

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

December 28, 2016

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2016-27-M
Petitioner,	:	A.C. No. 26-02780-393232
v.	:	
	:	
ACHA CONSTRUCTION, LLC,	:	Mine: Crusher 1
Respondent.	:	

DECISION

Appearances: Tara E. Stearns, Esq., and Joseph M. Lake, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Cassie Delbridge, Acha Construction, LLC, Elko, Nevada, for Respondent.

Before: Judge Paez

This docket 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”), 30 U.S.C. § 815. In dispute is one section 104(d)(1) citation issued to Acha Construction, LLC (“Acha” or “Respondent”).¹ To prevail, the Secretary must prove any cited violation “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

On August 4, 2015, the Secretary issued Citation No. 8876244 alleging Acha violated 30 C.F.R. § 56.9300(b) by failing to maintain the berms on a loading ramp at the required height. The Secretary proposed a specially-assessed penalty² of \$3,400.00, which Acha timely contested.

¹ In this decision, the hearing transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively.

² MSHA may elect to waive the regular assessment under 30 C.F.R. § 100.3 if it determines that conditions warrant a special assessment; when MSHA determines a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in section 100.3(a), and all findings shall be in narrative form. 30 C.F.R. § 100.5(a), (b); (Ex. S-4).

Chief Administrative Law Judge Robert J. Lesnick assigned me this matter on March 16, 2016. Upon proper notice to the parties, I held a hearing on October 4, 2016, in Elko, Nevada.

At the hearing, the parties stipulated to the following items verbatim in a joint exhibit:

1. Respondent is an operator within the meaning of the Mine Act.
2. At the time Citation No. 8876244 was issued, Respondent was engaged in mining activities at the Crusher 1 Mine (“the Mine”).
3. At all relevant times, the Mine’s products entered commerce or affected commerce within the meaning of the Mine Act.
4. At the time the Citation was issued, Ernie Merkley was employed by Respondent as foreman at the Mine.
5. The ramp described in the Citation leads to a loading bin attached to a crusher at the Mine.
6. During the month before the Citation was issued, one or more of Respondent’s employees regularly used a CAT 966K front-end loader (“the front-end loader”) to travel up the ramp and dump material in the loading bin.
7. The wheels on the front end loader are 32 inches high at the mid-axle point.
8. The ramp was used by one or more of Respondent’s employees to dump material into the loading bin on August 3, 5, & 6[,] 2015.
9. At the time of the inspection, Respondent had no written policy regarding the use of berms and guardrails on roadways.
10. At the time of the inspection, Respondent had never disciplined any miner for failing to comply with MSHA standards related to berms on roadways.
11. The proposed penalty of \$3,400, if paid, will not affect Respondent’s ability to remain in business.
12. Respondent abated the violation on the same day the Citation was issued.
13. Respondent has no history of violations that became final orders during the 15 months before the inspection.
14. MSHA assigned zero penalty points for Respondent’s size and the Mine size in calculating the proposed penalty.

(Joint Ex. 1; Tr. 16:5–17:21.) The Secretary presented testimony from MSHA Inspector Patrick Barney. Acha presented testimony from its former foreman Ernie Merkley and owner Cassie

Delbridge. The parties presented closing arguments at the hearing in lieu of submitting post-hearing briefs.

II. ISSUES

For Citation No. 8876244, the Secretary asserts that Acha violated 30 C.F.R. § 56.9300(b)³ by failing to maintain the berms on a ramp at the height required by the standard. (Tr. 121:17–21.) The Secretary asserts that the violation should be upheld as significant and substantial (“S&S”),⁴ inasmuch as it was reasonably likely to result in a fatality, and is a result of the operator’s high negligence and unwarrantable failure.⁵ (Tr. 121:25–123:20.) In contrast, Acha does not contest the fact of the violation but challenges the Secretary’s gravity and negligence determinations due to mitigating factors. (Tr. 123:24–124:11.)

Accordingly, the following issues are before me: (1) whether Citation No. 8876244 issued for a violation of 30 C.F.R. § 56.9300(b) was S&S; (2) whether Acha’s negligence in committing the violation is “high” and constitutes an unwarrantable failure; and (3) whether the Secretary’s proposed penalty against Acha is appropriate under section 110(i) of the Mine Act.

For the reasons set forth below, Citation No. 8876244 is **AFFIRMED** as written.

III. FINDINGS OF FACT

A. Operations at Acha’s Crusher 1

Acha operates Crusher 1, a construction sand and gravel plant located two miles south of Carlin, Nevada on the Eureka Highway. (Tr. 24:1–18.) To produce sand and gravel for construction, Acha uses front-end loaders to scoop up overburden around a given area or in a pit and feeds it into a crusher. (Tr. 25:3–16.) The employee operating the front-end loader then transports the collected material a couple hundred feet away up a ramp, which is approximately six to seven feet high at its top and has a slope of 75 degrees. (Tr. 25:3–10, 31:22–32:2, 66:18–67:4; Ex. S–1 at 1.)

³ Section 56.9300(b) provides: “Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b).

⁴ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁵ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an “unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

Upon reaching the top of the ramp, the front-end loader lifts the material overhead and dumps it into a loading bin that feeds the crusher. (Tr. 25:3–16; 73:2–6.) A front-end loader can carry up to two and a half tons of material. (Tr. 65:6–12.) The loading bin is positioned above the crusher where the material is sized, washed, and sorted into stockpiles through a system of conveyors. (Tr. 25:3–16, 31:4–9, 32:3–17.) Acha owns two front-end loaders: one Caterpillar (“Cat”) 966K and one Cat 950G. (Tr. 32:24–33:4.) On a normal operating day, Acha feeds the loading bin constantly throughout a shift, using the ramp approximately every 15 to 20 minutes. (Tr. 69:25–70:2.) Crusher 1 is a small, two-man operation where one employee operates a front-end loader while the other employee watches the crusher. (Tr. 33:12–34:2; 91:7–11.)

B. Inspection on August 4, 2015

On July 30, 2015, MSHA Inspector Patrick Barney was driving to his office when he noticed a cloud of dust coming from Acha’s Crusher 1 mine site. (Tr. 26:9–15.) He decided to conduct a spot inspection and pulled into the mine where Acha foreman Ernie Merkley⁶ had been on duty. (Tr. 26:14–21; Ex. S–15 at 1.) Barney issued a citation for the dust and served it to Merkley. (Tr. 26:22–27:5.)

Five days later, on August 4, 2015, Barney returned to the Crusher 1 mine site to continue his spot inspection after Cassie Delbridge, the mine’s owner, informed him that Acha had abated the dust violation and was ready to terminate the citation. (Tr. 26:22–27:5.) Barney arrived at the mine at approximately 6:00 a.m. (Tr. 28:8–11.) At the time, it was light out, and the weather was clear and cool. (Tr. 28:8–11.) As soon as he parked, Barney attempted to speak with foreman Merkley. (Tr. 28:1–20.) Merkley was sitting inside the mine’s Cat 950G front-end loader. (Tr. 36:15–20.) According to Barney, Merkley became upset and left the area without speaking to Barney. (Tr. 36:21–25; Ex. S–3 at 3.) Merkley did not accompany Barney as he continued his spot inspection that day, despite normal practice for a member of mine management to do so. (Tr. 40:4–16.) Instead, mine employee Luis Madris stayed with the inspector. (Tr. 36:24–37:1; Ex. S–3 at 3.)

Inspector Barney advised Madris to call Delbridge, who was responsible for safety at Acha. (Tr. 39:3–6; Ex. S–3 at 3.) Barney then noticed that the mine’s Cat 966K front-end loader had been left unattended without chocks in violation of MSHA’s standard, and he issued a second citation to the mine. (Tr. 39:10–15; Ex. S–16.) After Madris abated the violation by placing chocks on the front-end loader, Barney saw the mine’s other front-end loader on the ramp to the loading bin. (Tr. 40:20–23.) From 100 feet away, Barney noticed that the berms along the ramp were not high enough under MSHA’s standard, which requires berms to be at least mid-axle height of the equipment normally used on a roadway. (Tr. 40:22–41:1; Exs. S–2,

⁶ Ernie Merkley has worked in mining since 1993. (Tr. 86:1–2.) Before working for Acha, Merkley worked for Boehler Construction and Staker Parsons Companies. (Tr. 86:10–11; Ex. R–6.) During rebuttal testimony, Inspector Barney revealed that Merkley was terminated from his employment at Staker Parsons for violating the company’s safety policy on locking and tagging out equipment. (Tr. 118:7–119:17.) There is no evidence in the record that Acha had knowledge of the reasons behind Merkley’s termination prior to hiring him, nor did Merkley himself comment on the incident at hearing.

R-2.) Barney testified he could clearly see the loader tire behind the left-hand berm and tell the berm was not high enough. (Tr. 83:8-10.)

A berm is a wall of dirt designed to guard against mobile equipment going off elevated roadways, which typically include ramps. (Tr. 71:1-7, 62:21-24; Exs. S-2, R-2.) Berms help prevent mobile equipment from rolling over, which could lead to injury. (Tr. 70:14-21, 73:15-23.) Such injuries could include cuts from broken glass, neck and/or back injuries, and suffocation from heavy material, like overburden, falling from the elevated scoop of a front-end loader and burying the equipment operator in the cab. (Tr. 73:15-23.)

Along the ramp, Inspector Barney identified sections of berm that appeared nonexistent. (Tr. 41:3-7; Exs. S-2, R-2.) Barney walked over to the ramp to take photographs and measurements of the berms and front-end loaders. (Tr. 44:16-20.) The berm on the left-hand side facing the loading bin varied from six to 19 inches, and the berm on the right-hand side measured 25 inches. (Tr. 44:23-45:1; Ex. S-3 at 3.) The mid-axle height of the Cat 966K measured 32 inches, and the mid-axle height of the Cat 950G measured 28 inches. (Tr. 48:2-17; Exs. S-3 at 3, S-1 at 4-5.) After taking measurements, Barney found Merkley to ask about the condition. (Tr. 50:14-17.) Barney testified that he learned from Merkley that the condition had existed for at least five days and that the plant normally operated in this condition. (Tr. 51:1-3; Ex. S-3 at 3.) Merkley knew berms must be built to the mid-axle height of routinely-used equipment. (Tr. 51:5-6, 66:1-4, 89:4-6.)

Barney then issued section 104(d)(1) Citation No. 8876244 for failing to maintain the berms at the required height. (Tr. 58:18-22; Ex. S-1.) Barney wrote in relevant part:

At the loading bin the berms were measured at 28 [sic]⁷ inches on the right side and 6 to 19 inches on the left. The Front End Loader normally used to load the bin measured 32 inches at the mid-axle height. This ramp is used constantly to load the plant. The ramp is approximately 7 feet high with a 75 degree slope. In the event of an accident involving a rollover fatal injury would reasonably expected to occur. Ernie Merkley-Supervisor engaged in aggravated [sic] conduct constituting more than ordinary negligence in that he is the operator of the front end loader and allowed the condition to exist for multiple shifts.

(Ex. S-1 at 1.) Barney designated the citation as an S&S violation that was reasonably likely to result in a fatal injury to one miner. (Ex. S-1 at 1; Tr. 79:24-80:12.) He also characterized Acha's level of negligence as high. (Ex. S-1 at 1; Tr. 77:10-15.)

To abate Citation No. 8876244, Acha rebuilt the berms on the ramp. (Tr. 60:14-19; Ex. S-1 at 2.) Inspector Barney terminated the citation around 1:30 p.m. on August 4, 2015. (Tr. 60:14-19; Ex. S-1 at 2.) Barney later discussed the citation with Delbridge, who had no questions or comments at the time. (Tr. 61:1-18.)

⁷ Barney acknowledged a typo; the actual berm height was 25 inches. (Tr. 63:10-24.)

IV. PRINCIPLES OF LAW

A. Berms or Guardrails under 30 C.F.R. § 56.9300(b)

Section 56.9300(a) requires operators to provide and maintain berms or guardrails on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. 30 C.F.R. § 56.9300(a). Section 56.9300(b) further provides that berms “shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.” 30 C.F.R. § 56.9300(b).

B. Elements for S&S Violation

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 has been realized 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 further found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280–81 (Oct. 2010) (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). Finally, 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)).

C. Factors for Unwarrantable Failure

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). It is characterized by “indifference,” a “serious lack of reasonable care,” “reckless

disregard,” or “intentional misconduct.” *Id.* at 2003–04; *see also Buck Creek Coal*, 52 F.3d at 136 (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. *See 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. *See id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). 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 at 353.

D. Negligence Determinations

Commission Judges determine negligence under a traditional analysis rather than relying on the Secretary’s regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec’y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory regulation carries a requisite duty of care. *Id.* In the negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the “totality of the circumstances holistically” and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining, LLC*, 37 FMSHRC at 1703).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8876244 – Failure to Maintain Berms

Acha violated section 56.9300(b) by not maintaining the berms on its loading ramp at the mid-axle height of the equipment Acha normally used on the ramp. When Barney issued the citation, the berms measured between six and 19 inches on the left side and 25 inches on the right side. (Tr. 44:23–45:1; Ex. S–3 at 3.) The mid-axle height of the mine’s two front-end loaders were 32 inches and 28 inches. (Tr. 48:2–17; Exs. S–3 at 3, S–1 at 4–5.) Acha does not deny that it violated the standard but disputes the citation’s S&S and gravity designations, specifically the likelihood and severity of injury that would result from the violation. (Tr. 103:12–15; 123:24–124:11.) Additionally, Acha challenges the violation’s negligence designation due to mitigating circumstances. (*Id.*)

1. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove a violation of a mandatory safety standard. Acha's violation of section 56.9300(b) establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.9300(b) aims to prevent would occur. Section 56.9300(b) mandates berms be maintained at mid-axle height of the largest mobile equipment which usually travels a roadway. 30 C.F.R. § 56.9300(b). The purpose is to prevent mobile equipment from rolling over on roadways where a drop-off exists. *See* 30 C.F.R. § 56.9300(a); (Tr. 70:14–21). In this case, the berms were not high enough to deflect the size and weight of Acha's front-end loaders, which could carry up to two and a half tons of material. (Tr. 71:1–7, 65:6–12.) The ramp was narrow and just wide enough to fit the wheelbase of the front-end loaders. (Tr. 72:13–23.) Although a front-end loader would travel up the ramp at a low speed, it is put in an unbalanced, top-heavy position when it lifts material over the loading bin. (Tr. 73:2–6.) In addition to not being high enough, the berms were made of loose, unconsolidated material. (Tr. 71:1–7) Given these facts, I determine the hazard of a rollover was reasonably likely to occur on the ramp because the berms were not high enough and indeed woefully low in some areas to prevent machinery from going over the berm.

With regard to the third *Mathies* element, the Secretary must demonstrate a reasonable likelihood the hazard will result in an injury. If a front-end loader rolled over because the berm was insufficient height, an operator could be thrown about the cab from the resulting seven foot drop. (Tr. 67:23–68:20, 73:15–21.) Additionally, the material from the front-end loader's bucket could fall onto the cab, potentially breaking the cab's glass and burying the operator. (Tr. 73:22–74:9.) Consequently, I determine that the hazard of a rollover would reasonably likely result in injuries, thus satisfying the third *Mathies* element.

Lastly, under the fourth *Mathies* element, the Secretary must prove a reasonable likelihood that the resulting injury will be of a reasonably serious nature. With regard to this element, Acha asserts that any injury caused would not result in a fatality as Inspector Barney determined. (Tr. 103:11–104:2.) Acha contends that both front-end loaders were equipped with rollover protection, and if one of them were to roll over, it would be a relatively small drop-off. (Tr. 103:11–104:2.) Acha also notes that its employees wear seatbelts when operating the front-end loaders. (Tr. 103:11–104:2.)

Although Acha's front-end loaders were equipped with rollover protection and seatbelts, redundant safety measures are not to be considered in determining whether a violation is S&S. *Cumberland Coal Res.*, 717 F.3d 1020, 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). Nevertheless, even rollover protection and a seatbelt would not protect against up to two and a half tons of material falling on top of a front-end loader's cab. (Tr. 73:24–76:3.) The cab of the front-end loader consisted of mostly glass, which in the event of a rollover would likely break from the impact or from material falling on it. (Tr. 74:4–9.) An operator could reasonably likely be trapped underneath the material and unable to maneuver his

body, particularly if he had on a seatbelt. (Tr. 74:16–24.) The resulting injuries could include cuts, neck and back injuries, and suffocation, which could lead to a fatality. (Tr. 75:1–6.) Given these facts, I determine that the injuries expected to result from a rollover would reasonably likely be serious or even fatal, thus satisfying the fourth *Mathies* element.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 8876244 was appropriately designated as S&S. For the same reasons, I affirm the citation’s gravity designation as reasonably likely to result in a fatality.

2. Unwarrantable Failure and Negligence

The Secretary asserts that Acha’s conduct amounted to high negligence and an unwarrantable failure. (Tr. 123:18–20.; Ex. S–1 at 1.) In support, the Secretary argues that the violative condition existed for multiple shifts and that Merkley admitted to knowing the violation existed. (Tr. 78:2–7, 122:4–6.) In contrast, Acha claims that rain from the weekend prior to August 4 deteriorated the berms, which should be considered a mitigating factor when assessing negligence. (Tr. 109:10–24, 124:5–7.) Additionally, Acha asserts that the violation did not pose a high degree of danger and that its employees were trained to MSHA standards. (Tr. 124:8–11; *but see* Exs. S–8, S–10 (noting Foreman Meckley’s training records for 2015 were lost).)

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 facts and circumstances surrounding this violation unveil multiple aggravating factors. First, the violation posed a high degree of danger because it was reasonably likely to cause a serious or potentially fatal rollover as discussed above. *See* discussion *supra* Part V.A.1. Second, the conditions were obvious, and Inspector Barney noticed immediately that the berms were too low. (Tr. 40:24–41, 83:7–10.) Photographs of the ramp also showed that the berms were of inadequate height and had deteriorated. (Exs. S–1, S–2.) Those photographs in conjunction with Barney’s measurements demonstrate the condition was extensive given that the berms were not up to standard for the entire length of the ramp. (Tr. 44:23–45, 48:2–17; Exs. S–1, S–2, S–3 at 3.) In some places, the berms were nonexistent or less than half of the required height. (*Id.*) Further, Barney testified that Merkley informed him that the berms had been in such condition for five days.⁸ Barney witnessed the ramp being used the day of the citation, and the mine’s reports

⁸ Inspector Barney testified that Merkley told him that the violative condition had existed for five days, that the ramp was normally used in such conditions, and that Merkley normally operated the front-end loader. (Tr. 51:1–4; 54:24–56:14; 65:20–24.) Barney took thorough notes of his inspection, including his conversations with Merkley. (Tr. Ex. S–3 at 3.) Merkley, on the other hand, testified that he could not remember any of the conversations he had with Barney that day. (Tr. 92:6–12, 94:20–95:17.) Given Inspector Barney’s detailed notes of the encounter and that Merkley did not deny making such statements, I credit Barney’s testimony regarding the conversation. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (“Since the ALJ has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984))). *See also Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1196–97 n.8 (Oct. 2010) (Commission has

indicate that the ramp was also used the day prior. (Tr. 40:20–23, 17:2–4; Exs. S–6 at 1, R–4 at 1.) The condition therefore lasted for multiple shifts.⁹ Lastly, Merkley knew the standard and acknowledged the berms were not high enough. (Tr. 51: 5–6, 54:21–55:3, 66:1–4, 89:4–6, 92:19–32, 104:12–105:5; Ex. S–4 at 1.) Merkley therefore had knowledge of the violation and yet operated the mine’s front-end loader on the ramp.

The other unwarrantable failure factors appear to be neither mitigating nor aggravating. The Secretary did not present evidence that Acha had been placed on notice by MSHA that greater efforts were required for compliance with the berm standards. In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). The record is silent on any abatement efforts made prior to the citation’s issuance. Accordingly, I afford these factors no weight in the unwarrantable failure analysis.

Because Merkley was a mine supervisor, he is held to a higher standard of care, which he failed to meet by using the ramp despite knowing the berms were inadequate. After considering all the factors, particularly the high degree of danger, the violation’s obviousness, and the operator’s knowledge, I conclude that the violation was the result of the operator’s unwarrantable failure. For the same reasons, I also conclude that Acha was highly negligent for failing to maintain the berms on the loading ramp.

B. 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

recognized an ALJ’s credibility determinations are entitled to great weight and may not be overturned lightly).

⁹ Although Acha argues that rain the weekend prior to the citation contributed to the berms’ deterioration, Acha’s meteorological evidence shows a rain event but is inconclusive because it did not provide data for, and thus correspond with, the mine’s exact location. (Tr. 107:22–109:1, 109:18–22, 112:8–114:2; Exs. S–17, S–18, S–19.) Even if rain did occur over the weekend and eroded the berm, Acha failed to repair the berm before returning the plant to operation on Monday, August 3, 2015. (Tr. 114:23–115:2; Exs. S–6 at 1, R–4 at 1.) The following day on August 4, Inspector Barney witnessed Acha using the ramp and thus issued the citation. (Tr. 40:20–23, 58:18–22; Exs. S–1, R–1.) I note that although Barney was at the mine site on July 30 when he issued the citation for a dust violation, he did not find any problem with the berms at that time. Thus, it is possible a rain event occurred, further eroding the berms. Indeed, photos provided by Acha demonstrated soil moved due to the effect of running water. (Tr. 106:7–107:21; Ex. R–2, S–2.) It is possible the violative condition existed for five days but that the intervening rain over the weekend worsened the berms’ deterioration by the time Barney returned to the mine on August 4. Nevertheless, the record demonstrates that the violative condition lasted for five days, regardless of whether a rain event occurred the weekend prior.

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 that Acha pay a specially-assessed penalty of \$3,400.00 for Citation No. 8876244. (Ex. S-4.) Acha has stipulated that the proposed penalty will not affect its ability to remain in business. (Joint Ex. 1; Tr. 17:11-13.) Additionally, I have upheld the Secretary's S&S, gravity, unwarrantable failure, and negligence designations. I note, however, that a mitigating factor of rain may have affected the berms so that the violation may not have existed in that condition for the five days prior to August 4. Additionally, Acha had no history of violations that became final orders during the 15 months prior to the inspection. (Joint Ex. 1; Tr. 17:16-18.) Nothing suggests that Acha failed to make a good faith effort in attempting to achieve rapid compliance after the citation's issuance. In fact, Acha abated the violation on the same day the citation was issued. (Joint Ex. 1; Tr. 17:14-15.) Lastly, at the time of the inspection, Acha ran a very small operation, requiring only two individuals to run the plant. (Tr. 33:12-20, 17:19-21.) Acha owns and operates only one mine, Crusher 1, which has been closed since September 2015. (Tr. 98:12-15.)

Although I have affirmed the citation as written, I am not bound by the Secretary's penalty criteria. The minimum penalty under the Mine Act for an unwarrantable failure section 104(d)(1) citation is \$2,000.00. 30 U.S.C. § 110(a)(3)(A). Taking into account Acha's size, history of violations, and good faith efforts to abate the violation, as well as considering all of the facts and circumstances set forth above, I hereby assess a civil penalty of \$2,550.00.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8876244 is **AFFIRMED**. Acha Construction, LLC is **ORDERED** to **PAY** a civil penalty of \$2,550.00 within 40 days of the date of this decision.



Alan G. Paez
Administrative Law Judge

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