–173:5) The scraper's gate is then closed, and the bowl is raised to a leveled position. (Tr. 173:6–25) The gate is then opened, and the dirt is dropped and raked out. (Tr. 174:1–175:5) A scraper can weigh anywhere from 15 to 35 tons and typically travels at a speed of approximately six to eight miles per hour. (Tr. 80:14–81:5, 82:21–23, 176:4–7) Because of their weight, scrapers must be pushed by dozers to have enough power to move the dirt. (Tr. 175:14–176:16)

Caterpillar 631E scrapers are equipped with pedal brakes. (Tr. 129:24–130:3, 131:5–13, 177:12–14) The scrapers also come to a stop when the scraper's bowl contacts the ground. (Tr. 175:6–8) Project manager, Justin Crowe, and N.J. Wilbanks President, Chris Wilbanks, testified that pedal brakes are not strong enough to stop scrapers carrying a load and that the only way to brake in those cases would be to drop the bowl. (Tr. 183:16–20, 225:21–226:2) Crowe testified that pedal brakes would only be used in limited situations, such as loading them onto trailers, moving them around a yard, spotting them, or washing them. (Tr. 177:17–22, 183:8–15)

Dubics first tested scraper Unit 109. (Tr. 66:25–70:1) Prior to the test, the unit's operator informed Dubics that the scraper's pedal brakes did not function. (Tr. 67:3–11) Dubics asked the unit's operator to demonstrate and observed for himself that the equipment did not stop when the operator depressed the foot pedal. (Tr. 67:7–11) Dubics asked the equipment operator how long the brakes had not been working and whether they had been reported. (Tr. 69:5–10) The equipment operator told Dubics that the pedal brake had never worked during the time the equipment operator used the machine. (Tr. 69:7–10) Dubics then told Bishop that Unit 109 had to be tagged out of service. (Tr. 69:16–70:1)

Dubics also tested scraper Unit 110. (Tr. 70:2–4) When the unit's operator pulled up and dropped the bowl to stop the scraper, Dubics explained to him that he needed to check the

scraper's pedal brake. (Tr. 70:7–12) The equipment operator told Dubics that the pedal brakes had not worked for two weeks, which the equipment operator had reported to Bishop personally and recorded on a pre-shift examination. (Tr. 70:11–18) Dubics testified that the equipment operator marked "NA" for no action on the pre-shift examination because the equipment operator had informed the company about the brakes before and the company took no action to repair them. (Tr. 70:19–71:3) Dubics had the equipment operator test the pedal brakes, which did not work. (Tr. 72:17–22) Dubics told N.J. Wilbanks that the scraper needed to be taken out of service and allowed the operator to drive the scraper out of the way and tag it out of service. (Tr. 71:4–9)

Lastly, Dubics tested scraper Unit 117. (Tr. 71:10–15) Similar to the other two tests, the pedal brakes on the scraper did not function and the equipment only stopped when the unit's operator dropped the scraper's bowl. (Tr. 71:17–22, 72:12–16) The unit's operator informed Dubics that he did not report the brakes in a pre-shift examination because it was his first day on the job. (Tr. 71:21–25) Dubics testified that the unit's operator told him that the company was teaching him to drive the scraper with no pedal brakes, which Bishop confirmed. (Tr. 71:25–72:11) Dubics then had Unit 117 tagged out of service as well. (Tr. 72:25–73:2)

As a result of the tests, Dubics issued three imminent danger orders on August 25, 2010, to N.J. Wilbanks, stating that the company was operating the three scraper units without service brakes and placing them out of service until the company made the proper repairs.[4] (Tr. 73:2–74:9; Ex. S–7)

In addition, Dubics issued Citation No. 8546331 and Order Nos. 8546333[5] and 8546335, separately alleging that the brakes on scraper Units 109, 110, and 117, respectively, "would not stop the scrapper [sic] on the normal grade traveled empty," in violation of 30 C.F.R. § 56.14101(a)(1). (Tr. 77:14–92:2; Exs. S–8, S–9, S–10) Dubics designated each of the three violations as "S&S" and "reasonably likely" to result in a "fatal injury" to "one miner." (*Id.*) The following day, on August 26, 2010, he modified the likelihood of injury for each of the violations to "highly likely." (Tr. 81:13–82:7, 87:17–21, 91:8–12; Exs. S–8, S–9, S–10) Dubics also modified the violations to classify each as an "unwarrantable failure" on August 26, 2010. (Exs. S–8, S–9, S–10) Dubics originally designated each of the three violations as a result of the company's "high negligence," but approximately one month later, on September 16, 2010, modified the violations to increase the level of negligence to "reckless disregard." (Exs. S–8, S–9, S–10; Tr. 91:22–92:2) Dubics modified the violations' negligence designations after returning to his office and reviewing the violations with his supervisor. (Tr. 138:4–141:4)

N.J. Wilbanks abated Citation No. 8546331 and Order Nos. 8546333 by removing scraper Units 109 and 110 from the work site. (Exs. S–8, S–9) N.J. Wilbanks abated Order. No. 8546335 by repairing the brakes on Unit 117, which stopped the unit on the steepest grade at the work site when re-tested. (Ex. S–10) N.J. Wilbanks also had its supervisor reinstruct each

[4] Dubics issued imminent danger Order Nos. 8546330, 8546332, and 8546334, for the three Caterpillar 631E scrapers, Units 109, 110, and 117, respectively. (Ex. S–7)

[5] Dubics initially issued Order No. 8546333 as a section 104(d)(1) citation, but later modified the violation to a section 104(d)(1) order. (Ex. S–9)

scraper unit's operator on proper pre-shift examinations for mobile equipment. (Exs. S–8, S–9, S–10) Consequently, Dubics terminated each of the violations. (*Id.*)

IV. LEGAL PRINCIPLES

A. Mine Act Jurisdiction

Section 4 of the Mine Act provides, in part, that "[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h)(1) of the Act defines "coal or other mine" to include "lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, *or to be used in*, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form . . . or used in, *or to be used in*, the milling of such minerals[.]" 30 U.S.C. § 802(h)(1) (emphasis added).

Section 4 unambiguously expresses Congress' intent to regulate the mining industry to the full extent under the Commerce Clause, which includes the power to regulate mines whose products are sold entirely intrastate. *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004). In the legislative history of the Act, Congress instructed "that what is considered to be a mine and to be regulated under this Act be given broadest possibl[e] interpretation" and that "doubts be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, at 14 (1977).

B. Significant and Substantial

A violation is S&S "if, based on 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). To establish a S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has recently explained that in analyzing the second *Mathies* element, Commission Judges must determine "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." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element exists and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC

1573, 1574 (July 1984)). Finally, it is well settled that redundant safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res. LP*, 717 F.3d at 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016); *Buck Creek*, 52 F.3d at 135; *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015); *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

C. Negligence

The Commission evaluates negligence using "a traditional negligence analysis." *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted)). Because the Commission is not bound by the Secretary's regulations set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, the Commission considers 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. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically and thus find "high negligence" in spite of mitigating circumstances or "moderate" negligence without identifying mitigating circumstances. *Id.* In this respect, the Commission has recognized that the gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).

The Commission has not opined specifically as to what constitutes "reckless disregard." However, Commission judges have noted that the term "reckless" describes conduct characterized by "the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk[.]" *Stillhouse Mining, LLC*, 33 FMSHRC 778, 803 (Mar. 2011) (ALJ) (citing *Reckless, Black's Law Dictionary* (8th ed. 2004)). "Deliberate action contrary to the Mine Act with the conscious knowledge that such activity may seriously endanger worker constitutes reckless disregard." *Winn Materials LLC*, 36 FMSHRC 1430, 1435 (May 2014) (ALJ) (citing *Roxcoal, Inc.*, 36 FMSHRC 625, 634 (ALJ) (Mar. 2013)).

D. Unwarrantable Failure

The Commission has held that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," or "reckless disregard." *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length

of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Id.* 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. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). All relevant facts and circumstances of each case must be examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Mine Act Jurisdiction

Respondent asserts that MSHA did not have jurisdiction over the work site where Dubics issued the disputed violations and that the company lacked fair notice that MSHA would exert jurisdiction. (Resp't Br. at 8–11) Respondent reasons that the work site was not yet a mine at the time of the violations and that the company had not yet been given an MSHA ID number at the time of inspection. (*Id.*) In contrast, the Secretary maintains that the work site falls within the Mine Act's definition of "mine" and that N.J. Wilbanks did have fair notice that it would be subject to MSHA's jurisdiction based on the contract the company signed. (Sec'y Br. at 8–10)

Here, N.J. Wilbanks entered into a subcontract to perform site development work for a project identified as "APAC Plantation Quarry." (Ex. S–3) The quarry would be used to extract and process granite. (Tr. 64:20–65:18) N.J. Wilbanks' contract stated that its work on the site included tasks such as "blasting in pit area," "delivery of all clean rock to the portable crusher" that would be set up, and "adherence to MSHA regulations." (Ex S–3) N.J. Wilbanks' current president, who signed the subcontract, also testified that per the contract, the company knew MSHA regulations would "come [in]to play at some point in time." (Tr. 230:22–231:4, 73:20–22; Ex. S–3) However, the company was under the impression that MSHA regulations would not apply to every stage of the project, but only after the date when crushing operations began on site. (Tr. 193:10–195:4, 209:3–210:5) General contractor Brasfield & Gorrie told N.J. Wilbanks that the date would be in early November 2010, and thus, N.J. Wilbanks assumed that the work site fell under OSHA's jurisdiction until that date. (Tr. 195:19–196:23)

The Mine Act defines "mine" as any land or property "used in, *or to be used in* . . . extracting such minerals from their natural deposits[.]" 30 U.S.C. § 802(h)(1) (emphasis added). Considering Congress's intent that the statute be interpreted broadly in favor of MSHA jurisdiction, courts have held that the "to be used in" language would include properties that are not yet producing mine products, but are preparing to begin production. *See Cyprus Indus. Minerals Co. v. Fed. Mine Safety & Health Admin.*, 664 F.2d 1116, 1117–20 (9th Cir. 1981) (holding that activities conducted in preparation for future mining may bring a site within the definition of a "mine" if the activities were in contemplation of mining); *see also Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 390 (3d Cir. 1992) (recognizing that the Mine Act

refers to three time frames in section 3(h), including the term "to be used in" meaning contemplated use).

Despite Respondent's arguments, the terms of N.J. Wilbank's contract explicitly gave notice from the project's onset that the subject work site would be a "quarry" and used in mineral extraction, thus falling squarely into the statutory definition of a "mine" subject to MSHA's jurisdiction. Respondent had knowledge that its activities on site were conducted in contemplation of future mining. Thus, Respondent's mistaken belief that MSHA's jurisdiction would not apply to every stage of the project is not reasonable given that the plain language of the statute clearly and unambiguously encompasses any property to be used in mineral extraction, even when such mineral extraction has not commenced. Moreover, N.J. Wilbanks had received an MSHA ID in 2008 for work at another quarry and therefore should have known the extent of MSHA's jurisdiction permitted by statute given this prior experience. (Tr. 241:8–242:9; Ex. S–5)

Because the statute must be interpreted broadly in favor of the Mine Act's jurisdiction, I conclude that MSHA had jurisdiction over the site where N.J. Wilbanks performed work at the time of Dubic's inspection.

B. Citation No. 8546331, Order Nos. 8546333 and 8546335 – Service Brakes

1. Fact of the Violations

For Citation No. 8546331 and Order Nos. 8546333 and 8546335, the Secretary asserts that N.J. Wilbanks violated 30 C.F.R. § 56.14101(a)(1) by failing to have functioning service brakes on three Caterpillar 631E scrapers that could stop and hold the machines with their typical load on the maximum grade they travel. (Sec'y Br. at 10–11) According to the Secretary, the pedal brakes on each scraper are its "service brakes" and did not work when tested. (*Id.*) In contrast, Respondent argues that it did not violate the standard because each scraper could stop by dropping its bowl, a method which Respondent considers to be each scraper's primary service brake system. (Resp't Br. 3–7)

In this case, the pedal brakes on each of the three scrapers did not function from the moment they arrived on the site. (Tr. 221:24–222:3) Inspector Dubics considered these pedal brakes to be each machine's "service brakes." (Tr. 67:5–11, 69:5–10) To confirm, Dubics contacted the manufacturer, Caterpillar, who informed Dubics that the foot pedal, which applies brake pads to the scraper's four wheels, is what the manufacturer considered to be the service brake. (Tr. 131:5–20) N.J. Wilbanks' manager of the project, Justin Crowe, testified that although the scrapers were equipped with pedal brakes, the primary way to stop these machines was to lower the bowl, which was the industry's standard. (Tr. 177:4–22) According to Crowe, this method would stop the scraper immediately. (Tr. 183:21–184:4) N.J. Wilbanks President, Chris Wilbanks, also testified that in his experience working in the grading business, he had always used the bowl to stop the scrapers. (Tr. 222:4–223:23) Both Crowe and Wilbanks explained that the pedal brakes would not be strong enough to stop the scrapers if they carried a load and the only way to stop the machines in those situations would be to drop the bowl. (Tr. 183:16–20, 225:21–226:2) Crowe testified that the pedal brakes would only be used in limited

circumstances, such as loading or unloading the scrapers onto trailers, moving the scrapers around a yard, spotting the scrapers, or washing the scrapers. (Tr. 177:17–22, 183:8–15)

The cited standard, 30 C.F.R. § 56.14101(a)(1), provides: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(1). The Commission has previously considered the "service brakes" on a Caterpillar 631 scraper to be its installed wheel brakes, which are "activated with a pedal in the operator's compartment." *Missouri Rock, Inc.*, 11 FMSHRC 136, 137 (Feb. 1989). The Commission has also upheld determinations that dropping a scraper's bowl is not always a safe and reliable braking method, noting that the bowl "alone may not effectively stop the scraper in all instances." *Id.* at 140; *see also Knife River Constr.*, 38 FMSHRC 1289, 1293 (June 2016) (holding that a judge did not err in relying on an inspector's testimony that lowering the cutting tool to stop a scraper could put an operator at risk of injury in certain situations).

Based on the above, I reject Respondent's argument that dropping the bowl on each scraper qualified as a "service brake system." Rather, I determine that the Secretary has offered a reasonable interpretation of the standard that the scrapers' foot pedal brakes are its "service brakes" given that this interpretation is consistent with the Commission's prior findings. I also note that although Respondent demonstrated that the scrapers had an alternative method of braking, this method would not be ideal in all instances as Crowe testified to a number of situations where the pedal brakes would be used instead of dropping the bowl, including loading the scrapers onto a trailer. Given that N.J. Wilbanks subcontracted to work on the site for only a specific period of time, it can reasonably be inferred that the company would eventually have to move the scrapers and load them onto trailers — a task that could potentially lead to an accident if the scraper lacked a reliable braking method. It is undisputed that the pedal brakes on each of the scrapers did not function. Accordingly, I determine that the N.J. Wilbanks failed to have functioning service brakes on the three scrapers.

For the reasons stated, I conclude that Respondent violated 30 C.F.R. § 56.14101(a)(1) as alleged in Citation No. 8546331 and Order Nos. 8546333 and 8546335.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. N.J. Wilbank's three violations of section 56.14101(a)(1) establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violations created a reasonable likelihood the hazard that section 56.14101(a)(1) aims to prevent would occur. Section 56.14101(a)(1) requires mobile equipment to be equipped with a service brake system capable of stopping and holding the equipment in order to prevent the equipment from accidentally rolling and hitting miners. In this case, Dubics testified that there was some foot traffic in the area where the scrapers were operating. (Tr. 57:10–19) However, Respondent claims that the three scrapers would have been unlikely to hit a person because dropping the bowls could stop the machines on demand. (Resp't Br. at 14; Tr. 183:21–184:4) In addition, the

area was relatively flat, and the scrapers typically traveled at six to eight miles per hour. (Tr. 80:14–81:5, 127:21–25, 202:3–5) Nevertheless, Crowe, the project's manager, testified about a number of situations in which the scrapers would use pedal brakes instead of dropping the bowl, including loading them onto trailers, moving them around a yard, spotting them, or washing them. (Tr. 177:17–22, 183:8–15) Assuming continued normal mining operations, I find that there was a reasonable likelihood that N.J. Wilbanks would eventually perform some, if not all, of these tasks that utilize the scrapers' pedal brakes instead of bowl dropping. For example, as noted previously, N.J. Wilbanks would eventually have to move the scrapers and load them onto trailers when it finished its contract. Given that the pedal brakes did not function, I conclude that the hazard of miners being hit by the scrapers was reasonably likely because the scrapers performed various tasks where the pedal brakes were primarily used. Consequently, I determine that the Secretary has satisfied the second element of the *Mathies* test. However, taking into account Respondent's arguments, I conclude that the Secretary has not proven that the gravity should be designated as "highly likely," but should instead be designated as "reasonably likely."

With regard to the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a serious injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element has been realized. *Newtown Energy, Inc.*, 38 FMSHRC at 2045. If a scraper hit a miner because the service brake did not function, the miner would likely be crushed given that each scraper weighed anywhere from 15 to 35 tons. (Tr. 82:19–25, 176:4–7) Consequently, I determine that the hazard of a scraper hitting a miner would be reasonably likely to result in injuries, thus satisfying the third *Mathies* element. Furthermore, I determine that such injuries would be reasonably likely to be fatal given the size and weight of the mobile equipment, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 8546331 and Order Nos. 8546333 and 8546335 were appropriately designated as S&S. For reasons stated above, I determine the gravity for each of the violations to be "reasonably likely" to result in "fatal" injuries to "one miner."

3. Unwarrantable Failure and Negligence

The Secretary asserts that N.J. Wilbanks' conduct amounted to reckless disregard and an unwarrantable failure in each of these three violations. (Sec'y Br. at 13–17) In support, the Secretary argues that Respondent admitted to bringing the equipment onto the work site knowing their pedal brakes were defective and allowed the condition to exist for ten days. (Sec'y Br. at 13) The Secretary notes that the condition was highly dangerous and the operator made no effort to abate the condition. (*Id.* at 14–17) In contrast, Respondent claims it was unaware of MSHA's jurisdiction and the applicable regulations. (Resp't Br. at 15) Respondent also asserts that while it knew the pedal brakes were defective, Respondent did not display any lack of care because it knew the machines would be able to stop by dropping the bowl. (Resp't Reply Br. at 4)

In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *See IO Coal Co.*, 31 FMSHRC at 1350–51. The record reveals multiple aggravating factors regarding these violations.

In term of knowledge and obviousness, N.J. Wilbanks acquired the scrapers knowing that the pedal brakes were defective. (Tr. 221:24–222:3) Crowe admitted that he would not have chosen the three scrapers had the company realized MSHA regulations applied because their pedal brakes did not work. (Tr. 197:16–24) I have previously determined that the company should have known MSHA regulations applied.[6] *See* discussion *supra* Part V.A. The work site's supervisor, Bishop, also trained workers to operate the equipment without using pedal brakes. (Tr. 71:25–72:11) Therefore, I conclude that N.J. Wilbanks had knowledge of the violation and its duty to maintain the service pedal brakes under the standard. The involvement of supervisors Crowe and Bishop also supports an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC at 711. Furthermore, multiple employees reported the defective conditions to a supervisor and on pre-shift examinations. (Tr. 70:13–71:3, 75:7–76:3) Given the reports and the company's knowledge, I thus conclude that the conditions were obvious.

Regarding the length of time and abatement, the conditions lasted approximately ten days as N.J. Wilbanks commenced work on site on August 15, 2010. (Tr. 45:10–21, 70:10–12, 220:12–15) In terms of abatement, the Commission focuses on compliance efforts made prior to the issuance of the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Although problems with the scrapers' pedal brakes had been noted to a supervisor and on pre-shift examinations, the company took no action to repair the brakes. (Tr. 70:13–71:3, 75:7–76:3)

Finally, the violations posed a high degree of danger because they were reasonably likely to cause a serious or fatal accident as discussed above. *See* discussion *supra* Part V.B.2. Further, the condition affected three scraper units, which I consider to be extensive. (Exs. S–8, S–9, S–10)

The other unwarrantable failure factor appears neither mitigating nor aggravating. The Secretary did not present evidence that N.J. Wilbanks had been placed on notice by MSHA that greater efforts were required for compliance with the service brake standard. Accordingly, I afford this factor no weight in the unwarrantable failure analysis.

After considering all the factors, particularly the violation's obviousness, the company's knowledge, and the involvement of multiple supervisors, I conclude that Citation No. 8546331 and Order Nos. 8546333 and 8546335 were a result of N.J. Wilbanks' unwarrantable failure.

However, I do not find that N.J. Wilbanks' negligence rose to the level of reckless disregard. Reckless disregard has been characterized by deliberate action, conscious knowledge of substantial risk, and disregard or indifference to that risk. *See Stillhouse Mining, LLC*, 33 FMSHRC at 803; *Winn Materials, LLC*, 36 FMSHRC at 1435; *Roxcoal, Inc.*, 36 FMSHRC at 634. Here, I do not find that the company displayed complete disregard or indifference to the risk of miners being injured by the mobile equipment given that the company trained scraper operators to use an alternative braking method that would be effective in many, but not all,

[6] I also find the company's claim that it did know the defective pedal brakes constituted a violation because it did not know MSHA regulations applied suspect given that OSHA's regulation regarding service brakes nearly mirrors that of MSHA, providing that scrapers "shall have a service braking system capable of stopping and holding the equipment fully loaded[.]" 29 C.F.R. § 1926.602(a)(4).

instances. Nevertheless, the company failed to meet the duty imposed by the standard to maintain functioning service brakes on the mobile equipment. Considering all the facts and circumstances, I conclude that N.J. Wilbanks' negligence should be designated as "high" for the three violations.

C. Penalty

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed a specially-assessed penalty of $26,600.00 for each violation for a total combined proposed penalty of $79,800.00. Respondent is a small contractor of approximately 20 to 25 employees. (Sec'y Br. at 19; Resp't Reply Br. at 6) Respondent operates under multi-million dollar contracts, as demonstrated by the contract it signed with Brasfield & Gorrie. (Sec'y Br. at 19; Ex. S–3) However, Respondent notes that their contract prices include business costs and that its actual net profit is less than their contract prices. (Resp't Reply Br. at 6) Respondent asserts that the proposed penalty would affect its ability to continue in business, but has not provided any additional information regarding its ability to pay. (Resp't Br. at 15) The violations in this docket were issued to N.J. Wilbanks when it first began operations at the Warren County Quarry, and thus N.J. Wilbanks had no history of violations prior to Dubics' August 25, 2010, inspection. Respondent's history of violations show no other violations of 30 C.F.R. § 56.14101(a)(1) from August 25, 2010, to August 25, 2012, and only six other citations were issued to N.J. Wilbanks at the mine during that period. (Ex. S–1)

In regard to the violations themselves, I have affirmed the Secretary's S&S and unwarrantable failure determinations. However, I have lowered the gravity from "highly likely" to "reasonably likely" and the negligence from "reckless disregard" to "high." Additionally, N.J. Wilbanks demonstrated good faith abatement by removing two of the cited scrapers from service and having the other scraper repaired. (Exs. S–8, S–9, S–10) The company also worked with Inspector Dubics to implement further safety plans. (Tr. 230:6–15)

Based on the criteria above, I conclude that the Secretary's proposed penalty is inappropriate. The Secretary's special assessment was based on the Secretary's alleged gravity and negligence designations. However, I have lowered both these gravity and negligence determinations. The record therefore does not support the Secretary's special assessment.

The minimum penalty under the Mine Act for an unwarrantable failure section 104(d)(1) citation or order is $2,000.00. 30 U.S.C. § 820(a)(3)(A). Taking into account N.J. Wilbanks' small size, its lack of a history of violations, its good faith efforts to abate the violations, modifications to the violations' gravity and negligence, as well as considering all the facts and circumstances set forth above, I hereby assess a civil penalty of $2,000.00 for each of the three violations, or $6,000.00 in total.

VI. ORDER

Based on the above discussion, it is hereby **ORDERED** that Citation No. 8546331 and Order Nos. 8546333 and 8546335 be **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely" and to reduce the negligence from "reckless disregard" to "high."

WHEREFORE, it is **ORDERED** that Respondent pay a total penalty of $6,000.00 within forty (40) days of the date of this order.[7]

L. Zane Gill
Administrative Law Judge

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/ivn

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