FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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CLINTWOOD ELKHORN MINING COMPANY, INC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent,	CONTEST PROCEEDING Docket No. KENT 2011-0041-R Citation No. 6660595; 10/14/2010 Mine ID: 15-16734
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CLINTWOOD ELKHORN MINING COMPANY, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-0515 A.C. No. 15-16734-240621 Mine: Clintwood Elkhorn II

DECISION ON REMAND

Appearances: Matthew S. Shepherd, Esq., U.S. Dept. of Labor, Office of the Solicitor, Nashville, TN, for the Petitioner,

Melanie Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, for the Respondent.

Before: Judge L. Zane Gill

This case is before me on remand by the Commission. Docket No. KENT 2011-0041-R was the subject of an expedited hearing held on October 19, 2010. The hearing took place 13 days after the events that led to Citation No. 6660595 and five days after the citation was issued. At the close of the Secretary's evidence, Clintwood Elkhorn Mining Co., Inc., moved for dismissal of Citation No. 6660595 and three other citations and orders that are not at issue here. The dismissal was granted, and only the dismissal of Citation No. 6660595 was appealed to the Commission.

In its decision, the Commission found that Clintwood violated 30 C.F.R. § 77.1607(b) because the operator failed to maintain full control of his haul truck while it was in motion. *Clintwood Elkhorn Mining Co., Inc.*, 35 FMSHRC 365, 370 (Feb. 2013). Citation No. 6660595 was remanded to me to determine whether the violation was significant and substantial, whether it was an unwarrantable failure to comply by the operator, and to assess an appropriate penalty. *Id.* at 371. After the remand, the record was reopened, a supplementary evidentiary hearing was held on October 15, 2014, in Pikeville, Kentucky.[1]

Findings of Fact[2]

Clintwood operated a coal preparation plant in Pike County, Kentucky. *Clintwood Elkhorn Mining Co., Inc.*, 32 FMSHRC 1880, 1882 (Dec. 2010)(ALJ Gill). A steeply graded haul road, Coal Haul Road A, ran from the prep plant to a nearby coal mine operated by Hubble Mining. *Id.* at 1882-83; Tr.II 255:10-12.[3] Clintwood owned the mineral rights to the coal that Hubble mined. Clintwood leased the mine property to Hubble to mine the coal, and contracted with Hubble to purchase the coal it mined. (Ex. R-3; Tr.I 38:17-19; Tr.II 239:19-21; Tr.II 240-5-7) Hubble contracted with Tattoo Trucking to haul the coal it mined to Clintwood's prep plant using Coal Haul Road A. (Tr.I 38:23- 39:1) Clintwood also owned Coal Haul Road A and leased it to Hubble. (Tr.II 240:8-10)

On the morning of October 6, 2010, Shane Bishop, an employee of Tattoo Trucking, was hauling coal in a Mack 800 haul truck on Haul Road A from the Hubble mine down to Clintwood's prep plant. 32 FMSHRC at 1882-84. On his ninth trip down to the prep plant, Bishop encountered mine equipment occupying the road. (Tr.I 187:2-17) He braked and waited for the equipment to clear and then continued on his way. (Tr.I 187:20 – 188:2) While descending the hill, Bishop heard a loud sound from the truck engine. He attempted to shift gears, the engine died, and the brakes failed.[4] (Tr.I 187:20 – 188:2; Tr.I 188:12-17; Tr.I 203:1-5;

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[1] The contest docket was consolidated with the related penalty docket KENT 2011-0515.

[2] These findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

[3] Tr.I refers to the hearing transcript from 2010 and Tr.II refers to the hearing transcript from 2014.

[4] The circumstances of the engine and brake failure will be discussed in more detail below.

Tr.I 204:1-5; Tr.II 60:13-20) The truck accelerated down Haul Road A about 100 to 150 feet before crashing through a berm and a utility pole at the base of the hill. 32 FMSHRC at 1884. The truck rolled onto its passenger side, where it came to rest with its front axle suspended over the 30-foot drop-off to the prep plant's dump area. (Tr.I 32:12-23) Bishop suffered only an abrasion and some bruising, despite not wearing his seatbelt. 32 FMSHRC at 1884. He was taken to a hospital emergency room, examined by a doctor, and released without treatment. *Id.*

Preliminary Matter: Jurisdiction

At the close of the evidentiary hearing in 2014, Clintwood moved to dismiss the case and requested the citation be vacated. I declined to rule on the record, and directed the parties to brief the issue. Clintwood argued that MSHA did not have jurisdiction to issue Citation No. 6660595 because Clintwood was not an "operator" of Tattoo's truck. (Resp. Br. at 1) Clintwood further argued that its relationship with Tattoo was too tenuous for it to be an operator vis-à-vis Tattoo's violation.[5] *Id.* at 4.

The Secretary countered that Clintwood was an "operator" as defined by Section 3(d) of the Mine Act, 30 U.S.C. § 802(d). (Sec'y Br. at 5-6) Further, the Commission had already determined that Clintwood violated Section 77.1607(b),[6] and that Clintwood misinterpreted the law. (Sec'y Br. at 5; Sec'y Reply Br. at 2) The Secretary argued that the test to determine whether Clintwood was an "operator" was whether Clintwood had "substantial involvement" with the mine, not with the truck. (Sec'y Reply Br. at 2) I agree with the Secretary.

In *Berwind Natural Res. Corp.*, the Commission held that the definition of "operator" must be resolved on a case-by-case basis using a "totality of the circumstances" test to determine whether the "entity has substantial involvement *with the mine*." 21 FMSHRC 1284, 1293 (Dec. 1999)(emphasis added). The resulting Commission guidance is to "evaluate the participation and involvement of the entity in the mine's engineering, financial, production, personnel, and health and safety matters to determine whether that entity qualified as an operator under the Act." *Id.*

There is no dispute here that Clintwood owned and operated the coal preparation plant. Clintwood owned the mineral rights to the coal that Hubble mined and leased the property to Hubble to mine the coal. Clintwood also owned the land under Coal Haul Road A and leased it to Hubble. The accident happened on this road.

According to the agreement between Clintwood and Hubble, Hubble was responsible for mining the coal and transporting it to Clintwood's prep plant. (Ex. R-3, §§ 1.2, 3.1) Clintwood

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[5] Clintwood argued that it did not have a contractual relationship with Tattoo Trucking, did not own the truck that was involved in the accident, did not employ the truck driver, and the truck was not in its supervision or control. (Resp. Br. at 4)

[6] Despite the Secretary's argument, subject matter jurisdiction can never be waived. Fed. R. Civ. P. 12(h)(3).

retained the right to use Coal Haul Road A and required Hubble to have a transportation plan for the haul road. *Id.* at §§1.4, 1.10. Additionally, Clintwood retained the right to enter the mine and inspect "any [...] aspect of [Hubble's] operations," and required its consent prior to Hubble subcontracting out any work required by the contract. (*Id.* at §§ 1.15, 12.2)

Hubble contracted with Tattoo Trucking, the owner of the truck involved in the accident, to haul the coal mined at Hubble along Coal Haul Road A to the Clintwood prep plant. (Tr.II 52:15-21) Each production shift, Tattoo's trucks, about 12 to 15 of them, were repeatedly loaded with coal at the Hubble mine, driven down the haul road to Clintwood's prep plant, where the loads were weighed and dumped. The trucks were then driven back up the haul road to the mine for their next load. (Tr.II 31:3-9; Tr.II 354:5-6)

Clintwood had a financial relationship with the Hubble mine arising from its ownership, lease, and contractual relationships. Clintwood also retained the authority to inspect the Hubble mine, and to approve all subcontractors who performed any work under the contract. The same Hubble contractors hauled and dumped the coal from the Hubble mine at the Clintwood prep plant, deepening the relationship between the prep plant, the mine, and the contracting parties. Regarding production, although Clintwood accepted coal from multiple mines, all of the coal produced at the Hubble mine was hauled to the Clintwood prep plant. Based on the totality of the circumstances, I find that Clintwood was an "operator" and subject to MSHA's jurisdiction because it had substantial involvement with the Hubble mine.[7]

Moreover, Clintwood stipulated that it operated the Clintwood prep plant, (Joint Prehearing Rep., Stipulation 1). The citation alleges that the violation occurred at the prep plant. Bishop lost control of his truck on Clintwood's haul road, crossed over Clintwood's main road, hit Clintwood's berm, and nearly fell into Clintwood's dump site. Therefore, by virtue of its stipulation, Clintwood was an operator for purposes of the violation, and Bishop lost control of his vehicle on Clintwood's property.

Citation No. 6660595

Inspector Robert Bellamy[8] issued Citation No. 6660595 to Clintwood, alleging a violation of 30 C.F.R. § 77.1607(b). The Commission concluded that Clintwood violated the standard. The regulation states that "[m]obile equipment operators shall have full control of the

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[7] Clintwood also argued that the area where the accident occurred was a private way appurtenant to the mine, and therefore, not within MSHA jurisdiction. (Resp. Br. at 4-5) Even if the haul road was a private way appurtenant to the mine and under the control of the mine, the truck in question was used in mining activities, and was under MSHA jurisdiction. *See Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc., et. al,* 573 F.3d 788, 793-97 (D.C. Cir. 2009); *See Youngquist Brothers Rock, Inc.*, 36 FMSHRC 2492, 2493-97 (Sept. 2014) (ALJ Gill); 30 U.S.C. § 802(h)(1)(B),(C).

[8] At the time of the hearing, Bellamy had been working at MSHA for approximately twenty-four years and had conducted approximately 30 fatal accident investigations and numerous nonfatal accident investigations. (Tr.I 107:25 – 108:9)

equipment while it is in motion." 30 C.F.R. § 77.1607(b). Section 77.1607(b) is a mandatory safety standard. The citation alleges:

> On 10/06/2010, the contract driver of a loaded coal haulage truck failed to maintain control of the truck. The truck ran away down the mine coal haulage road, crossed the main prep plant access road and entered the prep plant stockpile before stopping. Overloading of the truck contributed to the driver losing control. This event caused exposure to employees from other mines, vendors and prop plant employees using the main access road and employees at the prep plant to a potentially fatal accident. The estimated weight of the loaded truck was 50,200 lbs. over the Gross Vehicle Weight Rating (GVWR) recommended by the manufacturer based on the average weight tickets for the previous eight loads for this truck on this date. Clintwood Elkhorn was aware that the trucks hauling to this prep plant are routinely overloaded and did nothing to stop this practice. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. S-12

The citation alleges that an injury occurred, the injury could reasonably be expected to be fatal, the violation was significant and substantial, one person was potentially affected, and the level of negligence was high. *Id.*

Negligence and Unwarrantable Failure

"Negligence" is not defined in the Mine Act. The Commission has, however,

> [R]ecognized that "[e]ach mandatory standard ... carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

Jim Walter Res. Inc., 36 FMSHRC 1972, 1975 (Aug. 2014); *Brody Mining, LLC*, 37 FMSHRC 1687, 1702. (Aug. 2015); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008). "Thus in making a negligence determination, a Judge is not limited to an evaluation of allegedly 'mitigating' circumstances. Instead, the Judge may consider the totality of the circumstances holistically." *Brody Mining, LLC*, 37 FMSHRC at 1702. Although the Secretary's part 100

regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative.

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an 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 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) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski).

The Secretary alleged high negligence and unwarrantable failure, and argued that Bishop's truck was overloaded at the time of the accident, that the overload contributed to the accident, that Clintwood Elkhorn was aware that the trucks hauling to its prep plant were routinely overloaded, and it did nothing to stop this practice. (Sec'y Br. at 9-13; Ex. S-12) The Respondent argued that the Secretary did not prove that the vehicle was overloaded, did not prove that even if it were overloaded, the overload caused the accident, and that it was driver error that caused the accident because the truck ran out of fuel. (Resp. Br. at 7-14) It must be noted that the standard relates to Bishop losing control over his vehicle while it was in motion, not whether something caused or contributed to the accident.

The Secretary's evidence and argument at the 2010 and 2014 hearings focused largely on establishing an evidentiary link between Gross Vehicle Weight Ratings (GVWR)[9] and the alleged consequences of overloading. The Secretary tried to convince the court that Bishop's truck was overloaded based on load records that showed loads in excess of the GVWR, and that the resulting overload contributed to the accident.[10] The Secretary argued that overloading puts

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[9] The GVWR is assigned by the truck's manufacturer and is the maximum weight the manufacturer recommends that a truck can haul. (Tr.II 114:16-21; Tr.II 115:17-21)

[10] The inspector testified that it was not MSHA's policy to issue a citation if a truck was overloaded past the GVWR, but MSHA considered loads in excess of the GVWR an aggravating factor for negligence and the unwarrantable failure analysis. (Tr.II 128:10-23; TR.II 129:6-10)

more strain on the brakes and can cause brake fade. (Tr.II 190:10 -191:10) This argument appears to be one of first impression. Neither the Mine Act nor the regulations defines "overload" or describes how MSHA determines that a truck is overloaded.

To prove high negligence, the Secretary attempted to show that Bishop's truck was overloaded by reference to an objective measure of what the truck could presumably safely haul -- the GVWR for a Mack 800 haul truck. However, Bishop's Mack 800 truck had been modified from the manufacturer's specifications to haul larger loads. (Tr.II 57:20 -58:16) Thus, the manufacturer's stated GVWR was practically useless to establish a proper load limit for Bishop's truck. The Secretary attempted to prove that the weight he proffered as the maximum load GVWR was for Bishop's modified truck. However, the Secretary's witness was unable to do anything more than speculate about the actual GVWR for Bishop's modified truck. His speculation was based on an inspection of seven or eight Mack 800 series trucks, but he never tested the actual haul limits or possible overload ratings of any of the trucks. (Tr.II 186-190; Tr.II 202:22 – 203:4; Tr.II 207:9-17) As a result, the Secretary failed to prove what the GVWR was for Bishop's truck, even assuming that the GVWR was relevant or a reliable means of determining overloading.[11] Since there was no baseline for comparison, the Secretary could not use the weight tickets for Bishop's truck from the previous eight loads before the accident to establish a pattern of overloading.

Even assuming the Secretary proved that Bishop's truck was overloaded, and further assuming that when a truck is overloaded it is harder to brake, I cannot find that the high negligence designation was appropriate. Bishop lost control of his truck because of driver error.

William Griffith, the owner of Tattoo Trucking, testified that driver error caused the brakes to fail and the truck to run away. Bishop allowed the truck to run out of fuel, which prevented it from restarting when he attempted to shift gears after the engine died. (Tr.II 26:18-25; Tr.II 60:21-24; Tr.II 66:17 – 67:2) This is consistent with Resp. Ex-5 and Griffith's testimony that there was no fuel leaking from the truck as it lay on its side after running through the berm and overturning. Further, the fuel tank was empty when the truck was inspected after the accident. (Tr.II 61:1-9; Tr.II 62:15 – 63:23)

At the time of the accident, Bishop had been driving for Tattoo Trucking for approximately five months. This was his first job working for a trucking company. (Tr.I 183:4-9) He did not have a commercial driver's license. (Tr.I 183:10-16) Based on Bishop's and Griffith's testimony, it was Bishop's inexperience that caused him to lose control of the truck. Bishop's truck ran out of fuel, causing the engine to make a loud noise, and when Bishop tried to shift, the engine stalled and died, which resulted in brake failure and loss of control. When an engine dies, as it did here, the steering and brakes do not work. (Tr.II 64:2-8) Normally, the jake brake, or engine brake, will still work even if the truck runs out of gas. However, the truck must still be in gear. (Tr.II 785:12-17) Here, since Bishop shifted the truck out of gear, the jake brake did not work either.

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[11] I need not discuss the notice issues with MSHA using GVWR as a threshold standard for overloading, or using it for enhanced enforcement.

Bishop was driving on an empty tank. Instead of coasting down the hill, as an experienced driver would have done, he attempted to shift into another gear, which caused the engine to quit. A reasonably prudent person familiar with driving such haul trucks would not have allowed the truck to run out of gas, and would not have shifted out of gear. However, this is not where the analysis ends.

It is well settled that under the Mine Act, an operator is strictly liable for violations of the Act and mandatory standards committed by its employees. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (Aug. 1982)("SOCCO") (citing *Allied Products Co. v. Fed. Mine Safety & Health Review Comm'n*, 666 F.2d 890 (5th Cir. 1982); *American Materials Corp.*, 4 FMSHRC 415 (March 1982); *Kerr-McGee Corp.*, 3 FMSHRC 2496 (November 1981); *El Paso Rock Quarries*, Inc., 3 FMSHRC 35 (January 1981)). However, the imputation of a rank-and-file miner's acts to an operator departs from strict liability under certain circumstances. The negligence of a rank-and-file miner is not attributable to an operator for the purposes of negligence designations, unwarrantable failure determinations, and penalty amounts. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (Aug. 1982)("SOCCO"); *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995). If "a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1462 (emphasis in original). The record indicates that at the time of the hearing, Clintwood did not supervise trucking operations at Hubble, did not issue directions to truck drivers at Hubble, and did not have authority to discipline truck drivers while they were at Hubble. (Tr.II 232:17 – 233:2)

Additionally, Tattoo gave its employees annual training (Tr.II 48:14-21), and since Bishop had been employed with Tattoo for only five months at the time of the hearing, he was "recently" trained. Clintwood did offer Tattoo's employees training, but Griffith could not recall if his drivers took advantage of the offer. (Tr. 49:3-9)

I cannot find Clintwood liable for Bishop's negligence as a rank-and-file miner. Therefore, I find that there was no negligence attributable to Clintwood. Additionally, I cannot find an unwarrantable failure to comply by the operator because there was no aggravating conduct constituting more than ordinary negligence.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an

injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Inspector Bellamy designated this violation as injury "occurred;" the referenced injury could reasonably be expected to be a fatality; it was significant and substantial; and one person was potentially affected. (Tr.II 101:1-5) Clintwood argued that there was no "injury," therefore, an injury did not "occur." (Resp. Br. at 15) The Secretary argued that Bishop was injured because he received an abrasion and bruising. (Sec'y Reply Br. at 12)

The Commission stated in *Freeman* that the term "injury" is not defined in the Mine Act or regulations, but the ordinary meaning of the word is "an act that damages harms, or hurts" or "hurt, damage, or loss sustained." *Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578-9 (July 1984)(quoting *Webster's Third New International Dictionary (Unabridged)* 1164, (1978)). This plain meaning of "injury" has been used by the Commission and its ALJs in numerous decisions. Here, Bishop suffered a "hurt" or "damage" because he sustained an abrasion and bruising. Therefore, an "injury" occurred.

Bellamy designated the injury as reasonably expected to result in a fatality because this type of accident -- a runaway truck -- could have resulted, and had resulted, in fatalities in the past. (Tr.II 101:7-14) The fatality designation not only pertained to the driver of a runaway truck, but could also affect a pedestrian miner struck by a runaway truck. *Id.*

I find that an injury occurred; it could reasonably be expected to be a fatality; and, one person was potentially affected.

Significant and Substantial

The citation was designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon 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). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) ("The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.")

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was S&S:

> 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.

6 FMSHRC 1, 3-4 (Jan. 1984).

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[12]

The first and fourth prongs of the *Mathies* test have been met. There was a measure of danger to safety – a discrete safety hazard – which arose from Bishop losing control of his truck as it was coming down the steep haul road. This hazard could have resulted in serious injuries to a miner. The remaining question is whether there was a reasonable likelihood that the hazard would result in an injury.

A runaway 40- to 60-ton truck carrying a full load down a steep haul road is extremely dangerous to the driver of the truck and to other miners on foot or to other mining equipment in the area. Before hitting the berm and landing on its side, Bishop's truck crossed over

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[12] The 4th and the 7th Circuits have changed the Commission's precedent under *Mathies* by placing the emphasis and bulk of the analysis on the second element of the test. *See Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148 (4th Cir. 2016). This Respondent, however, is not located in either of those Circuits, and thus, my analysis is under the traditional *Mathies* test.

Clintwood's main access road. There was a reasonable likelihood that Bishop's truck could have struck a person or a piece of equipment on the haul road, could have struck a miner or a piece of equipment while crossing the prep plant's main road, could have crashed and fallen into the prep plant's dump site, or Bishop himself could have been thrown from the cab of the truck – all of which could reasonably result in a fatality. (Tr.II 108:13 – 109:2; Tr.II 154:18 – 155:11; Tr.II 155:19 – 156:4) I find that the Secretary proved by a preponderance of the evidence that significant and substantial designation was warranted here.

Penalty

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ Zielinski).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the Section 110(i) criteria. *E.g., Sellersburg Stone Co.*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622.

In this case, Clintwood's history of violations is not an aggravating factor, however Clintwood is a moderate sized operator, controlled by a large entity. (Tr.II 93:17 -94:3) I found no negligence. Clintwood stipulated that the proposed penalty would not affect its ability to remain in business. (Joint Prehearing Rep., Stipulation 7) The gravity of the violation was very serious, because the runaway truck could have resulted in a fatality. At the initial hearing, there was a conflict whether Clintwood demonstrated good faith in abating the violation because the parties could not agree to an accident plan, but I consider Clintwood's abatement response appropriate. Considering all of these factors, I find that a penalty of $1,140.00 is appropriate.

WHEREFORE, it is **ORDERED** that Clintwood pay a penalty of **$1,140.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 6660595 be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation.

L. Zane Gill
Administrative Law Judge

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