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March 18, 2015

KNIGHT HAWK COAL, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. LAKE 2014-120-R Citation No. 8448666; 11/14/2013 Docket No. LAKE 2014-121-R Citation No. 8439096; 11/14/2013 Mine: Prairie Eagle South Underground Mine ID: 11-03205
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. KNIGHT HAWK COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2014-575 A.C. No. 11-03205-351829 Docket No. LAKE 2014-647 A.C. No. 11-03205-355399 Mine: Prairie Eagle South Underground

DECISION

Appearances: Edward Hartman, U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois for the Secretary;

Mark E. Heath, Spilman, Thomas & Battle, Charleston, West Virginia for Knight Hawk Coal.

Before: Judge Miller

These cases are before me on notices of contest filed by Knight Hawk Coal, LLC, and petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against Knight Hawk pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve one 104(a) citation and one 104(d)(1) citation, with a total proposed penalty of $78,209.00. Prior to the hearing, the parties reached a settlement regarding Citation No. 8448666. The settlement was read into the record and is addressed below. The parties presented testimony and evidence regarding the one remaining citation, Citation No. 8439096, at a hearing held on January 28, 2015 in St. Louis, Missouri.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Knight Hawk's Prairie Eagle South mine is a large underground coal mine located near Sparta, Illinois. At hearing, the parties stipulated to the jurisdiction of MSHA and the Commission. Knight Hawk Prehearing Report 6-7. Further, the parties stipulated that the mine timely, and in good faith, abated the violation, and that the proposed penalty will not hinder its ability to continue in business. *Id.* Furthermore, the parties stipulated that "[a]t the time of the accident on February 13, 2013, the decedent, Timothy Chamness, was remotely operating the Joy Continuous Mining Machine . . . in the 'red zone,' in violation of 30 C.F.R. 75.220(a)(1)[,]" and that the violation, which resulted in a fatality, was significant and substantial. *Id.* Finally, the parties agreed that pages 6 and 10 of the mine's roof control plan contain the red zone provisions at issue. Sec'y Ex. 3 pp. 6, 10.

Based upon the parties stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and after consideration of all evidence and the post-hearing briefs, I find that the violation and S&S designation are appropriate, that the negligence is high, as alleged, and that the violation is a result of the operator's unwarrantable failure to comply with the standard.

Citation No. 8439096

Citation No. 8439096 was issued by Inspector Harry Wilcox on November 14, 2013 pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.220(a)(1). The citation alleges that the mine violated its approved roof control plan by failing to ensure that its employees did not work or travel in the red zone around the remote controlled continuous miner. Wilcox determined that the condition resulted in a fatal injury, was S&S, affected one person, and was a result of high negligence and the mine's unwarrantable failure to comply with the mandatory standard. The Secretary proposed a specially assessed civil penalty in the amount of $70,000.00 for this alleged violation.

On February 13, 2013, Timothy Chamness, the operator of a remote controlled continuous mining machine, was killed in the No. 1 entry when he became pinned between the conveyor tail of a continuous mining machine and the right rib of the entry while repositioning the continuous mining machine from the third cut to the fourth cut at the No. 1 face. Following the fatality, the Secretary conducted an accident investigation and generated an accident report, which included a diagram of the accident scene. Sec'y Ex. 2 Appendix B. As a result of the accident, Inspector Wilcox issued the citation and alleged a failure to follow the approved roof control plan, which required that "[n]o one shall be in the red-zone when continuous miners are being trammed from place to place or being re-positioned in the working place." Sec'y Ex. 3 p. 6. The citation was terminated when the operator submitted, and MSHA approved, revisions to the roof control plan.

In order for the Secretary to prove a violation of section 75.220(a)(1) he must, first, establish that the provision allegedly violated is part of the approved and adopted plan, and, second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC

903, 907 (May 1987)). Knight Hawk has stipulated that, at the time of the accident, the continuous mining machine operator was operating the piece of equipment contrary to the mine's approved roof control plan and, therefore, in violation of section 75.220(a)(1).

Knight Hawk has stipulated that a fatal accident occurred and that the S&S designation is appropriate. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term "significant and substantial" to be:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum,* the Secretary of Labor 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.

I have found a violation of a mandatory standard based upon the stipulations of the parties. As a result of the violation, a miner standing in the red zone was pinned and killed while tramming the continuous miner. Based upon the evidence of the accident and the stipulations of the parties, I find that the violation is significant and substantial.

Following the accident, Wilcox and others conducted an investigation during which they took the statement of Chamness' supervisor and spoke to six miners who indicated that they had seen miners in the red zone. Six of the interviewed individuals indicated that, while they were aware of the hazards associated with the red zone, no one at the mine had been disciplined for walking or working in the red zone. As a result, and based upon all of the information he learned during the course of the accident investigation, Wilcox designated the citation as high negligence and an unwarrantable failure to comply with the mandatory standard.

Negligence

Each mandatory standard carries with it a duty of care to avoid violations of that standard and, if a standard is violated, a finding of negligence is made. *A. H. Smith Stone Co*, 5 FMSHRC 13, 15 (Jan. 1983). In this case, MSHA determined that the negligence was high. The Secretary, by regulation, defines negligence under the Act as "conduct either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). High negligence, according to the Secretary's regulations, occurs when the operator knew or should have known of the violative condition and there are no mitigating circumstances. *Id.*

The negligence of Chamness in stepping into the red zone cannot be attributed to the Respondent for penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1113, 1116

(July 1995). However, the fact that an hourly employee committed a violation does not shield the mine from being deemed negligent. Rather, in instances such as this, the Commission looks to the operator's actual or constructive knowledge of the violative condition or practice and its supervision, training, and disciplining of its employees. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982). Here, while there is evidence that was at least one poster and some training regarding the red zone was provided, there is also evidence to demonstrate that there was a complete lack of competent supervision and discipline.

Dale Winter, the mine superintendent, testified that the mine includes training on the hazards of the red zone in its new miner training, refresher training, and in some of its weekly safety meetings. Moreover, the mine has at least one poster warning against the hazards of the red zone, and the topic is included in the discussion of the roof control plan. He testified that, just a few days prior to Chamness' death, the mine held a refresher training for all miners, which was presumably attended by Chamness, and, during a discussion of the mine's roof control plan, there was a PowerPoint presentation which addressed the red zone and the hazards of working in the red zone. The training also included "no go" zones for other pieces of equipment, addressing the pinch point areas. Winter explained that approximately 15 minutes of the ten hour refresher training was dedicated to red zone issues. The diagrams and illustrations used in the annual refresher training were taken from materials provided to the mine by MSHA and primarily relate to the red zone of the continuous mining machine.

William Jankousky, the mine's safety director, agreed with Winter and testified that the dangers associated with working in the red zone have been a focus of MSHA over the past years. Since red zone violations often result in death, it is a very important topic to discuss with miners and, as a result, the mine has provided training on the issue.

Winter explained that the mine's discipline policy, as it relates to safety issues, calls for a verbal warning to a miner who commits an unsafe act. While Winter testified that a repeat or aggravated unsafe action could result in a letter of reprimand, a suspension or termination, he stated that he looks at repeated conduct on a case-by-case basis and the type of discipline is based upon the frequency of the conduct. For example, if he saw someone in a red zone seven months after being seen in the red zone previously, he would offer another verbal correction. He explained that the mine has a policy of leaving most of the discipline to the foreman, the immediate supervisor of the miners.

During his time at the mine, Winter has been involved in handing down two disciplinary actions related to the red zone. The first action occurred in 2009, just after the mine opened, and involved an employee backing up a continuous miner who stopped to hook up a cable strap and, in doing so, swung the tail and pinched his own arm. While the mine did not agree it was a red zone violation and, instead, classified it as an unsafe act near a pinch point, MSHA issued a citation for a roof control, red zone violation and, thereafter, Winter issued a letter of reprimand to the miner. Knight Hawk Ex. J p. 1. The second incident, in 2011, involved a verbal conflict between a surveyor helper and roof bolter operator. There, the roof bolter operator asked the helper to get out of the way, and, when the surveyor helper refused, the bolter operator trammed the roof bolter toward the helper, placing him in a pinch point area before he moved. The mine asserted that this was not a red zone violation pursuant to the roof control plan, and instead was a

violation of company policy. The bolter operator was suspended and subsequently discharged for intentionally placing a miner in harm's way.

Inspector Wilcox explained that he interviewed ten miners immediately after the accident and, on February 15th, the accident investigation team conducted additional interviews of seven of those miners. During the course of the accident investigation, Wilcox was not made aware of the two disciplinary actions Winter testified about, or any other action taken where a miner had been seen in the red zone. However, during interviews of the miners who worked with Chamness, Wilcox learned that each of those miners had observed miners in the red zone.

Wilcox testified that the seven miners interviewed by the accident investigation team were instructed as to the purpose and procedure of the investigation, and were asked if they had ever seen anyone in the red zone at this mine. Six of the miners agreed that they had seen other miners in the red zone, while one miner refused to answer. Wilcox explained that Richard Pasquino, the immediate supervisor of Chamness for the fifteen months prior to the accident, was one of the individuals interviewed by the accident investigation team. According to Wilcox, Pasquino told MSHA that he had observed Chamness in the red zone several times prior to the fatal accident. Although not specifically included in the questioning, Wilcox is certain that, because the questions centered on the accident that killed Chamness, the miners who were interviewed, including Pasquino were aware that the red zone referred to the area around the continuous miner, and that each of them stated that they had seen miners in the red zone. At hearing Pasquino denied that he intended his statement to mean the red zone associated with the continuous miner.

Pasquino and Winters both testified that the mine had a broader view of the red zone than that of MSHA. Pasquino explained that, at this mine, the term "red zone" was applied to every piece of equipment, not just the continuous miner, and that given the broad definition, miners could find themselves inadvertently in the red zone of a piece of equipment. Pasquino agreed that, prior to becoming a supervisor, he observed Chamness in a red zone three different times. However, in each of those instances, the red zone was not that of a continuous miner, but rather that of a different piece of equipment. Similarly, Pasquino asserted that, after he became a supervisor, he observed Chamness in the red zone two times, once on a scoop and once on a roof bolter, but not in the red zone of a continuous miner. Pasquino did not mention the incidents to Chamness prior to becoming a supervisor, but after becoming his supervisor, he counseled Chamness after both red zone incidents, which occurred roughly five months apart. While Pasquino acknowledged that the mine's policy probably required both supervisors and rank and file miners to report safety violations, he never did so because he felt it wasn't needed.

Pasquino indicated that he has not disciplined a miner during his time as a foreman and, rather, has addressed issues by counseling the offending miner. He acknowledged that the red zone is a dangerous area and continuing to work in the red zone can lead to more discipline, and eventually termination. He agreed that, if unsafe behavior continued on a weekly or daily basis, he may have done more than simply counseling. According to Pasquino, he saw no reason to involve the mine superintendent, or anyone else at the mine, in incidents where he counseled miners. However, Pasquino could not say if he had a duty to report any known violations to someone higher up.

I find that, because Pasquino had observed Chamness in the red zone multiple times, and had counseled Chamness twice about being in the red zone, he should have known that it was likely Chamness would again find himself in the red zone. Accordingly, I discount the testimony of both Winter and Pasquino, both of whom said they had no reason to believe Chamness would enter the red zone. Respondent failed to take sufficient steps to ensure that the mining machine operators, including Chamness, were staying out of the red zone when tramming the continuous miner. The mine had a responsibility both to take steps to better ensure that miners were not in the red zone and to take more substantial action against Chamness and other miners who were seen in the red zone, whether it be the red zone around the continuous miner or other equipment. It did neither. In reaching this conclusion I rely in part on the demeanor and attitude of the supervisors when discussing the red zone and the practice of counseling employees instead of taking some more definitive action to prevent miners from repeatedly entering the red zone, as defined by the mine operator or by MSHA.

I question whether the miners had the all-encompassing view of the red zone asserted by Knight Hawk, or if they understood the red zone as MSHA defines it. Nevertheless, my finding is the same in either case. Although Pasquino counseled Chamness twice during his 15 months as a supervisor, there is no evidence the Pasquino or anyone else at the mine followed through on any disciplinary action, nor is there any evidence that the mine established any specific programs, policies or procedures for addressing the red zone or disciplining miners in a way that would assure they would not enter the red zone after being observed doing so the first time.

Knight Hawk argues that, because MSHA did not ask Pasquino during the investigation what he understood the term "red zone" to mean, and because Pasquino's accident investigation statement, Knight Hawk Ex. R, mentions other pieces of equipment, it cannot be shown that Chamness previously entered the red zone of a continuous mining machine. Pasquino testified that, during the investigation, when he responded that he had been in a red zone himself, he believed MSHA was asking about the red zone in the context of any piece of equipment in the mine, and not just the continuous miner. The mine argues that, because this mine defines the red zone as the area around not only the continuous miner, but also around other equipment, including ram cars and loaders, the miners who spoke with the MSHA investigation team, when discussing other miners in the red zone, did not necessarily mean the red zone as it related to a continuous miner and, therefore, their statements are of minimal value in this case.

The context in which the miners' statements were made, along with the training materials and posters that include a continuous mining machine when discussing the red zone, lead me to find that most, if not all, of the discussion of the red zone during the investigation, related to the red zone as it applied to the continuous miner. The safety meetings covered "red zone/roof control" on some occasions, or covered, among other things, the roof control plan which refers to the red zone around the continuous miner. Further, while the mine's annual refresher training materials include diagrams of a "red zone" with a continuous mining machine, Knight Hawk Ex. H p. 173-174, the diagrams for other pieces of equipment refer to the area as the "no go zone". *Id.* at 176-181. All six miners who spoke to MSHA during the accident investigation made it clear that walking in the red zone was not an unusual practice. It follows that at least a portion of those occurrences were in the red zone area associated with the

continuous miner. However, even if I accept that the miners were only seen near equipment other than a continuous miner, it remains that, despite being told not to be in those areas, whether they be "red zones" or "no go zones," miners were observed in those dangerous areas and none were disciplined. Accordingly, I find that the miners' statements show that there were no consequences when miners did not comply with the mine's policies regarding being in the wrong areas around equipment, whether the equipment was a continuous miner or something else.

The operator defends its lack of discipline by arguing that it was not required to discipline miners in the red zone because there was no evidence that, when a miner was seen in the red zone, it was the zone around the continuous miner. In essence, the mine argues that, since it has expanded the meaning of "red zone" beyond the definition MSHA utilizes, it should be excused from following policy and disciplining miners for being in the red zone as the mine defines it. The mine also asserts that, because its definition of the red zone is expansive, a miner could potentially be in the red zone thousands of times each year and therefore miners were observed in the red zone a small fraction of the thousands of possible opportunities. Even if the argument is based upon fact, it does not make it any less dangerous or any less prohibited to enter a red zone, even one time. Knight Hawk's alleged expanded view of the red zone may in fact, dilute the need for extra caution in the red zone around the continuous miner.

The mine argues that Chamness' failure to follow the verbal counseling instructions, to stay out of the red zone, are a significant mitigating factor in the negligence analysis. Knight Hawk Br. 22 (citing *Western Fuel-Utah*, 10 FMSHRC 256, 258-262 (Mar. 1998)). I disagree and find that the conduct of Chamness was foreseeable, unlike those of the employee in *Western-Fuels.* Accordingly, I reject the mine's argument.

Based on the above discussion, I find that the mine was highly negligent in its training, supervision, and discipline regarding the issue of red zones. While some training was provided on the issue, it was essentially of no value and, in this particular instance, I find that it should not be considered a mitigating factor. Miners did not follow the training, and the mine did not enforce its own policies. The lack of discipline when miners were observed in the red zone rendered the training and supervision of those miners meaningless, and ultimately resulted Timothy Chamness losing his life after engaging in conduct that the mine knew was likely to occur. Accordingly, the Secretary's high negligence designation is affirmed.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the 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 conduct described as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (approving Commission's unwarrantable failure test). The Commission has explained that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and should be considered

in light of a number of factors. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). 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. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, concurring in part and dissenting in part). Based on the following analysis of the factors enumerated by the Commission, I find the violation was a result of the mine's unwarrantable failure to comply with the mandatory standard.

Length of time that the violation has existed.

In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition exists is a "necessary element" of the unwarrantable failure analysis. The Commission, in remanding that case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission explained that, even where the record of a case does not allow a judge to make a determinative finding with regard to how long a violative condition existed, the judge must analyze the element and "[e]ven imperfect evidence of duration in the record should be taken into account[.]" While the Commission has found that a duration of a "matter of seconds" may weigh against an unwarrantable failure finding, it has also held that a duration of a few minutes may support an unwarrantable failure finding. *Compare Dawes Rigging & Crane Rental*, 36 FMSHRC __ , slip op. 5 (Dec. 10, 2014) (noting that a miner who traveled under a suspended boom was only exposed for a "matter of seconds" which in turn weighed against a finding of unwarrantable failure), *with Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

While it is not entirely clear how long Chamness was in the red zone, here, as in *Midwest Materials*, the duration of the violation ended only because the miner was fatally injured by engaging in the exact activity the roof control plan, and in turn the standard, is designed to prevent. Even if this violation only existed for a short time, red zone violations can result in serious consequences in a short time and have been an ongoing issue at this mine since it opened in 2009.

The Secretary argues that, since the miners had been walking and working in the red zone for some time, without any disciplinary action, this element of the unwarrantable analysis is met. The mine, on the other hand, argues that miners may have been in a red zone associated with a machine other than the continuous miner and, therefore, it cannot be shown that the miners were violating the roof control plan on an ongoing basis.

I find that, while the violative condition, that is being in the red zone, may have existed for a short duration, it is reasonably likely that Chamness would have continued to do so had the

fatal injury not brought a stop to him operating the continuous miner. Accordingly, I find that this factor weighs in favor of an unwarrantable failure finding.

Extent of the violative condition.

In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the "extent of the violative condition is an important element in the unwarrantable failure analysis." The Commission has explained that the purpose of this element is to "account for the magnitude or scope of the violation[,]" and the judge may analyze it by looking at, among other things, the "extent of the affected area as it existed at the time the citation was issued[,]" the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC ___ , slip op. 5 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructor*s, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013). Moreover, a judge should not consider an operator's past practices in connection with the extensiveness factor. *Id.* In *Dawes* the Commission found that, because only one miner endangered himself by walking under the suspended boom, the violation was not extensive. *Id.*

I agree that, given the number of miners who acknowledged that they had observed others in the red zone, the practice of working in the red zone was common. However, the Commission emphasizes the violation itself in discussing this factor and, here, there was only one miner working in the red zone at the time and it cannot be said that the violation was extensive. Accordingly, I find that this factor is not especially instructive in determining whether an unwarrantable failure exists.

Whether the operator has been placed on notice that greater efforts were necessary for compliance.

The Commission has explained that repeated, similar violations, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). The prior violations relied upon to establish notice need not have been a result of an unwarrantable failure, nor do those violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013).

The mine argues that it has had only one incident that related to a red zone violation since 2009, and Knight Hawk disciplined the miner for his involvement in the incident. The incident, which occurred shortly after the mine opened in 2009, resulted in a citation for a red zone violation after the miner's arm was pinned by the conveyor on the continuous miner. The history of assessed violations provided by the Secretary demonstrates that the mine received one other citation for a violation of the roof control plan during the 15 month period prior to the accident in February, 2013. Sec'y Ex. 14.

The Commission has explained that its judges may take judicial notice of "extra-record information that is not the subject of testimony but is commonly known, or can safely be

assumed, to be true." *Union Oil Co. of Ca.*, 11 FMSHRC 289, 300 n. 8. (Mar. 1989). In addition, the Commission has recognized that the existence of, and content in, MSHA public documents is subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n. 4 (Aug. 2014) (taking notice of a report generated by the Department of Labor's Office of Inspector General); *Black Diamond Constr. Inc.*, 21 FMSHRC 1188, 1202 n. 3 (Nov. 1999) (Commissioner Marks dissenting on other findings but taking judicial notice of MSHA handbook); *Jim Walter Resources*, 7 FMSHRC 1348, 1355 n. 7 (Sept. 1985)(taking judicial notice of an MSHA policy memorandum).

The witness for the mine, William Jankousky, the corporate safety director, agreed that there has been a great deal of emphasis by MSHA on the hazards associated with the red zone. A search for the term "red zone" on the MSHA's website returns multiple pages addressing the importance of the red zone and the hazards associated with the area. I take notice of the search results, which include, among other things, summaries of accidents related to miners who were killed in the red zone, guidance on accident prevention which discusses red zone hazards associated with remote controlled continuous miners, statistics on fatalities which show section 75.220(a)(1) as the most cited standard for fatalities, information designed to increase hazard awareness among miners operating or working near continuous miners, graphics addressing red zone hazards and best practices for operators, and tips for avoiding injuries while operating and working near a continuous miner.[1] Moreover, MSHA includes the roof control plan standard, and in turn the red zone, in its Rules to Live By as one of the most frequently cited standards in fatal accident investigations. Fatality Prevention – Rules to Live By, http://www.msha.gov/focuson/Rulesto LiveBy/RulestoLiveByI.asp.

Clearly MSHA has emphasized to mine operators the seriousness of the red zone. In an effort to curtail the many fatalities associated with the red zone, MSHA recently published a final rule which will require mines to install proximity detectors on continuous mining machines. 30 C.F.R. § 75.1732 (Published January 15, 2015 and effective March 16, 2015). Additionally, mine inspectors, while at the mine, routinely discuss red zone hazards and the fatalities that have occurred as a result of violations of the red zone portion of the roof control plan. Given all the information about the dangers of working in the red zone, and the emphasis MSHA places on the issue, the operator was on notice, and should have had a heightened awareness in identifying and correcting hazards associated with the standard, especially given the testimony that miners at this mine were observed working in the red zone on many occasions without consequence. I find that this factor weighs heavily in favor of an unwarrantable failure finding.

Operator's efforts in abating the violative condition.

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[1] The search results were compiled by searching for the term "red zone" on MSHA's website through its "Advanced Search" option, available at: http://mshasearch.msha.gov/search?access=p&entqr=0&output=xml_no_dtd&sort=date%3AD%3AL%3Ad1&ie=UTF-8&lr=&client=MSHASearch&ud=1&site=AllDocuments&oe=UTF-8&proxystylesheet=MSHASearch&ip=10.2.12.238&proxycustom=<ADVANCED/>

In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge's finding that management did not take steps to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

Here, the mine took some steps to abate red zone issues by providing training to the miners. The mine included the issue of the red zones in its new miner training, task training and refresher training. Further, the red zone was sometimes a topic of discussion at the weekly safety meetings. However, there was little follow-through by the mine when it came to actually implementing and enforcing the training. When a miner was observed in a red zone, the incident was either not reported to management, or the person who was unlucky enough to be observed by a management member only received a counseling. The mine did little to support its suggestion that walking and working in the red zone were prohibited practices. Accordingly, I find that this factor weighs in favor of an unwarrantable failure finding.

Whether the violation posed a high degree of danger.

The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). Moreover, it has noted that a violation may be aggravated and unwarrantable where the hazardous nature of a violative condition is common knowledge. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009) (citing *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding a violation to be an unwarrantable failure based on "common knowledge" that power lines are hazardous and precautions must be taken around them)). Further, when a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). Furthermore, a high degree of danger may be evidenced where a fatal accident occurred as a result of the cited condition or practice. *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997).

Knight Hawk concedes, and I find, that the violation in this case certainly posed a high degree of danger. The continuous miner operator was killed as a result of the violation. The MSHA information provided to all mines demonstrates that working in the red zone is a major cause of fatalities in underground coal mines. The hazardous nature of working in the red zone was common knowledge, the mine knew the practice was occurring, and yet took no reasonable steps to prevent it from occurring in the future. As a result, the likelihood of an accident increased and, ultimately, resulted in a fatality. I find that the high degree of danger is an aggravating factor in this case.

Whether the violation was obvious.

The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).

Knight Hawk concedes that the violation was obvious. Certainly the violation was obvious the moment Chamness stepped into the red zone. Given the many miners who had been observed in the red zone, the mine should have been aware of what had become a common practice and taken steps to better identify this type of violative conduct given how obvious it is and how easy it is to avoid.

Operator's knowledge of the existence of the violation.

In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator's knowledge of the existence of a violation may be established where the operator "reasonably should have known of the violative condition." *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator "reasonably should have known of the violative condition" by showing that the "operator's knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]" *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1199-1200 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010)); *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010) (remanding the case to the judge with the instruction to consider whether a supervisor reasonably should have known, based on knowledge of previous practices at the mine, that the violative condition would continue to occur.)

Here, when Knight Hawk management observed a miner in the red zone it would sometimes engage in discussion with the offending miner, but little else was done. Six miners, as well as Chamness' supervisor the night of the fatal accident, agreed that they had observed miners in the red zone. Chamness had been observed in the red zone prior to the date of the accident and the mine had not taken action to prevent the hazard from re-occurring. Given the information learned during the accident investigation, I find that the mine knew, or at the very least should have known, that miners continued to walk in the red zone. The fact that miners may have had a different view of what constitutes a red zone does not change my finding in this regard. No matter what the miners understood the red zone to be, working or standing in the red zone area was tolerated. The only disciplinary action taken by the mine against an offending miner was a written reprimand in 2009 after MSHA issued a citation for a violation of the roof control plan. I do not find the 2011 incident, discussed *supra*, to be applicable as far as

disciplinary action is concerned, as it is obvious that the roof bolter intentionally moved his machine toward another miner. Nevertheless, that incident does serve to show the attitude of the miners toward the red zone.

While, as Knight Hawk contends, its roof control violation may have been brief and not extensive, under Commission precedent the Secretary satisfies her burden of establishing the unwarrantability of a roof control violation where a foreman knew of the violative condition, the violation occurred in a mine with a history of persons walking in the red zone, whatever that definition may be, and the violation created a hazard characterized by high danger. *See Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610 (Aug. 1994). Because all of those elements are present here, and based upon my above findings with regard to the unwarrantable failure factors, which illustrate the mine's "indifference" and "serious lack of reasonable care" regarding red zone issues, I conclude that the violation was a result of the mine's unwarrantable failure to comply with the terms of its approved roof control plan and, in turn, the requirements of section 75.220(a)(1).

Citation No. 8448666

Citation No. 8448666 was issued by Inspector Terry Hudson on November 14, 2013 pursuant to section 104(a) of the Act for an alleged violation of 30.C.F.R. § 75.512. The citation alleges that the mine failed to maintain a continuous mining machine to assure safe operating conditions. Hudson determined that the condition resulted in a fatal injury, was S&S, affected one person, and was a result of moderate negligence. The Secretary proposed a civil penalty in the amount of $8,209.00 for this alleged violation. Prior to hearing, the parties reached a settlement, the terms of which were read into the record.

The parties propose to reduce the negligence from "moderate" to "low," with a corresponding reduction in penalty, based on points, to $3,074.00. The Secretary submits that the negligence is reduced because the location of the damage was such that it was not readily seen during the inspection. In addition, the parties further propose to amend the narrative of the citation to read as follows:

> The Joy 14CM-15, Serial Number JM6284a, was not being maintained to assure safe operating conditions. The machine's trailing cable restraining clamp was located in such a manner that it was damaging the machine's hydraulic valve bank assembly wiring. When inspected, five of the solenoid coil control cables have been damaged with bare copper conductors showing on two of the coil control cables. The damaged control cables were the tail swing right and the stab up functions. This indicates that a complete and thorough examination was not done as required by this section. In addition data from the machine's on-board computer system, along with information gained during the interview process, indicate that immediately after the accident, the continuous mining machine's hydraulic system was not responding, preventing the tail swing left function from operating.

(Tr. 10-11).

I have considered the proposed modifications and find that they meet the requirements of the Act and, therefore, the settlement of Citation No. 8448666 is approved.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires, that in assessing civil monetary penalties, the ALJ must consider six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion that includes a consideration of the penalty criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

Knight Hawk is a large operator. The gravity, negligence, and history of violations are addressed above. While Knight Hawk did abate the violation in good faith, it also argues that its post-accident installation of proximity detection devices should be considered a significant remedial measure that should be taken into consideration when assessing the penalty. While I commend Knight Hawk for installing the proximity detection devices, I find that that the $70,000.00 proposed penalty for Citation No. 8439096 is appropriate in this case. The operator has stipulated that the penalty, as proposed, will not affect its ability to continue in business. Given my above findings, I assess a penalty of $70,000.00 for Citation No. 8439096 and a penalty of $3,074.00 for Citation No. 8448666.

III. ORDER

I assess a total penalty of $73,074.00 for both the settled citation and the citation addressed at hearing. Knight Hawk Coal Co. is hereby **ORDERED** to pay the Secretary of Labor the sum of $73,074.00 within 30 days of the date of this decision. The contest cases, having been resolved in the penalty dockets, are dismissed.

Margaret A. Miller
Administrative Law Judge

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