

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**FEB 11 2016**

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

BUZZI UNICEM USA,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. LAKE 2015-329-M  
A.C. No. 12-00064-373314

Mine: Lone Star Industries

**DECISION**

Appearances: Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor,  
1244 Speer Boulevard, Suite 216, Denver, Colorado, for Petitioner

C. Gregory Ruffennach, Esq., Ruffennach Law, 1629 K Street, N.W.,  
Suite 300, Washington, D.C. 20036, for Respondent

Before: Judge Barbour

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (1979) (the “Mine Act”), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) alleges that Buzzi Unicem USA (“Buzzi”) violated 30 C.F.R. § 56.14100(b), a mandatory safety and health standard for the nation’s metal and nonmetal mines. The Secretary further alleges that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation<sup>1</sup>) and that it was caused by Buzzi’s high negligence and unwarrantable failure to comply with a mandatory health or safety standard. The Secretary proposed a specially assessed penalty of \$5,300.00 for the violation.

<sup>1</sup> An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a 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 will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5<sup>th</sup> Cir. 1988) (approving the *Mathies* criteria).

The Secretary petitioned the Commission to assess the penalty as proposed. The company answered denying the violation occurred, or if it did, stating that the proposed penalty and S&S and unwarrantable failure designations were inappropriate. The Commission's Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if the alleged violation could be settled. The parties were unable to reach a settlement, and the case was set for hearing and tried in Greencastle, Indiana, on October 14, 2015.

**I. STIPULATIONS**

1. Buzzi Unicem USA ("Buzzi Unicem") engages in quarrying and cement manufacturing at the Lone Star Industries facility ("facility") in Putnam County, Indiana.
2. Buzzi Unicem's operations affect interstate commerce.
3. The area of the facility where the contested citation was issued is subject to the jurisdiction of the [Mine Act].
4. Buzzi Unicem is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the area of the facility where the contested citation of these proceedings was issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.
6. Eric Reno was, at the time the citation was issued, an authorized representative of the . . . Secretary of Labor assigned to MSHA, and was acting in his official capacity when issuing the citation. . . .
7. The citation . . . was properly served upon Buzzi Unicem as required by the Mine Act.
8. The citation . . . may be admitted into evidence for the purpose of establishing its issuance but not for the truthfulness or relevancy of any statements asserted therein.
9. The pre-operation reports, which the parties have exchanged and intend to introduce into evidence, are authentic and may be admitted into evidence.
10. The certified copy of the MSHA Assessed Violation History reflects the history of the 17 citation issuances at the Mine for 15 months prior to the date of the citation at issue and may be admitted into evidence without objection by Buzzi Unicem.
11. The penalty assessed in this docket will not affect the ability of Buzzi Unicem to remain in business.
12. Buzzi Unicem demonstrated good faith in abating the alleged violation in a timely manner.

JX-1; Tr. 15-17.

## II. BACKGROUND

### 1. The Mine and the Inspection

The Lone Star Industries mine is a cement plant located just outside of Greencastle. Tr. 20. Buzzi uses numerous pieces of mobile equipment at the mine for production and cleanup and maintains a system for preoperative examinations of mobile equipment prior to their use at the mine. Tr. 24, 118. Employees check for defects and deficiencies in the equipment during preoperative exams and may take any piece of equipment out of service by tagging it out if they believe they have identified a safety hazard. Tr. 31, 120. Management officials then perform their own inspection of the equipment to determine whether a hazard exists. Tr. 121. The equipment is put back into service if management officials determine that a hazard does not exist. Tr. 121. During one such preoperative exam on September 22, 2014, an employee at the mine identified what he believed to be a safety hazard on a John Deere 317 skid steer (a type of front-end loader) and included the following comment on his preoperative exam form: "Tagged out for moving on its own with operator not touching controls." Tr. 48; GX-5.

MSHA maintains a phone number that a miner can call to report a hazardous condition. Tr. 22. The miner has the option of giving his or her name or remaining anonymous. Tr. 23. The miner's message is reported to the MSHA district manager, who will then send an inspector to the mine to investigate the complaint, maintaining the complainant's anonymity if the miner prefers. Tr. 23. On September 24, 2014, MSHA received a hazard complaint from an anonymous caller. Tr. 21. MSHA subsequently learned that the caller was the same employee who had tagged the John Deere 317 out of service on September 22. Tr. 23. MSHA Inspector Eric Reno<sup>2</sup> spoke to the anonymous caller and conducted an investigation that day at the mine in response to the complaint. Tr. 20-21. The caller told Reno that the skid steer was creeping and lurching on its own when he removed his hands from the controls, even though it should have remained motionless if it were functioning properly. Tr. 21-22. The caller continued that after he reported the defect and tagged the equipment out of service, mine management asked him to continue operating the still defective equipment, using a parking brake to stop it if necessary. Tr. 21.

During the investigation at the mine, Reno spoke with miners and management officials and made a skid steer operator test the John Deere 317 five or six times so that Reno could observe the alleged safety defect. Tr. 33, 36-37. As a result of the investigation, Reno found that the skid steer did not stop when the skid steer operator took his hands off the controls and concluded that this condition was hazardous to miners working near the skid steer and that Buzzi had known of the condition and failed to correct it. Therefore, he cited Buzzi for a violation of mandatory safety standard 56.14100(b), which requires that, "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). Because he also found the alleged violation was S&S and the result of the company's unwarrantable failure to comply with the standard, he issued the citation pursuant to section 104(d)(1) of the Act.<sup>3</sup> 30 U.S.C. § 814(d)(1).

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<sup>2</sup> Reno testified that he had worked for MSHA for about three years, prior to which he had four to five years of experience performing various tasks in an underground mine. Tr. 18-19.

<sup>3</sup> Section 104(d)(1) of the Act states, in pertinent part:

## 2. The Equipment and the September 22 Tag-Out

Inspector Reno testified that Buzzi have roughly five or six skid steers at the mine. Tr. 24, 35. The John Deere 317 skid steer that is the subject of the hazard complaint is used for cleaning and maintenance and is the only one of its type at the mine. Tr. 25, 111. When used for cleaning, the equipment can scoop up piles of material with a bucket. Tr. 25. When used in tighter areas, another miner may shovel or sweep piles of material into the bucket, which may be raised or on the ground. Tr. 25-26. A miner performing cleanup may place himself directly in front of the bucket or on the side depending on the pile being cleaned and the area in which he or she is working. Tr. 26.

The skid steer functions through the use of foot pedals and levers on each side of the individual operating the equipment. Tr. 28. The foot pedals control the bucket and the levers (there are two) control the movement of the vehicle. Tr. 28. To move the equipment forward or backward, an operator pushes both levers in the direction he or she wishes to go. Tr. 28. Turning is accomplished by moving only one lever forward at a time. Tr. 29. When operating skid steers in the past, Reno would personally keep his hands in close proximity to the levers while the skid steers were stopped, in case he had to move the equipment forward or backward. Tr. 54. Douglas Bumgardner, an hourly worker at the mine who previously operated the skid steer at issue, testified that he typically keeps his hands on the controls when he is in the skid steer, unless he is attempting to use the parking brake. Tr. 78. According to Bumgardner, the skid steer cannot move faster than five miles per hour, even when the levers are at full throttle. Tr. 77. Brad Davis, the safety manager at the mine, testified that the maximum speed allowed for mobile equipment at the mine is to two to three miles per hour. Tr. 124.

The skid steer does not have a traditional brake as one might find on an automobile. Tr. 29. Instead, it is designed to stop when an operator removes his or her hands from the controls, and the levers return to a neutral position. Tr. 29-30. However, if the skid steer is on a steep grade, it may not be enough to release one's hands from the controls to bring the machine to a halt. Tr. 52. In such a situation, the operator may have to keep pressure on the levers in a neutral position to stop the skid steer. Tr. 52. In addition, the skid steer has an emergency brake that can halt its movement. Tr. 29. Bumgardner later added that the machine will also shut off automatically when a miner removes his or her seat belt. Tr. 79-80.

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“If . . . an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that . . . such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. 30 U.S.C. § 814(d)(1).

On September 22, 2014, the John Deere 317 was tagged out of service by an employee for defectively moving without the operator’s control. Tr. 32. John Brennan, a yard supervisor at the mine, inspected the machine and acknowledged the defect, but did not believe it to be a hazard. Tr. 93. Brennan asked a mechanic at the mine, Jon Seniour, to examine the equipment and attempt to fix it. Tr. 94. Seniour determined that some of the parts on the machine were worn out, but he did not feel comfortable in his ability to fully repair the equipment. Tr. 107-08. However, he nonetheless told Brennan that the machine was safe to put back into service. Tr. 94-95, 108. Brennan received a follow-up opinion from the safety manager at the mine, Brad Davis. Davis also thought it would be safe to return the machine to service. Tr. 96. As a result, the company returned the machine to service the same day and instructed the operator who reported the defect to use the skid steer’s parking brake to stop it. Tr. 33, 96.

According to Reno, Buzzi runs three shifts, and the skid steers operate on all shifts. Tr. 35. Reno stated that it is very common to be task trained on the use of skid steers, because numerous individuals operate them over the course of every shift, seven days a week. Tr. 32. After it was returned to service, the John Deere 317 was freely available for use to all task trained miners. Tr. 35. However, in spite of this common use, Reno discovered from his conversations with mine management and employees that the company had not disclosed the equipment’s safety defect to anyone other than the operator who tagged out the machine, either individually, in a meeting, or on a bulletin board, and had not instructed anyone other than that operator to use the parking brake to stop the equipment. Tr. 35-36.

Buzzi has five other skid steers at the mine, but several were out of service at the time of Reno’s inspection. Tr. 24, 97-98. Brennan testified that there were at least two more available, on September 22. Tr. 97-98. However, he also admitted he had to borrow one from the other side of the plant, because the lack of operational skid steers had placed the company “in a little bit of a jam.” Tr. 98.

**III. THE CITATION**

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8843406	9/24/2014	56.14100(b)

The citation states:

While inspecting the John Deere 317 . . . it was found that the machine will continue to creep when the operator removes his hands off the controls and the machine is in the neutral position. The machine was tested on level ground at high rpm’s and low rpm’s and it was found that the drive train was still engaged in the neutral position and the machine would still move forward under it’s [sic] own power. This machine was tagged out on 09/21/2014 for this hazard and it was found by mine management to not be a hazard and placed back into service with instructions given to the operator to activate the parking brake whenever the machine is stopped. This machine is used daily at the mine in multiple areas of the mine for maintenance and clean-up purposes. After

discussions were held with miners at the mine site, it was found that the machine is operated around other people, in some cases miners standing in front of the bucket shoveling material into it, and it is not common practice to activate the parking brake in this situation. Mine management did not address or instruct any other miners at the mine site of the condition of this machine nor set a plan to have the machine looked at by a trained mechanic. With continued practice operating this machine with the hazardous condition, it would be reasonably likely for an accident to occur that could result in lost workdays or restricted duty type injuries. This violation is an unwarrantable failure to comply with a mandatory standard. . . .

GX-1. The citation was abated by bringing in an outside contractor to replace multiple parts. Tr. 46. Specifically, the company installed new springs and rollers to replace defective parts. Tr. 109.

Inspector Reno first observed the violative condition when he asked an operator to test the equipment for him around five or six times on a variety of surface grades and RPM settings, both with the bucket raised and lowered. Tr. 37-38, 63. The tests revealed that in all scenarios the equipment would continue to “creep” when the operator removed his hands from the controls. Tr. 38. The equipment “may have jerked a little bit,” but it did not lurch or “lunge forward” as the anonymous complaint had alleged. Tr. 39. To stop the equipment’s movement, an operator would have to maintain tension on the controls in order to keep the levers situated in a neutral position. Tr. 40. The equipment did not move when the parking brake was on. Tr. 62.

Reno believed that this condition posed a safety hazard to miners because of the presence of numerous distractions at the mine and the practice of miners standing in close proximity to the equipment to shovel material into the bucket, sometimes in tight areas. Tr. 40, 147. Reno feared that if a skid steer operator became distracted by loud noises at the facility or an incoming call over the radios or cell phones miners carry with them<sup>4</sup> the operator could remove his or her hands from the levers. This in turn could cause the skid steer to collide with a miner performing clean-up duties in a tight area, and either pinch that miner into a corner or cause him or her to stumble into some other hazard. Tr. 40-41, 147-48. Due to dusty conditions at the mine, Reno also believed that a miner could remove his or her hands from the levers while sneezing. Tr. 41. Reno speculated that an individual distracted by a sneezing fit could have his or her hands off the levers for ten seconds, causing the machine to move approximately two inches in the process. Tr. 53. Additionally, Reno noted that there was significant foot traffic in the area, which increased the risk of an accident occurring. Tr. 41.

Reno was asked during the hearing how fast the equipment moved. He responded, “It wasn’t consistent. At times it would be slower; at times it would be faster.” Tr. 39. As a follow-up question, Reno was asked, “At the fastest, do you have an estimation about how fast it moved?” Reno responded, “It probably moved every bit of an inch [every] three to five seconds.” When asked by the court to repeat his answer, Reno again replied that “it would creep

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<sup>4</sup> Brennan confirmed that several miners wear radios or walkie-talkies, and that several use cell phones on the job even though they are instructed not to. Tr. 100-02, 104.

anywhere from an inch to more every three to five seconds it was moving.” Tr. 39. When confronted with the fact that one inch every five seconds translates to approximately one-hundredth of a mile per hour, Reno clarified that his measurement of one inch per three to five seconds was an average rather than a maximum range. Tr. 145. However, he did not specify approximately how much faster the skid steer could have moved when there was no pressure on the controls. Bumgardner later testified that according to his observation, the equipment moved 1 inch every 5 to 10 seconds. Tr. 81. Brad Davis, the safety manager at the mine, observed the equipment move one inch every five seconds. Tr. 121. Reno agreed the skid steer was the slowest mobile equipment at the mine. Tr. 61-62.

Reno designated the violation as S&S, because the machine was used daily, the company had no immediate plans or schedule to fix the defect, and the condition would probably get worse as the springs inside weakened and eventually broke. Tr. 44, 142-43. Reno thought the potential use of the equipment in dark and dusty mills, and the practice of miners standing in very close proximity to the machine while performing clean-up work increased the likelihood of injury. Tr. 44-45. He also testified that miners could sustain injuries by bumping into other equipment in order to avoid the moving skid steer. Tr. 70-71. As a result, Reno found that the violation was reasonably likely to result in injury.

In regard to the type of injury that could be reasonably expected, Reno testified that the machine is “very heavy” and the tires alone can weigh up to 300 pounds. Tr. 27. If the tires ran over a miner’s foot, they could break his or her toes. Tr. 44. Jon Seniour, a mechanic at the mine, added that the machine weighs somewhere between 3,000 to 6,000 pounds. Tr. 114. Reno also observed that the skip steer scoop has edges that could leave a bruise, and possibly scrape a miner, causing bleeding. Tr. 27. Reno explained his S&S designation by noting that broken bones, bruises, or lacerations would result in lost workdays or restricted duty. Tr. 45. These conclusions were partially informed by Reno’s experiences colliding with the scoop of a skid steer in the past, although not from the machine colliding into him. Tr. 27, 64. Reno admitted that he did not have training or experience evaluating the impact of slow-moving equipment. Tr. 62.

Reno designated the violation as an unwarrantable failure and a result of high negligence because the company was aware of the condition. It tagged the skip steer out of service, but then chose to return it to service and to notify only one miner out of 175 employees of the defect.<sup>5</sup> Tr. 42, 45. Additionally, Reno was troubled that Buzzi had no concrete plan to make repairs at the time. Tr. 42.

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<sup>5</sup> Brennan confirmed that the company was aware of the defect. Tr. 97. He added that there are 50 skid steer operators at the mine and that individuals operate skid steers on all four shifts, twenty four hours a day, seven days a week. Tr. 99-100. Brennan then confirmed that he did not reach out to these operators about the defect even though the skid steer was available for anyone on site to use once it was put back into service. Tr. 42, 45. While testimony revealed that at least one other miner, Bumgardner, may have known about the condition at the time, management officials did not inform him about the condition and would not have had any reason to know that he was aware of the condition, as he never mentioned any hazard or defect in a preoperative exam report. Tr. 90.

All four of the company's witnesses, which included Douglas Bumgardner, an hourly employee who operated the skid steer, Jon Seniour, an hourly employee who attempted to repair the equipment, John Brennan, a yard supervisor, and Brad Davis, the mine's safety manager, testified to their belief that the cited condition did not pose a safety hazard because the skid steer moved so slowly. Tr. 83, 93, 108, 121. Davis felt the movement of the vehicle, at a speed of roughly one inch per five seconds, was so minimal that it was "almost unrecognizable."<sup>6</sup> Tr. 121. Brennan added, as further support for his belief that the condition did not pose a hazard, that there were still three ways to stop the machine even with the defect, and that every skid steer operator at the mine is familiar with those methods from their task training. Tr. 93-94, 104-105. He also testified that he approved returning the equipment back to service once he got a follow-up opinion from both Seniour and Davis that it was safe to do so. Tr. 94-96.

In response to Reno's concerns about miners being struck by the machine while shoveling material into its bucket, Bumgardner noted that while it is common to have two person cleaning operations, the miner shoveling material into the bucket will typically stand to the side of the skid steer rather than directly in front of it, and never with his or her back to the machine. Tr. 78-79, 89. However, Davis admitted that miners work in front of the John Deere 317 when doing maintenance and cleanup, and that the machines are operated daily and frequently during the day. Tr. 130, 133. Bumgardner testified that he had never operated the machine inside the plant and could not think of any place inside where he would have to use it. Tr. 88-89.

As for Reno's concerns that the condition of the skid steer would deteriorate over time and therefore was reasonably likely lead to injury, Bumgardner testified that he had noticed this condition existing for a couple months prior to the citation, and that it did not get worse during this period. Tr. 81-82. Seniour added that the machine is 15 years old, and that its performance had deteriorated very little in that time. Tr. 154. Therefore, he did not expect significant deterioration before the skid steer was repaired. Tr. 154.

Brennan testified that he had called a John Deere "sales mechanic" on September 22, within two hours of his inspection of the skid steer. Tr. 95. According to Brennan, the sales mechanic indicated that he would only be able come to the plant toward the end of the week, due to a busy workload. Tr. 95. Brennan conceded that there was no specific date for repairs and no purchase order issued. Tr. 152. However, he expected the sales mechanic to arrive by September 25, and the skid steer to be repaired in a timely manner following that. Tr. 152-53. Davis testified that his decision not to talk to all skid steer operators about the John Deere 317 defect rested on the assumption that Brennan would have a John Deere mechanic come to the mine and fix the equipment shortly. Tr. 139. He believed that the defect did not pose a safety hazard at the time and that it would not get worse within the period of time it would take the John Deere employee

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<sup>6</sup> During cross-examination, the Solicitor stated, "You didn't eliminate completely the possibility of an injury from this condition; correct?" Davis replied, "No ma'am." The Solicitor continued, "You just thought that if there was an injury, because the equipment was moving so slowly, it probably wouldn't be a life-threatening injury, correct?" Davis answered, "Correct, ma'am." Tr. 132-33. However during redirect examination, Davis stated that he believed there was no possibility of injury of any kind. Tr. 138.



to arrive, but that if it did, someone would identify the problem in a preoperative exam so that the issue could be dealt with then. Tr. 139-40.

#### IV. LEGAL ANALYSIS

##### 1. Fact of the Violation

Section 56.14100(b) states, “Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Buzzi contends that the Secretary has not met his burden to prove that the defective condition on the John Deere 317 had reached the point where it adversely affected the safety of the company’s employees or created a “hazard to persons,” primarily due to the slow speed of the vehicle and the uncommonness of operators removing their hands from the controls. Resp’t Br. at 5, 7. The court disagrees.

In interpreting section 56.9002, a defunct predecessor to section 56.14100(b), the Commission explained “that the language ‘affecting safety’ has a wide reach and that ‘the safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.’” *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citing *Allied Chemical Corp.*, 6 FMSHRC 1854, 1858 (Aug. 1984)). The Commission also noted that it is appropriate when dealing with this standard to evaluate the evidence in light of what a “reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Id.* (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614, 1617-18 (Sept. 1987)). In the S&S context, the Commission recognized that the word “hazard” denotes “a measure of danger to safety or health.” *Nat’l Gypsum*, 3 FMSHRC at 827, 827 n.7.

While the defective spring and roller system in the John Deere 317 skid steer may not have had a “major” or “immediate” impact on safety, the court finds that it did create a clear measure of danger to the safety of miners, which is all that the wide reaching standard requires. A reasonably prudent person, familiar with the mining industry and the broad protective purpose of the standard, would have taken the skid steer out of service immediately in order to meet the protection intended by the standard.

With the significant foot traffic in the area that Inspector Reno observed and miners working in very close proximity to the skid steer for cleaning and maintenance, the court accepts that even a slow moving defective vehicle could pose a safety hazard. Tr. 41, 54. The record makes clear that the overwhelming majority of employees at the mine were unaware of the defective condition. Tr. 97, 99-100. A distracted skid steer operator who had not been alerted to the risks of leaving the controls unattended on level ground could take his or her hands off the levers, which in turn could lead to one of the accidents Reno listed, including the scenario where a wheel would roll over a miner’s foot. Tr. 44, 114. Indeed, such accidents were possible even if operators typically kept their hands on the controls. Miners on the ground who had not been alerted to the hazard were also exposed to an increased risk of injury, because they were more likely to be inattentive around the defective skid steer.

Buzzi also argues that the company had timely arranged for a repair at the end of the week, thereby satisfying the cited standard's requirement that defects be corrected "in a timely manner to prevent the creation of a hazard to persons." Resp't Br. at 6 n.3. However, it is undisputed that the company returned the equipment into service without any specific date set aside or purchase order issued for repairs. Tr. 152. Under these circumstances, the court finds that Buzzi did not satisfy the timeliness requirements of the standard and that the Secretary has met his burden for proving the violation.

## 2. S&S and Gravity

The court finds that the Secretary did not establish a reasonable likelihood that the hazard contributed to by the defective skid steer would result in an injury or illness of a reasonably serious nature. The primary consideration leading to this finding is the defective vehicle's extraordinarily slow rate of movement. Inspector Reno initially testified, and subsequently reiterated, that "[a]t the fastest," the machine would "creep" at a rate of one inch per three to five seconds, which translates to approximately one-hundredth of a mile per hour.<sup>7</sup> Tr. 39. Bumgardner and Davis observed similar rates of movement. Tr. 81, 121. Based on these consistent testimonies, the court finds that the vehicle was moving approximately one inch every five seconds.

The court further finds that this rate of movement would not be reasonably likely to lead to an injury, as required by the third step of the *Mathies* analysis, as it would give even inattentive miners on the ground enough time to avoid contact if the kid steer slowly moved their way. *Mathies*, 6 FMSHRC 1, 3-4. While miners do sometimes work in close proximity to the skid steer while cleaning, Bumgardner credibly testified that those miners would have no reason to work with their backs to the machine, and would typically stand to the sides of the vehicle. Tr. 79. Such miners could easily move out of the way if the skid steer began to creep.

It is also unlikely that an operator would remain distracted long enough to allow the vehicle to run into a miner. Reno conceded that the machine would move approximately two inches during a ten second sneezing fit, which this court considers to be a minimal distance. Tr. 52-53. Longer distractions causing greater movements are far too speculative to form the basis of an S&S finding.

The Secretary argues that the evaluation of reasonable likelihood should be made assuming continued mining operations, and that the safety defect would get worse with continued operation. Sec'y Br. at 6-7. However, the court credits Bumgardner's testimony that this defective condition had existed for at least two months and that it had not gotten worse in that period. Tr. 81-82. Given that timeline, the court does not find it likely that this condition

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<sup>7</sup> When called back to the stand for rebuttal testimony, Reno later stated that this estimate was an average rather than a maximum range, and that there was no consistency to the vehicle's rate of movement, but he never clarified how much faster the vehicle could move with the controls in the neutral position. Tr. 143, 145. It would be highly speculative to conclude from this testimony that the vehicle could have moved significantly faster in neutral, especially when the Secretary did not dispute Bumgardner's or Davis's testimony that the machine was only capable of moving between two to five miles per hour when the levers were at full throttle. Tr. 77, 121.

would deteriorate significantly enough with continued mining operation to make an injury reasonably likely. Therefore, the S&S finding must be vacated.

While the violation has been found to be non-S&S, the court must further make a gravity finding with the understanding that the gravity and S&S nature of a violation are not synonymous. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (explaining “the focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.”) Inspector Reno detailed a plausible series of injuries that could result from the hazardous defect, ranging from less serious scrapes and bruises to the more serious threat of broken bones, crushed by the weight of roughly 300 pound tires. Tr. 27. Given this range of possibilities, the court finds the violation to be moderately serious, as an injury could reasonably be expected to lead to lost workdays and restricted duty.

### 3. Negligence and Unwarrantable Failure

Reno designated the violation as an unwarrantable failure to comply with a health or safety standard and cited Buzzi under section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1); GX-1. However, as the Commission has explained, “[t]he statutory language of section 104(d)(1) expressly makes a significant and substantial finding a prerequisite for the issuance of a section 104(d)(1) citation.” *Youghiogheny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1998). Since the court is vacating the S&S finding, it must also vacate the unwarrantable failure finding and modify the 104(d)(1) citation to a 104(a) citation.

This court however finds Buzzi highly negligent just as the Secretary alleges. The Commission has previously found high negligence when an operator had actual knowledge of the violative condition and failed to act. *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). According to the Commission, the real “gravamen of high negligence is that it ‘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)). Buzzi indisputably had actual knowledge of the violative condition when the defective skid steer was tagged-out of service on September 22. Tr. 93. And while the company did ask multiple individuals to examine the equipment after it was tagged out and did discuss repairs with a John Deere representative (facts that Buzzi argues should mitigate its negligence), the company failed to act with sufficiently reasonable care when it returned the skid steer into service without notifying more employees of the defect and without scheduling a specific date for repairs. Tr. 42-45; Resp’t Br. 12-15.

Buzzi claims it was only minimally, if at all, negligent primarily because it had a good faith and reasonable belief that the condition was not hazardous. Resp’t Br. 12-15. As evidence of the good faith and reasonableness of its belief, Buzzi cites to the slow speed of the vehicle, the lack of prior citations for this specific issue which could have put the company on notice that greater efforts were required, and the fact that the condition was never mentioned in a preoperative exam in the two months prior to the September 22 tag-out. Resp’t Br. 12-15.

As the court has already found the cited condition to be a violation at even minimal speeds, the slow speed of the vehicle does not affect Buzzi’s awareness of the facts constituting

the violation. Instead it bears on the gravity and S&S nature of the violation. Similarly, the lack of prior citations under this standard would only be material if the facts of the violation, by themselves, were not enough to put the company on notice that greater compliance efforts were required. However, the court has found that the defect itself was sufficient to do just that. Finally, Buzzi's failure to identify the condition for at least two months through regular preoperative exams is a failure of the preoperative exam system rather than evidence that it was reasonable to think no hazard existed. This is especially true because Buzzi employees are required by their company to identify defects, and not just safety hazards, in their preoperative exam reports, and at least one Buzzi employee testified that he failed to do either when he first noticed this defect. Tr. 86, 90; RX-1 at 2.

**V. OTHER CIVIL PENALTY CRITERIA**

The parties stipulated that the company exhibited good faith in abating the violation and that the penalty assessed will not affect Buzzi's ability to remain in business. JX-1 at 2. However the Secretary subsequently argued in his post-hearing brief that the company did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation, because it returned the defective equipment back into service before the defect was repaired. Sec'y Br. at 15. Since the parties already stipulated to Buzzi's good faith abatement efforts, the court accepts that finding. If the Secretary is arguing that Buzzi demonstrated good faith in abating the violation after it was cited, but that it did not demonstrate good faith in achieving rapid compliance after it learned of the violation, the court has taken that argument into consideration in its negligence finding.

The company characterizes itself as a "mid-sized operator," while the Secretary classifies the mine as a "large cement plant," employing approximately 175 persons. Sec'y Br. at 1, 14; Tr. 90; Resp't Br. at 15. The court accepts that while the subject mine is large, the company as a controlling entity is "mid-sized." At hearing, the Secretary characterized Buzzi's violation history in the 15 months preceding the violation at issue as "moderate to moderately light." Tr. 155; GX-7. The company further clarified at hearing that the Secretary's print-out of previous violations included some violations originally cited in 2008 and 2009 that were not assessed until a delayed settlement for a backlog case, and that clearly fell outside the 15 month period. Tr. 156. The court, having taken all of this into consideration, concludes that the company has a moderately light violation history.

**VI. PENALTY**

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8843406	9/24/2014	56.14100(b)	\$5,300.00	\$634.00

The court has found that the violation is moderately serious, that an accident was unlikely, and that the violation was due to the company's high negligence. The Secretary proposed a penalty of \$5,300.00, but given these findings and the civil penalty criteria discussed above, the court finds that a penalty of \$634.00 is appropriate. The court has departed from the

proposed penalty because it has found the likelihood of injury to be much lower than the Secretary alleged.<sup>8</sup>

**ORDER**

In view of the conclusions and findings set forth above, within 30 days of the date of this decision, the S&S finding **SHALL BE VACATED**, Citation No. 8843406 **SHALL BE MODIFIED** to change the type of action from a 104(d)(1) citation to a 104(a) citation and to reduce the likelihood of injury from “reasonably likely” to “unlikely,” and the company **SHALL PAY** a civil penalty in the amount of \$634.00. Upon payment of the penalty, this proceeding **IS DISMISSED**.<sup>9</sup>

  
David F. Barbour  
Administrative Law Judge

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<sup>8</sup> The Secretary’s originally proposed penalty was also based on a special assessment pursuant to section 100.5 of the Secretary’s Part 100 regulations. 30 C.F.R. § 100.5(a). The Secretary relied on Buzzi’s awareness of the violation and the need for effective deterrence in justifying its special assessment. Sec’y Br. at 13; Tr. 46. However these factors have been taken into account in the court’s negligence and gravity determinations.

<sup>9</sup> 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.