FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HUMPHREYS ENTERPRISES, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. VA 2012-504 A.C. No. 44-07133-290886 Mine: No. 26 Strip

DECISION AND ORDER

Appearances: Najah A. Farley, Esq., and Ryan M. Kooi, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;

William J. Sturgill, Esq., Sturgill Law Office, P.C., Wise, Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary's Petition for the Assessment of Civil Penalty filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In dispute are one section 104(d)(1) citation and one section 104(d)(1) order issued to Humphreys Enterprises, Inc. (hereinafter "Humphreys" or "Respondent") by the Mine Safety and Health Administration ("MSHA") at the Lyons Pit section of Humphreys' No. 26 Strip mine. In order to prove the citation and order before me in this proceeding, the Secretary must establish the existence of each violation "by a preponderance of the evidence," that is, the trier of fact must find the existence of fact is more probable than its nonexistence. *RAG Cumberland Res.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

I. STATEMENT OF THE CASE

Both of the alleged violations in this docket were issued following a quarterly inspection of Respondent's No. 26 Strip mine by MSHA Inspector Stonewall Eldridge. Citation No. 8172475 charges Humphreys with a violation of 30 C.F.R. § 77.1000 for failing to maintain spoil slopes at a 45-degree angle as required by the mine's ground control plan. Order No. 8172476 alleges a violation of 30 C.F.R. § 77.1313(a) for failing to conduct an adequate on-shift

examination. Both of these alleged violations are designated as "significant and substantial" ("S&S")[1] and determined to be the result of Respondent's unwarrantable failure to comply with a mandatory health or safety standard.[2] The Secretary proposes a penalty of $2,000.00 for each alleged violation for a total proposed civil penalty of $4,000.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. VA 2012-504 to me, and I held a hearing on May 8, 2014, in Abingdon, Virginia.[3] The Secretary presented the testimony of MSHA Inspector Stonewall Eldridge and Geotechnical Engineer Gregory Rumbaugh. (Tr. 15:18–25, 105:1–8.) Humphreys presented the testimony of four witnesses: Mine Foreman Terry A. Brooks, Surveyor Jewell E. Carty, Engineer James R. Jones, and Humphreys' Safety Director Lawrence E. Clapp. (Tr. 144:1–5, 167:1–8, 173:2–8, 183:3–9.) The briefing schedule closed in August 2014, with both the Secretary and Humphreys submitting simultaneous post-hearing briefs, and the Secretary filing a reply brief.[4]

II. ISSUES

The Secretary asserts that both the citation and order in this docket were properly issued and that each was an S&S violation of the Mine Act and an unwarrantable failure to comply with a mandatory health or safety standard. (*See* Sec'y Br. at 13–32.) Accordingly, the Secretary believes his proposed penalty is appropriate. (*Id.* at 32.) In contrast, Respondent believes that the conditions at the Lyons Pit section of Humphreys' No. 26 Strip mine on December 27, 2011, were safe and that the mine was following its MSHA-approved ground control plan. (Resp't Br.

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[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes violations "of such nature as could significantly or substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

[2] 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."

[3] At the hearing, the Secretary and Respondent submitted exhibits and a list of stipulations. In this decision, the Secretary's exhibits are referenced as "Gov't Ex. #," Respondent's exhibits are referenced as "Resp't Ex. #," and the stipulations are referenced as "Joint Stip. #." Government Exhibit 19 includes four photographs, which were also admitted separately as Respondent Exhibits 1, 2, 5, and 6. Government Exhibit 20 includes four photographs also marked Respondent Exhibits 3, 4, 7, and 8. For ease of description, the photographs are referenced in this decision as Respondent Exhibits 1 through 8. Further, the cross-section map of the Lyons Pit was marked as Government Exhibit 21 and Respondent Exhibit 10, and is referred to as "Gov't Ex. 21" throughout this decision. Similarly, a map of the Lyons Pit area was marked as Government Exhibit 22 and Respondent Exhibit 9, and is referred to as "Gov't Ex. 22" in this decision.

[4] In this decision, Respondent's Brief will be referenced as "Resp't Br.," the Secretary's Post-Hearing Brief will be referenced as "Sec'y Br.," and the Secretary's Reply Brief as "Sec'y Reply."

at 37–38.) In particular, Respondent disputes not only the accuracy of Inspector Eldridge's angle measurements but also the meaning of Humphreys' notations in its on-shift examination records. (Resp't Br. at 15–16, 23–24.) Therefore, Respondent contends Citation No. 8172475 and Order No. 8172476 should be vacated. (Resp't Br. at 37–38.) Respondent further contends, in the event the alleged violations are upheld, that the cited conditions were neither S&S nor due to the operator's unwarrantable failure. (*See* Resp't Br. at 13–36.) Thus, Respondent argues that the Secretary's proposed penalties should be vacated or reduced. (*Id.*)

Accordingly, the issues before me are: (1) whether the Secretary has carried his burden of proof that the conditions described in Citation No. 8172475 violated 30 C.F.R. § 77.1000; (2) whether the record supports the gravity and unwarrantable failure designations for Citation No. 8172475; (3) whether the Secretary has carried his burden of proof that the conditions described in Order No. 8172476 violated 30 C.F.R. § 77.1313(a); (4) whether the record supports the gravity and unwarrantable failure designations for Order No. 8172476; and (5) whether the proposed penalties for each alleged violation are appropriate.

III. FINDINGS OF FACT

A. Operations at Humphreys Enterprises No. 26 Strip Mine

Respondent Humphreys Enterprises operates the No. 26 Strip mine, located in Norton, Virginia. (Joint Ex. 1: Stip. 1; Gov't Ex. 3.) The No. 26 Strip mine contains four coalbeds. (Gov't Ex. 3.) The alleged violations in this matter relate to Humphreys' mining activity of the Lyons coalbed, in an area of the mine known as the Lyons Pit. The coal seam at the Lyons Pit was initially covered by "spoil," which is material, such as rock, dirt, and tree roots, that has accumulated over the coal seam. (Tr. 23:4–8.) To access the coalbed to remove coal, Humphreys had to dig a path through the spoil for their equipment to reach the coalbed. (Tr. 149:8–150:13.)

MSHA regulations at 30 C.F.R. § 77.1000 require operators such as Humphreys to "establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks," and to file a copy of their ground control plan with their local MSHA district office. *See* 30 C.F.R. § 77.1000, 77.1000-01. Humphreys Enterprises submitted the ground control plan for their No. 26 Strip mine to the appropriate MSHA District Manager in Norton, Virginia on April 27, 2009. (Gov't Ex. 3.) The plan was developed in conjunction with engineering services provided to Humphreys by Appalachian Technical Services, and establishes pit dimensions and mining practices for the No. 26 Strip mine that are designed to ensure safe and stable ground conditions. (*Id.*) The ground control plan specifies that the maximum angle of deposited spoil at the Lyons Pit is 45 degrees. (*Id.* at 2.)

In December 2011, Humphreys Enterprises began operations in the Lyons Pit. (Tr. 149:21–23.) First, dozers started removing spoil and pushing it into piles to create a pathway for rubber-tired mining equipment to get to the coalbed. (Tr. 149:8–150:11.) As the dozers moved toward the coal seam, they pushed spoil into two spoil banks running along the left and right sides of their path. (*Id.*) The right-side spoil bank was part of an existing highwall that had been created by a previous mining company. (Tr. 22:7–25.) The left-side spoil bank, in contrast, consisted completely of spoil that Humphreys had dug out to access the coalbed.

(Tr. 22:20–25.) The "toe" of the right-side spoil bank, where the spoil bank meets the pit floor, had been dug back to widen the floor so the path would be wide enough for "two production loaders and a truck in between them" to travel abreast for double loading while removing spoil material. (Tr. 36:19–37:8, 51:16–52:6; *see* Joint Ex. 1: Stips. 14–17.) This equipment moved in to the area on December 21, 2011, which meant the Lyons Pit became "active" on that day. (Tr. 148:8–14; Joint Ex. 1: Stip. 6.) By December 27, the day of the inspection, Humphreys' productions loaders and haulers had advanced past the spot between the two spoil banks but had not yet reached the exposed coalbed; Humphreys was still in the process of removing the spoil material in front of the coalbed but now only one hauler (or truck) at a time was driving between the spoil banks. (Tr. 24:10–24, 51:22–52:11.)

B. Inspection at the Lyons Pit on December 27

1. Ground Control Violation

On December 27, Inspector Eldridge arrived at the Lyons Pit portion of the No. 26 Strip Mine at approximately 7:15 a.m. to conduct a regular E01 (or quarterly) inspection. (Tr. 19:5–6, 20:23, 21:4.) Prior to arriving at the mine, Eldridge had prepared for the inspection by reviewing the mine's files, including its ground control plan. (Tr. 19:11–17.) Once Eldridge arrived at the mine, he met with Mine Foreman Terry Brooks and began traveling around the facility with him. (Tr. 20:24–21:3.) He traveled with Brooks down into the pit area, where equipment operators were loading overburden and hauling it to the overburden dump area with both production spreads.[5] (Tr. 21:7–11.)

As Eldridge walked into the pit, he followed the path Humphreys created between the right and left spoil banks to access the coal seam. (Tr. 21:23–22:11.) While in the pit, Eldridge immediately noticed the spoil banks on each side of the Lyons Pit appeared to be too steep. (Tr. 26:7–11.) He discussed the spoil banks with Brooks and documented the conversation contemporaneously in his inspection notes. Eldridge wrote, "I commented that the left side of the pit the spoil had been sloped some but was not finished. [Brooks] stated that they had started sloping it but pulled off of it. The Right [sic] side spoil has not been touched (sloped) at all." (Tr. 26:17–22, 29:15–22; Gov't Ex. 2 at 5–6.)

Because the slope on both the left and right spoil banks appeared to be greater than the required maximum angle, Eldridge took out his Abney hand level and began to measure the angles on the spoil banks.[6] (Tr. 32:5–14.) Using the hand level, Eldridge measured the right-side spoil slope's angle to be sixty-nine degrees, and the left-side spoil slope's angle to be sixty degrees. (Tr. 34:25.) To support his measurements, Eldridge took several photographs of the spoil slopes. (Tr. 35:1–5; Gov't Exs. 4–10.) Eldridge also noted that the "toe" of the slope, where the spoil bank met the mine pit floor, had been dug out of the spoil banks, presumably to

[5] A "production spread" at the Lyons Pit consists of a production loader and a couple of haulers. (Tr. 19:20–22.)

[6] The Abney hand level is a standard MSHA-issued piece of equipment often used to measure slope angles and grades. (Tr. 34:16–20.)

allow equipment removing spoil material to get through, thus increasing the slope angle. (Tr. 36:7–11.)

Eldridge considered the left and right spoil banks to be hazardous to miners because they had not been sloped down to the required 45-degree angle, and he had documented equipment traveling within approximately three feet of the recently cut-out "toe" of the slope. (Tr. 37:11–19.) In addition, Eldridge observed larger diameter boulders and water seepage on the right-side spoil slope. (Tr. 38:9–11; Gov't Ex. 5.) The seepage concerned him because it indicated the spoil was saturated with water and thus unstable.[7] (Tr. 38:10–15.) Eldridge believed these conditions were S&S and an unwarrantable failure under section 104(d)(1) of the Act.

To abate the spoil slope condition, the mine constructed two earth berms 30 feet away from the toe of each spoil bank, which would prevent any miners or equipment from getting too close to the spoil banks and being covered with spoil in the event of a structural failure. (Tr. 50:10–51:16.) Humphreys flagged each berm with red tape so miners could easily identify and avoid the hazardous area. (Tr. 51:7–13, 53:6–10, 162:19–23; Gov't Exs. 11–14.) This method of abatement was appropriate because equipment no longer needed to be close to the toe of the spoil bank (nor did any additional material need to be cut out of the toe); at that point in the mining process at the Lyons Pit, the operator was moving only haulers in and out one at a time, rather than digging between the spoil banks with both loaders abreast as a unit and a truck in between to haul out the spoil. (Tr. 51:16–52:14.) After Humphreys constructed the berms, Eldridge issued Citation No. 8172475, which reads verbatim:

> The mine operator is not following the established ground control plan for the safe control of all highwalls, pits and spoil banks. The spoil banks located in the Lyons Strip Pit are not being sloped to 45 Degrees or less as stated in the Ground Control Plan dated April 27, 2009. The spoil bank on the right side of the pit is on a 69 Degree slope and stands 35' to 40' high. The left side spoil bank is on a 60 Degree slope and stands 50' to 55' high. Two production loaders are working sideways underneath the high spoil while loading two haulers. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing the equipment to work underneath the hazardous spoil. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov't Ex. 1; *see* Joint Ex. 1: Stips. 12, 14–15.)

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[7] The rainfall and temperature changes during December caused freeze and thaw cycles, which create further instability. (Tr. 39:19–23.) When water freezes, it expands, wedging into the spoil around it. (Tr. 39:17–24.) When the ice thaws, it contracts, allowing the same area to accommodate more water than before. (*Id.*) When the water freezes again it will wedge the spoil out even further. (*Id.*) Thus, over time, these freeze-thaw cycles contribute to instability. (*Id.*)

Eldridge marked this citation as "reasonably likely" due to both the steepness of the spoil banks and the recent rain and consequent water saturation that would contribute to the slope's instability. (Tr. 54:6–22.) He also determined this violation could cause "permanently disabling" injuries because, in the event of a spoil slope failure, spoil material would come down over equipment on the pit floor. (Tr. 55:10–18; Gov't Ex. 1.) Eldridge believed this was S&S and would lead to serious injuries, even though the body of the equipment itself might provide some protection from the crushing injuries. (*Id.*) Because Eldridge had not observed any miners on foot in the area, he marked the type of injury as "permanently disabling" rather than "fatal." (*Id.*) Eldridge also designated this citation as an unwarrantable failure with high negligence because he thought an experienced foreman should have easily recognized the condition, given how obvious the steepness of the spoil banks had been upon entering the Lyons Pit. (Tr. 55:19–56:22.)

2. On-shift Examination Violation

Eldridge continued his inspection by looking at the mine's examination records, noting that the day shift examination notes for December 21 state "spoil high" under the "Hazardous Condition" section of notes on the Lyons Pit. (Tr. 56:1–4; Joint Ex. 1: Stip. 8; Gov't Ex. 16.) These on-shift examination notes also state under the "Action Taken" section, "working down with dozers." (Joint Ex. 1: Stip. 9; Gov't Ex. 16.) Yet, the high spoil conditions Eldridge observed on December 27 were not recorded in the on-shift examination book for either the December 21 evening shift or on December 22. (Joint Ex. 1: Stips. 10–11; Gov't Exs. 17–18.) As a result, Eldridge issued Order No. 8172476, which states verbatim:

> Adequate on shift examinations are not being done in the Lyons strip pit. The Lyons strip pit became active on December 21, 2011, on the day shift at which time the foreman recorded in the on shift examination book that the pit had "High Spoil" and the corrective action recorded was "working down with dozers". No hazards were reported in the exam book for the night shift, also working in the Lyons pit on December 21, 2011. No spoil hazards are reported in the exam book for either shift on December 22, 2011. The mine was idle four days during the holidays and resumed work today, December 27, 2011. The spoil banks in the Lyons pit are not sloped to a maximum of 45 Degrees as stated in the Ground Control Plan. No entries of any kind have been documented in the exam book for today. The foreman engaged in aggravated conduct constituting more than ordinary negligence by not documenting and correcting the spoil bank hazards. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov't Ex. 15.)

Mine Foreman Terry Brooks conducted both pre-shift and on-shift examinations on December 27. (Tr. 150:15–20.) Over the course of the shift, Brooks explained he would look at

the spoil banks in the Lyons Pit approximately once an hour, and they appeared safe and stable to him during the shifts prior to the inspection. (Tr. 154:18–23, 159:17–22.) Brooks also acknowledged that the mine's on-shift examination notes on December 21 indicate high spoil in the Lyons Pit area but maintained this was in reference to the spoil in a different area than the one Eldridge had cited. (Tr. 154:1–6.)

C. Humphreys' Spoil Bank Survey

When Humphreys' Safety Director Clapp arrived at the Lyons Pit on December 27, 2011, he spoke with Brooks and learned that the mine had been issued a section 104(d)(1) citation and a section 104(d)(1) order during the inspection earlier that day. (Tr. 184:8–14.) He then walked to the pit and saw the cited area had been barricaded and flagged. (Tr. 184:18–25.) Because Clapp did not believe the spoil banks were sloped at an unsafe angle, he decided to conduct his own survey of the spoil slopes. (Tr. 185:2–10.) He had ordered similar surveys in the past because he felt his surveyors' equipment was far more accurate than hand-held equipment, such as the Abney hand level. (*Id.*) Clapp instructed the foreman and night shift foreman not to disturb the areas that had been flagged off. (Tr. 184:24–25.) On his way home from the mine that day, Clapp stopped by the mine office and told Humphreys' surveyor Roger Jones that their surveyors should meet him in the Lyons Pit to conduct a survey the next morning. (Tr. 185:8–10.)

On December 28, 2011, Humphreys' surveyor Jewell Carty went to the Lyons Pit to conduct a survey of the cited spoil slopes. (Tr. 168:22–69:15.) Upon arriving at the pit, Carty and a survey team met with Brooks and Clapp. (Tr. 169:1–6.) Clapp informed them that a citation had been written on the slope and instructed them as to where he wanted them to take a cross-section of the slope. (Tr. 206:15–24.) The surveyors then conducted a survey of the sections of the spoil slopes that had been flagged the day before. (Tr. 169:10–18.) They sent their survey data to the engineering department, where a cross-section survey map was produced under the supervision of Carty's supervisor, Roger Jones. (Tr. 168:13–17, 169:16–170:7; Gov't Ex. 21.) This map shows the slope angles on the right and left side spoil bankss to be approximately 44.4 and 45.8 degrees, respectively. (Gov't Ex. 21.) Although both Carty and Jones had surveying experience, neither one is a licensed land surveyor. (Tr. 170:21–25, 181:24–25.)

IV. PRINCIPLES OF LAW

A. 30 C.F.R. § 77.1000

Section 77.1000 requires that:

> Each operator shall establish a ground control plan for the safe control of all highwalls, pits, and spoil banks to be developed after June of 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000. The Commission has recognized that this section requires operators of surface coal mines to establish and follow a ground control plan. *RNS Servs., Inc.*, 18 FMSHRC 523, 523 n.1 (Apr. 1996). Humphreys' ground control plan required the spoil banks in the Lyons Pit to be sloped at an angle no greater than 45 degrees. (Gov't Ex. 3.)

B. 30 C.F.R. § 77.1713(a)

Section 77.1713(a) requires that:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a). Under this standard, an operator must ensure that a certified person regularly checks active working areas for hazards, records them, and corrects any hazardous conditions. *See Black Castle Mining Co.*, 36 FMSHRC 323 (Feb. 2014). In order to establish a violation of this standard, the Secretary must show hazardous conditions were present in the Lyons Pit when the mine was active on December 22 and 27, 2011, and that these conditions were not recorded in the on-shift examination book or corrected as required by the applicable standard.

C. Significant and Substantial

Both of the alleged violations in this docket were designated as S&S violations. 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 an 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 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

Besides specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a

mere technical violation—i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Nat'l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission has indicated "[t]he correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.l3 (Aug. 2012). In addition, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citations omitted), *aff'd on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013). Finally, the Commission indicated an evaluation of the reasonable likelihood of injury should be made assuming continued 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)).

D. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 135–36 (approving 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 each case to see if any aggravating factors exist. The Commission has identified several such factors, including the length of time that the 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 is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001), *appeal voluntarily dismissed* (Oct. 19, 2001) ("Consol"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

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

A. Additional Findings of Fact

The parties disagree on the angle at which the spoil banks in the Lyons Pit were sloped. The parties presented conflicting evidence regarding their perceptions of the slope angles, the accuracy of angle measurements taken with an Abney hand level, and the reliability of the cross-section map produced by Humphreys. The parties also disagree as to the meaning of the "spoil high" notation in the mine's examination book during the day shift on December 21.

1. Angle of the Spoil Bank Slopes at the Lyons Pit

Several witnesses testified about their visual impressions of the spoil bank slope angles at the Lyons Pit, based on both their recollections and analysis of photographs. Inspector Eldridge testified it was immediately apparent to him that the spoil banks in the Lyons Pit appeared to be steeper than 45 degrees, and he supported his observations by taking photographs and angle measurements. (Tr. 26:6–11, 32:7–34:25; Gov't Exs. 4–14.) I find Eldridge's testimony to be credible, particularly because his photographs depict spoil slopes that appear very steep. (*See* Gov't Exs. 4–14.) To further support Eldridge's contention that the spoil banks were steeper than 45 degrees, the Secretary presented the testimony of Gregory Rumbaugh, an MSHA engineer asked to investigate the spoil slope citation at the Lyons Pit. Rumbaugh has extensive relevant experience, and he sufficiently and competently explained why the photographs and documents he reviewed indicated that Humphreys was in violation of its ground control plan.[8] As he pointed out, several features in the photographs indicate the spoil banks were steeper than 45 degrees, including reference objects and areas where the toe had been cut back to create a steeper angle. (Tr. 113:14–116:23; Gov't Exs. 4–14.) Throughout their testimony, both Eldridge and Rumbaugh convincingly explained why the spoil slopes were sloped at approximately 60- to 70-degree angles.

In contrast, Humphreys' Foreman Brooks testified that he had regularly examined the slopes for potential hazards, that they appeared safe to him, and that he knew the ground control plan required the slopes to be at a 45-degree angle. (Tr. 146:22–147:18, 154:15–23.) However, Brooks later admitted he had never reviewed the ground control plan in its entirety. (Tr. 165:10–15.) He was also unable to tell Inspector Eldridge the plan's maximum allowable spoil slope angle when asked on the day of the inspection. (Tr. 30:14–20.) Brooks' testimony indicates he was not sufficiently familiar with the mine's ground control plan. It is unclear how Brooks could be certain the spoil slopes were safe and in compliance with the ground control plan without knowing the specifics of the plan. Because of the inconsistencies in Brooks' testimony, I find it to be unreliable and outweighed by Inspector Eldridge's testimony.

Respondent also argues that the Secretary's photographs and measurements were not accurate enough to support a violation. Safety Director Clapp argued that the angle at which a photograph is taken can have a great impact on the perceived slope, and he took his own pictures to show this. (Tr. 186:6–7, 188:1–10; Resp't Exs. 1–8.) Clapp and surveyor Jewell Carty also doubted the precision of Inspector Eldridge's Abney hand level, suggesting that his measurements might be off by several degrees. (Tr. 193:13–194:7, 171:11–172:16.) Both men suggested that correct use of the hand level required a steady hand and some estimation, and both felt that modern surveying equipment might be more accurate. (*Id.*) Although the Secretary's expert, Rumbaugh, admitted that both the angle of a photograph and the estimation involved for

[8] Prior to joining MSHA, Rumbaugh had approximately 10 years of work experience as a land engineer, which included experience with the excavation of new slopes at a mine, as well as investigations of various geotechnical aspects of engineering projects. (Tr. 105:18–106:14.) Specifically, Rumbaugh has experience investigating a fatal accident caused by an embankment failure, as well as evaluating embankment and highwall stability. (Tr. 107:22–25, 109:19–24.)

Abney hand level use might affect an angle perception by a few degrees, the difference between a 45-degree slope and a 60-degree slope is well beyond these margins. (Tr. 132:4–11, 136:15–24.) Ultimately, I find that any discrepancies between an angle measurement taken with different instruments would be minor, and thus agree with the Secretary that the Abney hand level provided a reasonable approximation of the slope angles in this case. (Tr. 132:4–11.)

Furthermore, Respondent relies on the cross-section map created from Humphreys' surveyors' data as evidence that both spoil slopes in the Lyons Pit were sloped at close to a 45-degree angle, as required by Respondent's ground control plan. (Gov't Ex. 21.) However, several circumstances surrounding Humphreys' survey and creation of this cross-section map lead me to determine that the survey map is not reliable. Primarily, I find convincing Rumbaugh's explanation as to why Respondent's survey and cross-section map are unreliable. Rumbaugh drew on his extensive geotechnical engineering experience and review of conditions at the Lyons Pit. He opined that Humphreys' cross-section map could not be representative of the actual condition of the spoil banks because the data points selected for the survey were not spread out or numerous enough to depict an accurate representation of the slope angles. (Tr. 122:19–127:14, 142:16–19; Gov't Exs. 21–22.) For an accurate survey, Rumbaugh stated that surveyors would have taken roughly 100 to 200 ground surface "shots," in contrast to the mere 12 taken by Humphreys' unlicensed surveyors.[9] (Tr. 127:8–19.) Additionally, the Humphreys employee actually taking shots for the survey, Jewell Carty, was not a licensed land surveyor. (Tr. 170:21–25.) Although Carty testified that Roger Jones would stamp his work if necessary, Jones himself was also not a licensed land surveyor and had not stamped the survey. (Tr. 171:1–4, 181:24–25.) These deficiencies cast into question the level of professional accountability and supervision present in Humphreys' survey and map production, and thus undermine the survey's reliability. For these reasons, I give no weight to the cross-section map produced by Respondent.

Thus, I find that the Secretary has shown by a preponderance of the evidence that the spoil banks in the Lyons Pit on December 27 were sloped at an angle greater than 45 degrees in violation of Humphrey's ground control plan.

2. Interpretation of examination notes

The parties also presented conflicting testimony regarding the "spoil high" notation in the mine's on-shift examination book for December 21, 2011. (Gov't Ex. 16.) Respondent maintains that the "spoil high" notation in the on-shift examination book on December 21 was referring to high spoil *in front* of the loaders, not to the cited areas on the side spoil banks. (Tr. 151:21–154:6; Resp't Br. at 8, 23.) Brooks testified that on December 21, he observed high spoil in front of the loading equipment, recorded this in his examination book, and had a dozer work down the material so it would not be unsafe for the loaders going in to pick up the spoil material in front of them. (Tr. 152:1–20.) According to Brooks, the "spoil high" notation in his

[9] The mine's safety director, Eddie Clapp, believed that the Humphreys' surveyors took the appropriate points "where they need to." (Tr. 189:11–17.) However, Clapp himself is not a surveyor.

examination notes on December 21 had been in reference to a different area, that is, the spoil in front of the loading equipment. (Tr. 154:1–6.)

Yet, Brooks' own contemporaneous actions give me significant pause about the accuracy of his testimony on this point. As the parties have stipulated, Brooks recorded "spoil high" and "working down with dozers" in his December 21 on-shift examination. However, Brooks' on-shift record does *not* reference the location of the "spoil" in question. Although he may have testified to the best of his recollection at the hearing, his own contemporaneous account provides no basis for determining which "spoil" he meant. Even more troubling, Brooks admitted that he did not raise this point with Inspector Eldridge at the time of the inspection. (Tr. 154:7–9.) Given his position as a foreman responsible for safety hazards and the potentially costly penalty facing Humphreys, it is reasonable infer that Brooks would have mentioned the meaning of his "spoil high" notation when Eldridge issued the citation. In view of the above, I have serious doubts regarding the accuracy of Brooks' claim that his "spoil high" notation referred to a third spoil pile.

In contrast, Inspector Eldridge's account corresponds well with his contemporaneous inspection notes. Eldridge testified that he was certain the on-shift examination notes on December 21 referred to conditions on the left- and right-side spoil banks because, "[t]he two spoil banks on the left side and the right side going into the Lyons Pit were the only two spoil banks that they had going as far as getting on the Lyons seam . . . ." (Tr. 61:12–16.) Eldridge also testified that when he discussed the spoil slopes with Brooks, Brooks stated that the spoil had been high and that he had started sloping down a particular area with dozers but had pulled off to do something else. (Tr. 62:23–63:1.) When observing the area Brooks referred to, Eldridge noted that it was obvious to him where they had started sloping the spoil. (Tr. 62:22–23.) On each point, Eldridge's notes from the day of the inspection buttress his account. (*See generally* Gov't Ex. 2 (recording his observations).)

Based on the testimony and evidence before me, I therefore credit Eldridge's testimony on this point, and I find that the plain and direct "spoil high" notation on December 21 referenced material on the spoil banks in the same location as the cited condition.

B. Citation No. 8172475 – Spoil Bank Slope

1. Fact of Violation

Section 77.1000 requires each operator to establish a ground control plan for the safe control of all highwalls, pits, and spoil banks, and to follow their established ground control plan. *See* 30 C.F.R. § 77.1000. Humphreys' ground control plan established that spoil banks in the Lyons Pit would be sloped at an angle no greater than 45 degrees. (Joint Ex. 1; Gov't Ex. 3.)

For the reasons discussed above, I have found the Secretary's evidence regarding this violation to be credible, and that the photographs and testimony support upholding the violation. I give little weight to Respondent's evidence. At best, Respondent's arguments suggest that the angle measurements and the photographs of the slopes could overstate the slope of the spoil banks by a few degrees. Yet, the slopes were measured at 60 and 69 degrees, far greater than the

45 degrees required by the ground control plan, and photographs of the area support that finding. (Tr. 34:24–25, Gov't Exs. 4–14; Resp't Exs. 1–8.) Even after accounting for a small margin of error, it is still obvious from the photographs that the slopes were fairly steep. (Gov't Exs. 4, 6.) Therefore, I determine that Respondent Humphreys Enterprises violated 30 C.F.R. § 77.1000.

2. Gravity and S&S determination

To establish an 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*, 6 FMSHRC at 3–4.

As discussed above, the first element of the *Mathies* test, a violation of a mandatory safety standard, has been established. Further, Eldridge and Rumbaugh credibly testified that the steepness of the spoil slopes could create a hazard because the spoil material could slide or topple, particularly when considering the water seepage and freeze-thaw conditions present at the Lyons Pit in December 2011. (Tr. 38:4–15, 128:5–10.) Thus, the Secretary has shown the presence of the second *Mathies* factor, that this violation contributed to a discrete safety hazard of the steep spoil slopes failing and causing rocks and spoil material to drop into the pit below.

With respect to the third *Mathies* element, this hazard was reasonably likely to result in an injury for several reasons. First, the "toe" of the spoil bank had been cut out and dug back. Because the toe of a spoil bank helps prevent the failure of the material above it, the removal of the toe can lead to slope instability. (Tr. 113:19–114:5.) In addition, there had been recent rain as well as water seepage on the spoil banks, which Rumbaugh testified can create slope instability by as much as a factor of two.[10] (Tr. 57:7–10, 114:24–115:2, 159:10–15, 165:22–166:2; Gov't Ex. 2 at 11.) Particularly in December when the inspection took place, any water present in the slopes would have undergone freeze and thaw cycles, which means that the expansion of water would create gaps in the spoil material and lead to further instability. (Tr. 38:11–12, 39:14–24.)

[10] Respondent objects to the Secretary's evidence regarding the presence of water on the spoil slopes in the Lyons Pit. Specifically, Respondent asserts that neither the text of Citation No. 8172475 nor Eldridge's notes mention water seepage. (Resp't Br. at 21.) Although water seepage is not mentioned in the text of the "violation" portion of Citation No. 8172475, the inspector had designated the citation as S&S, and evidence of water seepage is relevant to consideration of the third *Mathies* factor (rather than for showing the violation itself). A Judge's decision as to whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (citing *National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981)). In this instance, the particular facts surrounding this violation include the weather conditions and water content of the spoil slopes in the Lyons Pit during December 2011.

Respondent argues that the likelihood of a spoil bank failure was low because the spoil banks had existed for years, as another coal company had been in the area prior to Humphreys, and no failures had occurred. (Resp't Br. at 26.) This argument is inapplicable to the left side spoil bank because it consisted entirely of new spoil material. (Tr. 22:20–25.) Further, even if the slopes were stable at the time another mining company was in the area, Humphreys' practice of digging back the "toe" of the slope created an additional source of instability. (Tr. 76:2–77:9, 114:1–5.) Most importantly, Respondent's arguments regarding the absence of slope failure in the years prior to this inspection are misplaced. The Commission has held that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citations omitted), *aff'd on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013). Thus, the Secretary has satisfied his burden of proof on the third *Mathies* element.

Regarding the fourth *Mathies* factor, this citation was marked as "permanently disabling," because Inspector Eldridge had documented equipment operating close to the spoil banks and thought that, in the event of a spoil bank failure, large boulders and spoil material would come down onto the equipment and expose miners working in the pit to crushing injuries. (Tr. 37:17–20, 44:1–4.) Further, miners were working parallel to the spoil slopes, which Rumbaugh testified would increase their exposure to falling material in the event of slope instability. (Tr. 128:11–129:1.) In contrast, Clapp did not think any injuries resulting from this hazard would be severe because miners are never on foot in this area, so no miner would be directly exposed to hazards. (Tr. 194:17–195:15.) Clapp noted that the height of each spoil bank was not that much larger than the average height of the equipment used in the pit, which meant that there would have to be a "massive failure" to cover a hauler in spoil material.[11] (Tr. 195:1–15.) However, Rumbaugh credibly testified that he had investigated similar circumstances in the past, and could remember instances in which equipment operators had become trapped in the falling material. (Tr. 128:5–10.) I agree with Eldridge's determination. Because operators were working parallel to the slopes, at times within three feet of the spoil banks, I determine that the type of injuries reasonably likely to result from a spoil bank failure would be permanently disabling. The Secretary has therefore established the fourth *Mathies* element. Having determined that the Secretary has proven all four of the factors required by *Mathies*, I conclude that Citation No. 8172475 was appropriately designated as S&S.

3. Negligence and Unwarrantable Failure

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. The Commission has identified several such factors, and I will discuss each of these factors below.

[11] Clapp estimated the average height of equipment to be about 20 feet, and the parties' joint stipulations state that on December 27, 2011, the right spoil bank was approximately 35 feet high and the left spoil bank was approximately 50 feet high. (Tr. 195:1–12; Joint Stip. 14–15.)

The facts of this violation indicate the presence of several aggravating circumstances at the Lyons Pit. First, the violation was extensive in that the mine operator was out of compliance with its ground control plan for significant portions of both spoil banks. The violative conditions were also obvious, and Inspector Eldridge noticed immediately that the spoil slopes appeared too steep. (Tr. 55:21–25.) Even an untrained eye can ascertain from photographs of the Lyons Pit that the spoil slopes are very steep. (Gov't Exs. 4–14.) Further, the operator's efforts in abating the violative condition were minimal in that Brooks had instructed the dozers to work down the slope, but had called them off the job and done nothing further. For the reasons stated in my S&S analysis, the violation posed a high degree of danger that miners could suffer serious injuries from falling or sliding rocks and debris from the spoil banks. Moreover, the "spoil high" notation in the on-shift examination book on December 21 indicates that the operator had knowledge of the existence of the violation for the few shifts leading up to Eldridge's inspection on December 27. (Gov't Ex. 16.)

The other unwarrantable failure factors are relatively insignificant as either mitigating or aggravating factors. With respect to the length of time the violation existed, the violation in question was first present when documented in the examination notes on December 21, and the slopes were still too steep during the inspection on December 27. Even after accounting for the mine closure over the Christmas holiday from December 22 through 26, there were still four shifts during which miners were exposed to hazardous conditions. (Tr. 156:1–2; Joint Ex. 1: Stip. 13.) The Secretary did not present any evidence that Humphreys had been on notice from MSHA that greater efforts were required for compliance with its ground control plan at the Lyons Pit. Indeed, Humphreys had just begun operations in the area and the spoil banks could not have existed for longer than a few weeks. After considering all the unwarrantable failure factors, I conclude that the above-discussed aggravating factors—particularly the operator's knowledge of the condition, the obvious nature of the violation, and the degree of danger it posed—all support an unwarrantable failure designation. Consequently, I determine that the Secretary proved the ground control violation was the result of the operator's unwarrantable failure.

Inspector Eldridge designated the citation as high negligence because he determined this violation was obvious, as he had noticed almost instantly upon walking into the Lyons Pit that the spoil slopes appeared to be too steep. (Tr. 55:21–25.) This meant that a miner with experience in evaluating hazards, such as a certified foreman, should have noticed the condition long before the spoil banks were allowed to accumulate to that degree. (*Id.*) The mine's Safety Director Eddie Clapp disagreed with the negligence designation assigned to the citation because he felt that the violation came down to a difference of opinion between the inspector and the foreman as to the angle of the spoil slopes. (Tr. 198:16–199:6.) However, in the mine's on-shift examination book from December 21—six days before Eldridge's inspection—Mine Foreman Brooks noted high spoil in the Lyons Pit. (Tr. 56:1–4; Gov't Ex. 16.) Thus, the record demonstrates that mine personnel had actual knowledge of this hazard and failed to address it adequately. Accordingly, I conclude that a high negligence designation is appropriate.

4. Penalty Analysis

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil

penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. *See* 30 U.S.C. § 820(i). Further, the Secretary has proposed the statutory minimum of $2,000.00 for this section 104(d)(1) citation, and I am bound to go no lower than that minimum amount. 30 U.S.C. § 820(a)(3)(A); *Stansley Mineral Res. Inc.*, 35 FMSHRC 1177, 1180 (May 2013).

Respondent's violation history shows that it has no history of previous violations at this mine. (Gov't Ex. 25.) Further, the parties have stipulated as to the size of the mine and that the total proposed penalty in this matter will not affect Respondent's ability to continue in business. (Joint Ex. 1: Stips. 19–20.) I find the proposed penalties to be appropriate for the size of the operator. As detailed above, I have found that Humphreys displayed high negligence amounting to unwarrantable failure and that this violation was S&S. Nothing in the record suggests the operator did not demonstrate good faith in achieving compliance after notification of the violation. Upon consideration of these factors, I conclude that a penalty of $2,000.00 is appropriate for this violation.

C. Order No. 8172476 – On-shift Examiniation Violation

1. Fact of Violation – 30 C.F.R. § 77.1713(a)

I have found that the spoil banks on both sides of the Lyons Pit were far steeper than allowed by Humphreys' ground control plan from December 21 through 27, and Respondent's on-shift examination notes during most of this period show no record of this hazard. (Gov't Exs. 16–18.) Thus, Respondent also violated 30 C.F.R. § 77.1713(a) by failing to note the obvious hazards in its on-shift examination records.

2. Gravity and S&S determination

The first *Mathies* factor, the violation of a mandatory safety standard, has been established. The second *Mathies* factor requires that the violation contribute to a discrete safety hazard. *Mathies*, 6 FMSHRC at 3–4. In this instance, the violation caused a lack of notice of steep spoil banks at the mine, which contributed to the hazard of steep, unstable spoil banks on either side of the pit. With respect to the third *Mathies* factor, this hazard was reasonably likely to cause an injury because it created a workplace where miners entered the Lyons Pit and traveled parallel to the potentially unstable slopes without protection from possible slope collapse. Further, the absence of any notation in the onshift records made it more likely that the steep slopes would last for longer periods of time because miners would not be aware of the need to slope down the spoil. Although not binding on my decision in this matter, I note that other Commission Administrative Law Judges have also found violations of this standard to be S&S, citing similar concerns that a failure to record hazards will leave those hazards uncorrected and make it more likely for miners to be assigned to work in unsafe conditions without any warning of possible danger. *See Ky. Fuel Corp.*, 36 FMSHRC 159, 172 (Jan. 2014) (ALJ); *Extra Energy Inc.*, 34 FMSHRC 3285, 3294 (Dec. 2012) (ALJ). Finally, *Mathies* requires that the injury in question be of a "reasonably serious" nature. *Mathies*, 6 FMSHRC at 3–4. As discussed above,

a spoil bank failure would cause large boulders and spoil to come down onto equipment in the Lyons Pit, which would be reasonably likely to cause permanently disabling, crushing injuries for equipment operators working close to the slopes. Thus, I determine that the fourth *Mathies* factor has been met.

Having determined that the Secretary has proven all four of the factors required by *Mathies*, I conclude that Order No. 8172476 was appropriately designated as S&S.

3. Negligence and Unwarrantable Failure

The Secretary again claims that Humphreys' level of negligence was "high." (Sec'y Br. at 32; Sec'y Reply at 4.) In addition, the Secretary characterizes the operator's conduct as an unwarrantable failure to comply with a mandatory standard. (Sec'y Br. at 32.; Sec'y Reply at 4.) According to the Secretary, Respondent's knowledge of the violative condition, its previous—and ineffective—efforts to abate the condition, and the duration of the condition demonstrate that Humphreys' actions constitute "aggravated" conduct that is greater than ordinary negligence. (Sec'y Br. at 30–32.) For its part, Humphreys claims: (1) it had no notice that the condition was violative, (2) that the condition was not dangerous, and (3) that it did not believe the spoil material was hazardous.[12] (Resp't Br. at 30–31, 34–36.) In addition, Respondent notes that Humphreys promptly abated the condition. (*Id.* at 31.)

Based on the evidence before me, two of the Commission's unwarrantable failure factors are again relatively insignificant. Although the condition in this case existed for several days, I recognize that the mine did not operate between December 22 and December 26. (Tr. 156:1–2.) Thus, miners were only present for a few shifts. In addition, the Secretary did not introduce any evidence that Respondent was on notice that greater efforts were necessary for compliance, as Humphreys had just begun the process of working in the Lyons Pit that month. (Tr. 149:3–23.) In some cases, this lack of notice might constitute a mitigating factor in an unwarrantable failure analysis. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080–81 (Dec. 2014). Yet, the Commission has refused to consider a lack of prior notice from MSHA as a *mitigating* factor when an operator's "'good faith' belief that it was not required to note [a condition it believed to be non-hazardous] in its weekly examination and promptly correct the hazards . . . was not objectively reasonable." *Mach Mining, LLC,* 35 FMSHRC 2937, 2942–43 (Sept. 2013). Here, the slope of the spoil banks violated Humphreys' ground control plan by several degrees, and Humphreys objectively should have known that it was required to record the conditions in its on-shift reports. Accordingly, I determine that duration and notice neither aggravate nor mitigate Respondent's conduct in this case.

However, the five remaining (and interconnected) factors enunciated by the Commission suggest that Humphreys' on-shift examination violation constitutes aggravated conduct that is

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[12] Humphreys' also reiterates its claim that the "high"spoil notation on the December 21 on-shift examination referred to a different area of the mine. (Resp't Br. at 28–29, 35.) Given my factual findings on this point, *see* discussion *supra* Part V.A.2, I need not revisit this argument in the context of my unwarrantable failure analysis.

greater than ordinary negligence. The spoil banks for each bank exceeded 45 degrees. This condition was obvious to anyone conducting an on-shift examination. Specifically, Inspector Eldridge identified the spoil banks as excessively steep almost immediately. Moreover, Mine Foreman Brooks himself identified the condition in his December 21 exam record. Indeed, he initiated—but did not complete—efforts to abate the violative condition. These abatement efforts demonstrate his awareness of this obvious condition, which exposed Humphreys' miners to the serious danger of being struck or crushed by falling rocks and dirt. In spite of this danger, neither Brooks nor any other miner ever recorded these obvious conditions during any of the next three shifts. Notwithstanding the actual duration involved, Humphreys' failure was extensive because both excessively steep spoil banks were unreported for *every* active shift between Brooks' initial notation on December 21 and Eldridge's inspection on December 27.

In many cases, previous efforts to abate a violative condition might somewhat temper an operator's violative conduct. The Mine Act establishes a high standard of miner safety, and operators should be encouraged to make efforts to protect their miners. But in this case, Respondent's half-hearted abatement efforts highlight the magnitude of Humphreys' negligence. After Brooks called off Respondent's efforts to address the excessively steep slopes on December 21, no further steps were taken to address those conditions until Eldridge arrived on December 27. Despite Brooks' knowledge that these obvious, extensive, and dangerous conditions required attention, Humphreys' safety examiners did not note the conditions in their on-shift reports for the next three days.

At best, Humphreys' failure to document these hazards and take adequate action to correct them constitutes a level of indifference or disregard for miner safety. Thus, I conclude that Respondent's conduct in this case constituted an unwarrantable failure to comply with a mandatory standard. For the same reasons, I likewise conclude that Respondent's level of negligence was "high."

4. Penalty Discussion

Under section 110(i) of the Mine Act, I must consider the following six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i). Further, the Secretary has proposed the statutory minimum penalty of $2,000.00 for a section 104(d)(1) violation, and I am bound to go no lower than that minimum. *See* 30 U.S.C. § 820(a)(3)(A); *Stansley Mineral Res. Inc.*, 35 FMSHRC 1177, 1180 (May 2013).

Respondent's violation history shows that they have no history of previous violations at this mine. (Gov't Ex. 25.) The parties have stipulated to the mine's size and that the proposed penalty will not affect Respondent's ability to continue in business. (Joint Ex. 1: Stips. 5, 19–20.) I conclude that the proposed penalty is appropriate given the operator's size. I have determined that the Secretary's negligence and gravity designations for this violation are appropriate as written. Nothing in the record suggests the operator did not demonstrate good

faith in achieving compliance after notification of the violation. Upon consideration of these factors, I conclude that a penalty of $2,000.00 is appropriate for this violation.

VI. ORDER

For the reasons above, it is hereby **ORDERED** that Citation No. 8172475 and Order No. 8172476 be **AFFIRMED** as written. Humphreys Enterprises is **ORDERED** to pay a civil penalty of $4,000.00 within 40 days of the date of this decision.[13]

Alan G. Paez
Administrative Law Judge

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[13] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.