

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 13, 2017

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

v.

BUCKLEY POWDER COMPANY,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-0377-M  
A.C. No. 34-01905-408412 SB9

North Troy Quarry

**DECISION**

Appearances: Maria C. Rich, U.S. Department of Labor, Dallas, TX, for the Secretary;  
Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, CO, for Buckley  
Powder Company.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Buckley Powder Company (“Buckley”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Dallas, Texas. Respondent presented a closing argument on the record, the Secretary filed a post-hearing brief, Respondent filed a reply brief, and the Secretary filed a brief in response to Buckley’s reply brief. One section 104(a) citation was adjudicated at the hearing. Buckley was an independent contractor performing blasting work at the North Troy Quarry, a surface mine in Johnston County, Oklahoma. For reasons set forth below, I affirm the alleged violation, but vacate the inspector’s significant and substantial designation and reduce the level of negligence to low.

**I. DISCUSSION WITH FINDINGS OF FACT  
& CONCLUSIONS OF LAW**

Citation No. 8959025 alleges a violation of section 56.14132(a) of the Secretary’s safety standards and asserts that the backup alarm on a dewatering truck did not operate properly when tested. The citation further alleges that the truck is used in a pit area where there is both foot traffic and other mobile equipment operating. Section 56.14132(a) requires that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” 30 C.F.R. § 56.14132(a).

Inspector Larry Kinsey<sup>1</sup> determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that the violation was significant and substantial (“S&S”), that one person was affected, and that Buckley’s negligence was moderate. The Secretary has proposed a penalty of \$873.00 for this alleged violation.

Although I have not included a detailed summary of all evidence or each argument that was raised, I have fully considered all the evidence and argument.

### **Summary of the Evidence**

Vulcan Construction Materials operates the North Troy Quarry, a surface mine in Mill Creek, Oklahoma. Tr. 11. Buckley was an independent contractor at the mine and was responsible for loading holes and discharging shots. Tr. 11-12.

On February 22, 2016, MSHA Inspector Kinsey traveled to the mine to conduct a regular inspection. Tr. 11. While traveling with Ned Jennings, the mine manager, he observed three Buckley employees in the pit area.<sup>2</sup> Tr. 16-17, 29, 43-44. Inspector Kinsey entered the pit area and spoke with Jessie Scott, the blaster from Buckley. Tr. 17. Inspector Kinsey observed that Buckley employees were operating a dewatering truck and a powder truck<sup>3</sup> and that a skid steer loader was also in the area. Tr. 17, 44. At the time Inspector Kinsey arrived, Buckley employees were dewatering a drill hole and were preparing to load it with explosive materials.<sup>4</sup> Tr. 18, 21.

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<sup>1</sup> Inspector Kinsey has been with MSHA for 15 years and conducts between 40 and 60 inspections per year. Tr. 8-9. Prior to working for MSHA, he worked for 20 years in surface coal mines operating heavy equipment, including a drill. Tr. 9. He has drilled and loaded shot holes. Tr. 10.

<sup>2</sup> The Secretary, in his brief, states that Scott testified there were four individuals in the blast site on the day in question. Sec’y Br. 3. However, it appears that the Secretary misunderstood Scott’s testimony. Both Inspector Kinsey and Scott testified that only three Buckley employees were present. Tr. 29, 43-44. In its brief, Buckley stated that only three Buckley employees were at the blast site. Buckley Br. 2-3.

<sup>3</sup> The transcript includes references to both a “powder truck” and a “bulk truck.” These trucks are one and the same. Tr. 52-53. For clarity’s sake I refer to the truck as the “powder truck” throughout this decision.

<sup>4</sup> The blasting process generally involves drilling holes to specific depths in the layout of the shot, testing the depth of the holes to make sure they match the drill log, determining which holes have water in them or are otherwise blocked, using the dewatering truck to dewater holes containing water, loading the holes with emulsion, caps and primers, stemming the holes, and then tying all of the holes together before setting off the shot. Tr. 10-11, 17-18, 44. The purpose of dewatering the holes is to remove the water so that the explosive materials can be inserted to the bottom of the hole. Tr. 18-19.

While inspecting the dewatering truck, Inspector Kinsey instructed the truck driver to put the truck into reverse. Tr. 17, 22. The backup alarm did not sound when the truck was put into reverse. Tr. 22, 55. As a result, the truck was removed from service and Inspector Kinsey issued Citation No. 8959025 for an alleged violation of section 56.14132(a) for failing to maintain the backup alarm in functional condition. Tr. 15, 22.

### **Fact of Violation**

I find that the Secretary established a violation of the cited standard. The cited standard requires that audible warning devices provided on self-propelled mobile equipment be maintained in a functional condition. Consequently, a violation will exist when an audible warning device, such as a backup alarm, on a piece of self-propelled mobile equipment, such as a truck, does not function. *Wake Stone Corp.*, 36 FMSHRC 825 (Apr. 2014); *See e.g., Northern Aggregate, Inc.*, 37 FMSHRC 562 (Mar. 2015) (ALJ), *Northern Illinois Service Co.*, 36 FMSHRC 2811 (Nov. 2014) (ALJ), *Moltz Construction, Inc.*, 36 FMSHRC 1861 (July 2010) (ALJ). There is no dispute that when the dewatering truck was put into reverse the backup alarm did not function. Tr. 22, 55. While the backup alarm may have been functional at the beginning of the shift when the pre-operational examination of the truck was conducted, as discussed below, the Commission has explained that the term “maintain,” as used in the cited standard, requires that the alarm be “capable of performing on an uninterrupted basis and at all times . . . [and] imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.” *Wake Stone Corp.* at 827 (quoting *Nally & Hamilton Enter., Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011)). Because the alarm did not function when tested, I find that a violation has been established. Buckley did not seriously contest the fact of violation at the hearing or in its brief.

### **Significant & Substantial and Gravity**

I find that the violation was serious but the Secretary did not establish that the violation was S&S. 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). 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 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[,]” and then determine whether “there exists a reasonable likelihood of the

occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.<sup>5</sup>

In order to address the S&S issue it is helpful to understand the purpose of the dewatering truck and how it is operated. The dewatering truck is a one-ton flatbed truck with a hydraulic tank and dewatering pump in the bed of the truck. Tr. 21. The hydraulic tank blocks the view out the rear window of the truck. Tr. 21, 56. A hose connected to the tank is held by a reel that extends off the left side of the truck and partially obscures the view to the rear of the truck on that side. Tr. 21, 23. The reel, with the hose attached, must be positioned with the hose lined up over the hole so that the pump attached at the end of the hose can be lowered into the drill holes to pump out water. Tr. 21, 23, 43, 54. The truck must be in park in order for the dewatering process to work. Tr. 46. The purpose of dewatering the holes is to remove the water in order to allow the explosive materials to be loaded to the bottom of the hole. Tr. 18-19. In order to dewater a drill hole, a person must be on foot by the truck to align the hose and pump and insert them into the hole. Tr. 22, 30. The dewatering truck is equipped with a boom that can slide two to three feet, which allows some leeway in positioning the reel and hose over the hole. Tr. 54. Once a hole is dewatered, explosive materials are removed from the powder truck to load into the hole. Tr. 43.

Inspector Kinsey determined that the violation was S&S because the alarm on the dewatering truck was not functioning, the truck would be operating in reverse at times, and there was foot traffic and other equipment operating in the area of the shot. Tr. 22-27. He described the area of the shot as a confined space. Tr. 22. He testified that he observed two persons on foot and one in the dewatering truck at the time he was in the area. Tr. 30-31. While he did not see anyone directly behind the dewatering truck, at least one of the individuals on foot was standing next to the truck. Tr. 31. While Inspector Kinsey opined that it was unlikely that the driver of the dewatering truck would be the individual who lined up the pump and hose with the hole, he acknowledged that it was possible for the driver to do that. Tr. 30. The only time Inspector Kinsey saw the truck operate in reverse was when he asked the driver to do so to test the backup alarm. Tr. 31. Buckley was in the process of dewatering the holes and the dewatering truck would have to be backed up as the work progressed. Tr. 23, 27. Further, the dewatering truck, which was used to haul the skid steer on a trailer to and from the mine property each day, would have to back up to hook up the trailer at the end of the day.<sup>6</sup> Tr. 25, 27. He

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<sup>5</sup> The Secretary, in his brief, takes issue with the Commission’s S&S analysis in *Newtown* and argues that I should instead defer to his interpretation of Section 104(d)(1) as requiring only a showing that the “violation be of such a nature that it ‘*could* result in[] a safety hazard.’” Sec’y Br. 5-6 (quoting *Newtown*, 38 FMSHRC at 2038 (Aug. 2016) (Commissioners Jordan and Cohen, dissenting) (emphasis added)). With all due respect, I am bound by the majority’s decision in that case.

<sup>6</sup> Buckley does not keep its equipment at the mine site. Tr. 25. The equipment is transported each day from the Buckley office in Mill Creek to the mine. Tr. 25, 36. The skid steer is transported from the office to the mine site on a trailer pulled by the dewatering truck. Tr. 25.

explained that, while a person on foot could easily suffer a fatal injury if struck by the truck, he determined that it was reasonably likely that any injury would be permanently disabling given that the truck would be traveling at a low rate of speed if it ran into the skid steer or powder truck. Tr. 26-27.

Jessie Scott<sup>7</sup> testified that on February 22, 2016 he first went to Buckley's office, which was not on mine property and prepared to go to the mine. Tr. 36. As part of his preparations he conducted a pre-operational examination of the dewatering truck, during which no defects were found.<sup>8</sup> Tr. 37-40, 50. According to Scott, the backup alarm was working at the time of the examination.<sup>9</sup> Tr. 40. After gathering the caps and boosters needed for blasting and hooking up the dewatering truck to the trailer with the skid steer, Scott and his crew traveled the four miles from the office to the mine. Tr. 36-37, 42. Scott explained that the blast site at the mine is surrounded by a berm with an entrance in it and a sign stating "keep out, explosives." Tr. 42, 51. Scott stated that only Buckley employees and maybe a quarry manager are allowed in the area. Tr. 43. He further stated that if he saw someone who was not a Buckley employee enter the blast site he would stop work and ask them what they needed before carrying on with loading the holes. Tr. 52.

Scott described Buckley's dewatering process and why it was unlikely anyone would ever be behind the dewatering truck. All of the holes at this mine are normally wet and need to be dewatered right before being loaded. Tr. 45. The shot pattern at the time consisted of three rows with nineteen holes in each row. Tr. 48; Ex. R-5. Buckley's method of working through the pattern involved the dewatering truck backing up to the hole so that the hose and pump could be positioned over the hole. Tr. 52-53. Scott explained that the blaster, in this case him, would follow behind the dewatering truck on foot, which, because the dewatering truck was operating in reverse, would place him in front of the dewatering truck. He would load the holes with

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<sup>7</sup> Jessie Scott has been with Buckley for ten years and is currently a branch manager, but was the blaster in charge of loading the shot on February 22, 2016 and was the manager of the other persons on the blast crew that day. Tr. 34-35.

<sup>8</sup> The pre-operational examination and lack of any defects were documented in Buckley's electronic logbook, PeopleNet. Tr. 37; Exs. R-3 and R-4. The records documenting the examination are kept in the normal course of business. Tr. 38. Scott explained that in order to drive the dewatering truck the driver must login to PeopleNet and go through a pre-operational examination before the truck can be driven. Tr. 38-39. The PeopleNet software prevents the vehicle from moving until the driver has logged on. Tr. 39. Scott also testified that the truck driver conducts a post-operational examination in order to logoff of PeopleNet and the defect would have been noted, at the latest, by the end of the shift on the February 22. Tr. 51; Ex. R-3 p. 2. Moreover, the vehicle would have been examined again the next morning during the pre-operational examination by the equipment operator. Tr. 51

<sup>9</sup> Buckley introduced into evidence an incident report form which was filled out following the issuance of the subject citation. Tr. 40; Ex. R-2. The form, which was filled out by Taylor Willis, Buckley's branch manager at the time, indicated that Willis heard the backup alarm function when he assisted Scott while hooking up the trailer carrying the skid steer. Tr. 40-42.

material from the powder truck, which would follow behind him. Tr. 44-45, 52-53. Consequently, as the equipment worked its way through the shot pattern the dewatering and powder trucks would be facing each other. The dewatering truck operated in reverse and the powder truck moved forward. Tr. 53. Scott testified that, when on foot, he was at times between the two trucks as they worked their way through the shot pattern. Tr. 55. He agreed that he moved around and there were no barricades to prevent him from going behind the dewatering truck and he would get close to the truck. Tr. 49, 55. He further acknowledged that there was no spotter assisting the truck while it operated in reverse. Tr. 56. Nevertheless, he testified that while on foot he would never walk behind the dewatering truck and there was no reason for him to do so. Tr. 49, 57. Scott would be the only person on foot in the blasting pattern as the trucks moved to the next hole.<sup>10</sup> James Brown, the Buckley employee who was driving the dewatering truck, was responsible for parking the truck then exiting it to lower the pump and hose into the hole. Tr. 45-46, 49. Scott stated that Brown could never be on foot while the dewatering truck was moving because he was the truck's operator. Tr. 46. Because the dewatering process requires that the truck be in park, no miner would ever be exposed to the hazard presented by the inoperable backup alarm while water is being pumped out of the holes. *Id.*

Scott conceded that other individuals would sometimes visit the blast site and specifically noted that "sometimes a quarry manager" would come into the area. Tr. 42. Further, he stated that although other persons do not normally "stay around the blast site," someone "might come down there and check on me and ask me what time we're going to be done." Tr. 52.

I credit the testimony of Scott as to the procedures Buckley followed when dewatering and loading the holes, as described above. I already determined that the Secretary established a violation of the cited standard. As stated in *Newtown*, the second step requires the judge to (1) define the particular hazard to which the violation allegedly contributes and then (2) determine whether there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. The hazard in this instance is that a pedestrian will be struck by the backing dewatering truck. I find that the lack of an operable backup alarm certainly would contribute to this hazard especially since the view from the driver's seat to the rear of the truck was at least partially obstructed.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The critical issue here is whether there existed a reasonable likelihood of the occurrence of the hazard. Was there a reasonable likelihood that a pedestrian would be struck when the

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<sup>10</sup> Scott explained that Clay Whatley was the powder truck driver that day and his job can be performed entirely from inside the cab of the truck. Tr. 45-47. As a result, he would not have been on foot.

truck was backing up based on the particular facts surrounding the violation? I find that such an event was not reasonably likely.<sup>11</sup>

Scott would have been the only person on the ground, because the other two employees would be moving the two trucks. There was no proof that any other vehicles were parked along the blast holes as they were being dewatered and there would be no reason for a vehicle being behind the dewatering truck. Although sometimes a manager from Vulcan would enter the blast area to check on Buckley's progress, there was no evidence that he would exit his vehicle much less walk behind or near the dewatering truck as it was backing up. Scott was the blaster in charge and he was directing the operations, so it would be highly unlikely that he would walk behind the dewatering truck while it was moving because doing so would prevent him from performing an important part of his job, which was helping to make sure that the dewatering truck and the powder trucks were being correctly positioned to dewater and load the next hole. Although the dewatering truck backed up frequently during a shift and it would have been physically possible for Scott or someone else to walk behind the dewatering truck as it backed up, I find that under the particular facts presented here such an event was highly unlikely.<sup>12</sup>

The third step in the S&S analysis requires the judge to assume the existence of the hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown*, at 2038. Assuming that someone was struck by the dewatering truck while it was backing up, a serious injury would be reasonably likely and such an injury would be of a reasonably serious nature including but not limited to permanently disabling injury or a fatality. The violation, while not S&S, was serious.

I base my S&S and gravity findings on the particular facts presented in this case. Scott would have been the only person on foot when the dewatering truck was backing up and he would know if anyone else entered the blast site. Because it was a tightly controlled area, I find that it was unlikely that Scott or another person on foot would have walked behind the dewatering truck.

### **Negligence**

Inspector Kinsey determined that Buckley was moderately negligent because it had conducted a pre-operational examination of truck, at which time the backup alarm had been working. Tr. 28. Inspector Kinsey believed that the alarm quit working during the shift. Tr. 28. He terminated the citation after Buckley repaired the alarm and he had them test it out by placing the truck in reverse, at which time the backup alarm sounded. Tr. 28.

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<sup>11</sup> The lack of a back-up alarm did not contribute to a hazard for those in other vehicles or to the driver of the dewatering truck while he was backing up. No other vehicles would have been behind the dewatering truck and, assuming that another vehicle was present, an injury would have been unlikely in the event of a collision due to the slow speed of the dewatering truck as it backed up to the next hole.

<sup>12</sup> Backing up the dewatering truck to connect to the trailer carrying the skid steer loader would by necessity involve someone acting as a spotter to line up the hitch on the back of the truck to the hitch on the trailer. It was unlikely that anyone would be struck by the truck in this situation.

The Commission has determined that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). The Commission analyzes negligence by considering what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

I find that Buckley’s negligence was low. When writing the citation Inspector Kinsey accepted that Buckley had conducted a pre-operational examination of the truck that morning and that the alarm had been working. Moreover, he acknowledged that the alarm must have quit working sometime during the shift. The PeopleNet report submitted into evidence indicates that the pre-operational examination was completed shortly after 7:11 a.m. on February 22. Ex. R-3 p. 2. The citation was issued at 11:20 a.m. the same day. The violative condition could not have existed for more than four hours and could have existed for only a matter of minutes because Inspector Kinsey did not see the truck operate in reverse except during the test.<sup>13</sup> A reasonably prudent person would have understood that the condition constituted a violation of the standard. The pre-operational examination and lack of evidence as to when the malfunction occurred mitigate Buckley’s negligence. Consequently, I find that Buckley’s negligence was low.

## II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). While the Secretary’s exhibit booklet included a history of violations marked as S-3-1 through S-3-24, he did not introduce the history at hearing and the exhibit was not entered into evidence. Nevertheless, this exhibit and information at the MSHA website indicate that Buckley had no history of violations at this mine site. Exhibit A to the penalty petition indicates that Buckley had a history of 15 previous violations on a corporate-wide basis. The parties did not present evidence as to Buckley’s size but Exhibit A to the penalty petition indicates that Buckley was assigned 16 penalty points, which correlates with a medium to large size contractor. 30 C.F.R. § 100.3 Table V. The violation was timely abated. No evidence or stipulation was made that payment of the proposed penalty would have an adverse effect upon Buckley’s ability to continue in business. The gravity and negligence are discussed above. Based on the penalty criteria, I assess a civil penalty of \$250.00 for Citation No. 8959025.

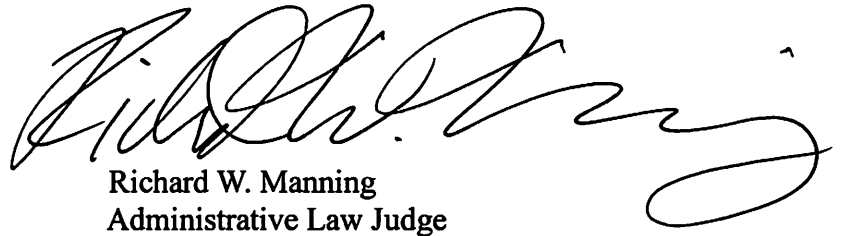
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<sup>13</sup> The Secretary argues that the negligence should be moderate because “the dewatering truck had been operating in reverse throughout the shot pattern, yet none of the Buckley Powder miners including Mr. Scott, the supervisor, noticed the alarm not functioning.” Sec’y Br. 12. However, no evidence was introduced at hearing regarding the status of the backup alarm prior to the test the inspector observed and I cannot assume that the backup alarm failed to operate during all or most of the shift.



### III. ORDER

For the reasons set forth above, the violation alleged in Citation No. 8959025 is **AFFIRMED**, the significant and substantial designation is **VACATED**, and the negligence attributed to Buckley is **MODIFIED** to low. Buckley Powder Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$250.00 within 40 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

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