

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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March 29, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2017-0099
Petitioner,	:	A.C. No. 12-02374-424654
v.	:	
	:	
SOLAR SOURCES, INC,	:	Mine: Shamrock Mine
Respondent.	:	

**DECISION AND ORDER**

Appearances: Ms. Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Mr. Mark Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, for Respondent

Before: Judge Moran

**Introduction**

This case is before the Court upon a petition for the assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act” or “Act”). On June 29, 2016, while backing in, a dump haul truck overtraveled the berm at a dumping location, going over the embankment to the slurry pit some 47.75 feet below, landing upside down. The driver jumped from the haul truck before it went over the embankment but received significant injuries from his escape.

Two matters arose from this accident: a section 104(d)(1) citation alleging a violation of 30 C.F.R. §1605(l), pertaining to berms; and a section 104(d)(1) order, alleging a violation of 30 C.F.R. §77.1713(a), pertaining to the requirement for an onshift examination. A hearing was held in Owensboro, Kentucky, commencing on December 12, 2017. For the reasons which follow, the onshift examination was dismissed at the conclusion of the hearing upon a motion for a directed verdict, while the berm violation, per this decision, is upheld. A civil penalty in the amount of \$68,300.00 is imposed for the berm violation.

**The cited standards.**

30 C.F.R. §77.1713(a), titled, “Daily inspection of surface coal mine; certified person; reports of inspection,” provides at subsection (a) “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. §1605, titled, “Loading and haulage equipment, provides; installations,” provides at subsection (l) “Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.”

**Citation No. 9102704:**

Citation No. 9102704, a section 104(d)(1) citation, alleged a violation of 30 C.F.R. § 77.1605(l). The MSHA inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be fatal, and the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

Berms, bumper blocks or similar means were not provided or of substantial construction to prevent overtravel and overturning at the West End gob dump located in the 001 pit. An accident occurred where an end dump over traveled and went over the embankment and over turned on 6/29/2016. The berm where the overtravel occurred was constructed of the slurry material. This material would not compact enough to create a substantial means of stopping overtravel. The mine operator has engaged in aggravated conduct by failure to ensure adequate berms were in place in an area known to have constant problems with maintaining berms. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9102704.

As a subsequent action, the operator amended its ground control plan and implemented training on the new approved plan. *Id.* The Secretary proposed a specially assessed civil penalty of \$68,300.00.

**Order No. 9102705:**

Order No. 9102705, a section 104(d)(1) order, alleged a violation of 30 C.F.R. § 77.1713(a). The MSHA inspector assessed the gravity as highly likely, the injury or illness that could reasonably be expected to be fatal, and the negligence as high, and the violation as S&S, with one person affected. The condition or practice alleged is:

The operator failed to conduct an adequate examination on 6/29/2016 day shift for the 001 gob dump on the West end of the pit. The certified person conducting the exam drove by the gob dump and only glanced at the area. The certified person did not identify

an inadequate berm which allowed a haul truck to overtravel the dump and overturn shortly after the examination was conducted. Hazardous conditions were allowed to exist and were not reported and not corrected by the operator which contributed to the accident. The mine operator engaged in aggravated conduct constituting more than ordinary negligence in that the inadequate examination allowed a hazardous condition to exist of inadequate berms on the gob dump. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9102705.

As a subsequent action, the operator conducted an onshift examination of all areas in the 001 pit. *Id.* The Secretary proposed a specially assessed civil penalty of \$68,300.00.

### **Findings of Fact**

The parties stipulated to certain matters. Gov. Exhibit P 1. The certified history of violations was also admitted. Ex. P 2. It is uncontested that the Respondent, Solar Sources, Inc., owns and operates the Shamrock Mine, a surface bituminous mine in Ireland, Indiana. Tr. 404.

Testimony began with MSHA Inspector Jason Noel. Before becoming an inspector, in 2013, he had eight years of mining experience. All of that was with the Air Quality Mine for Peabody, where he did work on the surface. Tr. 40-42. That prior experience included inspecting berms. Tr. 42, 45. His experience included examining the entire berm, including its base.<sup>1</sup> This included looking for cracks, slips and any sign of movement. Tr. 46-47. Examining the base of the berm would be included if there were signs of problems on the berm itself. Tr. 48. On June 29, 2016, Noel conducted an E07, non-fatal accident investigation. He arrived, after the accident, the same day of its occurrence. Tr. 44.

Upon arriving at the mine, Inspector Noel met with the mine's pit foreman, Keith Lutgring. Noel viewed the truck, which had over traveled the berm and landed some 47.75 feet below in the slurry pit, and was upside down. Tr. 55, 67, Ex. P 5. The slurry pit is also referred to as the "gob dump." Tr. 86. No berm remained where the truck had backed through it. Noel took photographs of the site. Tr. 56. Photo A0089, within Ex. P 6, shows the area with the then missing berm, although on the left side of the picture one can see part of the berm that remained. Tr. 57. At page 90 of the same exhibit, Noel identified rubber tire tread marks at the area of the former berm. However, he could not say that those tire marks were from the truck that went over the berm. Tr. 63-64.

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<sup>1</sup> Initially there was some lack of clarity, at least on the part of the Court's understanding, when referring to the "base" of the berm. In this instance, the truck was dumping material. In doing so, it would back up to the berm, stop, and the dump the load over the edge. One might be referring to the base in the sense of the bottom of the slurry pit, where the truck came to rest, but the Respondent's reference, as well as the Secretary's, was to the base of the berm itself, that is, the surface ground on which the berm physically rested. Tr. 50-51. Thus, the "base" of the berm refers to the area directly under the berm. Tr. 376. Again, the R's central theme is that there was a base failure as opposed to a berm failure.

Based on what remained of the berm, Noel stated that it was “mostly mud. It was a muddy consistency throughout the entire berm, like, kind of like slicing a Twinkie in -- with a knife, and once you slice the Twinkie, you can see the inside of the Twinkie. Kind of like the same thing with the berm here.” Tr. 64. Noel informed that, using his hands, he examined the consistency of the berm material, confirming its muddy makeup. Tr. 70. He added to that description that it was a “consistency [that] really reminds me of similar to cottage cheese. The texture of it, it's kind of -- it's got a little bit of lumpy mud in it, but it's -- it's heavily saturated with water. ... it's just real gooey, mushy. ... it was just a -- a real fine mud.” Tr. 71-72. Upon consideration of all the evidence, the Court finds that in fact the berm material was as described by the inspector.

Noel took some measurements as part of his investigation at the site. Tr. 67. Referring to , Ex. P 5, he described a diagram which was included within his notes, reflecting the dimensions of the dumping area, from an overview, that is, an aerial, perspective. Per the diagram, it begins with a 45 foot entrance to the dumping area, then reflects the 16 foot 7 inch width where the now missing part of the berm used to be located. The total width of the berm is approximately 30 feet. The 47.75 figure in the diagram is the measurement taken from the berm to the truck's left rear tire, as it sat upside down at the bottom of the slope. A square, representing the truck and where it came to rest, is also in the diagram. Tr. 67-69.

Speaking to photograph 91, within Exhibit P 6, Noel stated that it illustrates “that the berm was saturated with this mud and that it was significantly darker, visually, you could see that, and that the berm was missing from where the truck went through.” Tr. 73. The same photo, at the center left, shows part of the berm that remained. *Id.* In Noel's opinion, that remaining portion was still inadequate, as it was “mostly mud,” but as one continued to move to the left it became more stable. Tr. 74-75. Noel expressed his view that when the berm was initially constructed it was made of substantial material but that

[a]fter hauling this slurry material that they were hauling to this dump, it landed -- they would have spillage onto the berm, and that spillage would cause, you know, the -- the water that's in that slurry would leach down into the -- the berm and weaken the berm. It would saturate the berm. So the berm really wasn't at the consistency of the slurry, but it was a -- of a muddy consistency and -- and it weakened the berm, as a result.

Tr. 75-76.<sup>2</sup>

It was slurry that was being dumped at the site where the berm failed. Tr. 77. Noel stated that “[t]he slurry material comes from the wash plant and comes from belt presses.”<sup>3</sup> *Id.*

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<sup>2</sup> As will be discussed later, the Court notes here that, after hearing all the testimony at the hearing, it concluded that Noel's explanation is found to be the most reasonable and best supported explanation for the berm's failure.

<sup>3</sup> Noel described that belt presses “basically are -- ... a machine that it has a bunch of rollers and a really finely mesh screen that travels those rollers, and ... material falls on it and it's a mud material, it's a waste product from the plant that they can't mechanically separate. It's kind of

Thus, the slurry represents the material left after the saleable coal is removed. It is also referred to as the gob. Tr. 78-79. The material is loaded into the end dump truck which then dumps it into the slurry pit. It was at that dumping point where the berm in issue was located. Noel stated that the material which is hauled and then dumped into the pit is "real soupy. ... if the [truck] operator would slam on the breaks real hard, it would slosh out." Tr. 80. This description is not in dispute.

A berm, Noel stated, has to "ensure that it's still strong and compacted substantial material that's wide enough, tall enough, there's no cracks or anything on the dump or just make sure that it would warn or redirect a truck before it over-traveled." *Id.* Referring to photograph 90, Noel stated that the dark color indicates it is "still real wet and soupy." Tr. 81. He expressed this was an indication of a potentially weak berm that is getting saturated with water. *Id.* Still referring to picture 90, within Exhibit P 6, Noel identified the presence of "rubber tire marks from a rubber-tired machine." Tr. 82. Those marks, he stated, would not be made by a bulldozer. Tr. 82-83. Photo 92 shows "the berm to the left of where the truck went through. ... Just to [the inspector's] right would be where there would be no berm when [he] was standing taking the photograph. So the berm, you can kind of see how it's dark and muddy consistency throughout the -- the inside of the berm and then along with the tire marks going across the -- across the face of the berm there." Tr. 83. Noel also identified markings in the material from "a rubber tire machine, probably the back wheels of the dump truck, where it spun out or spun against the berm." Tr. 84. Noel interpreted this as indicating "that they were possibly hitting the berm and causing damage to the berm." Tr. 84-85. This action, hitting the berm with the dump truck's wheels, in Noel's opinion, "weakens the berm. ... if you spin against it, you could be pulling the material away from the berm that's supposed to be part of the berm. You're ... damaging the integrity of it." Tr. 85.

In his experience, Noel has seen truck wheels go up on berms. Tr. 87. This has the effect of weakening the berm, "because you're -- you're losing that cohesion in the material. Once you impact the berm, that cohesion of the -- the material, you start losing that, and then it starts going away. It gets weaker and weaker." Tr. 86. The remedy is to retrain the truck drivers not to slam into the berms and to rebuild the berms, adding material to it. Tr. 87. As for the tire track he observed, Noel did not know when it was made. *Id.*

Regarding photograph 93, Ex. P 6, near where A0093 appears on the photo itself, the inspector identified that "there is a triangle wedge there where the -- the back wheels would've went off and there's a bar in front of the back wheels that would've -- where the truck sat down at and then would've, as it was going over, taken that material out." Tr. 88-89. Noel marked on Photo 93 the number 1 and a circle denoting the triangular shape "that the bar in front of the rear tires would've taken out as the truck went over." Tr. 90. Then he circled and marked with the number 2 "what was left of the berm after the truck had went through the -- over-traveled

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getting too fine, so what they'll do is they'll put it on the belt, and then ... it kind of goes through those rollers and squeezes it and tries to get a lot of the moisture out of it. [and eventually] ... a cake would fall off the end of the belt press and go into either a hopper or into the end dump and out to wherever they're disposing of that [waste] material." Tr. 77-78.

through the berm.” *Id.* Photo 93 depicts the right side of area where the over-travel occurred. Photo 92 depicts the left side. *Id.*

Noel stated that the consistency of the berm was the same on both sides of the breached area; both were a muddy mixture. Tr. 92. He concluded that the berm had been insufficiently maintained. *Id.* The Court also finds this to be a fact.<sup>4</sup> Noel confirmed that on both sides of the area where the berm was penetrated, the remaining berm consisted of an inadequately composed mushy material. Thus, Noel agreed with the Court’s summary of the scene of the accident that it was his testimony if one were to look “at the area where the berm collapsed, where it went away, that both to the left and to the right of it, there was at least some number of feet of this inadequately composed, mushy material, cottage cheese, existed to the left and to the right of where the berm collapsed; is that true or not true.” Tr. 102. Noel answered, “[t]hat is true.” *Id.*

Noel stated, that if the berm had been maintained with substantial material,

it would've warned the driver that he was into the berm. It would've helped redirect him, but the main thing is that the -- there would be the berm -- the berm would still be there. Instead of going through the berm and nothing being left, the truck would've went up and over the berm, and if you can -- I mean, you can look on the ground, there's nothing left of it. It -- it wasn't there. You know, if it was substantial – of substantial material, it would've went up and over. It kind of just drove over the top of it.

Tr. 104.

Noel also remarked that, looking at the bottom right quarter of Photo 96, it shows “[t]hat the berm was not of substantial construction.” Tr. 104-105. Thus, he confirmed that if there had been a substantial berm in that area, there would have been, “a berm or a hump -- large hump of material with tire tracks going right over the top of it.” Tr. 105. Testifying with regard to his Photos 91 and 103, with the latter being a close-up of the former, Noel stated that the berm height was running at about 38 inches, with the mid-axle height of the truck that went through it being 39 inches. Tr. 114.

Regarding the inspector’s earlier testimony referencing tire tracks, he was asked by the Secretary about the “tire tracks going up the side at the right-hand of the berm, and ... then tire tracks going up on the left-hand side of the berm.” Asked what that indicated to him, in terms of its effect on the berm, Noel responded, “That it -- it was damaged or compromised. ...there was evidence of that.” Tr. 120-121. If truck wheels are up on the side of the berm, as opposed to having trucks moving straight back, perpendicular to the berm, Noel stated that “the straighter the better. You have less spillage, less chance of driving one tire through the berm versus not the other.” Tr. 121. Elaborating, when asked if it made any difference, he added, “if a tire goes up on the side of the berm, if it doesn't go in square,” and therefore his answer was, “[y]es ... [because] ... you're putting a lot of pressure on one spot in that berm, but you can drive one tire

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<sup>4</sup> **Note: Throughout this decision, whenever the Court notes that it finds something to be a fact, such a finding has been made upon consideration of the entire record.**

through the berm and, you know, it -- it'd already be through the berm, but the other one may be right there on the edge or close to going through the berm as well." *Id.* In sum, ideally a truck should go straight back, that is to say, perpendicular into the berm to dump its load and have its rear wheels stop before those wheels start riding up on the berm. Tr. 121-122.

Noel's view, referring to his Photo 105, and whether it reflects a collapse of the berm, was that it shows "more of a truck drive through the berm. The berm didn't -- I mean, collapsing, there's no evidence of that." Ex. P 7, Tr. 123. If the berm had collapsed, Noel stated he would've seen "[t]hat the ground would have broke apart, been below it, or there would be parts of the berm left, ... [it] would be jagged .. [because] ... when ground breaks apart, it's -- it's -- doesn't break straight off like a knife cut through it. It leaves little jagged rocks and pebbles and different things. It's never straight. It -- it breaks at the weakest point." *Id.* Thus, Noel reaffirmed that there was no indication from his photos showing evidence of a collapse of the base. *Id.*

Inspector Noel did not do any testing of the berm site, such as compaction or density tests. However, he did not feel that it was necessary because "it was clear that the truck had traveled through the berm and over-traveled through it, and that the berm was insufficient by its - - in the photographs and what I've seen at the scene." Tr. 125. He saw no evidence of sloughing of material, as he did not see "undercut material and -- and piles of loose material underneath of whatever was sloughing off, but it usually would undercut itself or you'd have loose overhanging material somewhere. It [d]idn't have any overhanging material." Tr. 125-126.

Noel thus reasserted his primary view, that he had no reason to doubt that the berm had been initially constructed adequately, but that it was "just not maintained that way." Tr. 125.

As part of his investigation, Noel looked at the onshift exams. Those onshift exams did not record any hazards for dumps or berms. *Preshift* exams are not required on the surface. Tr. 126-127, and Part 77, Safety standards for surface coal mines and surface areas of underground coal mines. There were notations in the onshift exams of "push dumps," meaning a dozer had been used to push on a berm and thereby add some new material to it, but as no specific location was identified, it was not useful information. Tr. 127. Noel stated that an examiner could look for certain characteristics in assessing berm stability, such as "some different cracks. You know, material being washed away or different color mud. You know, different color of the -- the material, you know. If it's not a dry, suitable material, that would indicate some issues going on. The ground moving, that'd be something you would see." Tr. 128.

After spending time at the accident site, Noel went to the hospital, where he first met with Phillip Lutgring, pit foreman, and then Shawn Standish, the truck driver. Tr. 129-130. The only eyewitness to the event was the truck driver. Tr. 130. Lutgring, who also directs the workforce, told Noel that he conducts the onshift exam. According to Noel, Lutgring informed that "he drove by the area and kind of glanced at it, thought the berm was okay, or it was at axle height and that it appeared to be okay." Tr. 131. Noel stated that it was his "impression" that Lutgring had described this as his onshift. Tr. 132. Noel then restated his view that Lutgring was referring to his onshift for that day, although he added that he would need to check his notes to confirm that. Tr. 133. Noel continued that Lutgring told him that "the berm was mid-axle

height, and that it appeared to be okay. He didn't indicate any – any reason for [Noel] not to believe that he didn't conduct the onshift exam.” Tr. 133-134.

Thus, according to Noel, Lutgring indicated [to him] that he had already drove by that area to do the onshift.” Tr. 134. Directed to page 11 of his inspector notes, Ex. P 5, Noel then stated that Lutgring “told [him] that he conducts the onshift examinations. He told me he *hadn't drove by that area yet*, but he did -- now, *he hadn't made it to the area yet, but that he did drive by*. He *glanced at it*, and then he also told me that that area is constant problems. They have problems with those berms often.” Tr. 135. (emphasis added). Noel also stated that Lutgring “drove by looking out his truck window. That he had a good -- good view of it. He was able to identify that it was mid-axle height. That it was [a] good berm.” Tr. 135. However, Noel reiterated that Lutgring “said the words that *he hadn't made it to that area*. ... and then he says that he drove by but he didn't get out. He just thought it looked okay, yes.” Tr. 137 (emphasis added). The Court revisited that Lutgring had told the inspector Noel that “[h]e hadn't made it to the area.” The inspector agreed that was what his notes reflect. Tr. 136. The Court then inquired if it was fair to state that Lutgring never expressly told him that he did an onshift but “[i]nstead, he told you some other things and from that, you concluded that essentially, he had made an onshift, even though he hadn't used those words?” Tr. 137. Noel responded to the Court, “That is correct.” *Id.*

Noel also had a conversation with the truck driver, Standish, who was then in the hospital. The driver related what happened, telling Noel, “that he had backed into the dump. As he backed in, he kind of felt the tires start to sink, so he tried to pull out of it. When he did, he -- he couldn't pull out of it.” Tr. 139-140. Noel continued, that the driver “felt his truck start to sink, so he tried to pull out, and he was unable to pull the truck back out. So at that time, the truck was starting to ease back over the edge. He decided that he didn't want to end up down there with the slurry, so he jumped from the truck, received his injuries, and he was able to watch the truck go over [while he was] laying there on the ground.” Tr. 140.

Referring to the Citation he wrote, No. 9102704,<sup>5</sup> citing 30 C.F.R. §77.1605(l), Noel stated that he wrote it because “the berm was inadequate ... it didn't have a substantial means of stopping the truck or warning or redirecting the driver that he was too close to the edge.” Tr. 142. Reiterating his earlier testimony, Noel stated that he determined the berm to be inadequate because “the berm that was left there, it was made of that mud material that wouldn't hold the weight of the -- you know, wouldn't stop a truck or warn him that he was too close to the edge.” *Id.* He added that he cited that standard because “the truck over-traveled through the berm.” *Id.* Noel evaluated the likelihood of injury as “highly likely,” and to cause fatal injuries and as S&S.<sup>6</sup> *Id.* He considered the negligence to be high, because “the mine operator knew about the

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<sup>5</sup> In what was ultimately determined to be a small matter, the Citation inaccurately described the area where the incident occurred as the “west end gob dump,” but it was actually *the east end gob dump*. Tr. 140-141. There was only one gob dump at that time. *Id.*

<sup>6</sup> Noel expressed that the injury could have been worse, “[h]ad the truck maybe stayed up on its wheels instead of flipping over upside down, it would've continued further on down the embankment, went deeper into the slurry, you know, fully engulfing the truck with whatever



condition and had no mitigating circumstances.” Tr. 143. This was based on the remark of the mine’s pit foreman, Phillip Lutgring, that “these berms were a constant problem.” Tr. 143-144. Noel also informed that Lutgring told him that the mine would fix, i.e. maintain, the berm with a dozer. As Noel knew what Lutgring meant, there was no need for elaboration about the nature of the fix.

Noel added that another reason for marking the negligence as high was that “the berm material was significantly darker in color and should've been easily identified by ... the most casual observer.” Tr. 146. Also, he noted that in the mine’s onshift book they never indicated a specific hazard, yet Lutgring had informed him that these were “constant problems.” *Id.* The fact that no hazard had been identified also caused Noel to conclude that the onshift exam had not been adequate. *Id.* As for his unwarrantable failure designation, Noel based that determination on the berm material being “definitely darker and different in colors from what it was supposed to be [and that this condition] had existed for more than one shift.” Tr. 147. His determination that the condition had been present for more than one shift was based “[b]ecause it -- it doesn't -- mud doesn't soak into a good berm material overnight. It doesn't happen within hours. It takes time for this to -- to happen and to occur. So it wouldn't happen in one -- matter of couple hours.” *Id.* He could not be more precise about the duration of the problematic condition because that depends on a lot of factors. *Id.* Noel also expressed that he had issues with the prior onshift exam too, on the basis that he concluded that the problem had existed for more than one shift. *Id.* Thus, he concluded that the condition should have been identified earlier. Tr. 148.

His unwarrantable failure conclusion was also based upon the high degree of danger presented. Noel believed that with a truck going 40 feet down an embankment into a 30 foot deep slurry pit was quite dangerous and that it was “something that the -- the operator should've been able to identify and known about, and then they didn't have any corrective action prior to that.” *Id.* Thus, he concluded that, as Lutgring knew this was a problem, the berms should've been examined more frequently. Tr. 148-149. To adequately assess the berm, the person conducting the onshift should have “got out, looked at it, made sure there was not cracks in the ground or on the berm, made sure the berm was good and substantial height and a good, dry, solid material, not wet and muddy ... [and this should've been] indicated that on the onshift book ...” Tr. 149.

As part of his investigation, Noel learned that it had been about a week since they last worked on the berm. *Id.* Noel also learned that the berm had been constructed about a month earlier and, as noted, that they last worked on it about a week prior to its failure. Tr.150. The inspector also expressed that the unwarrantable failure was justified because “if there was a substantial berm built in that location, it --, there would've been a berm left .... the truck would've went over -- you know, there would be tire tracks over the top of it, but there wasn't any evidence of that, so that was also part of that consideration.” Tr. 150-151. The Court agrees with the Inspector’s analysis of the unwarrantable failure factor.

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would be in it.” Tr. 143.

Testimony then turned to Order No. 9102705. Tr. 151, Gov. Ex. P 4. This was the section 104(d)(1) order issued for an alleged violation of the onshift exam duty, per 30 C.F.R. §77.1713(a). *Id.* It alleged an inadequate examination had been made in that there was a hazard on the gob dump, but that the foreman conducting that exam failed to identify the hazard. Tr. 152. The essence of the Order was the assertion that the onshift examination on the same day and the same shift on the day of the haul truck overtravel was not properly performed in that, as Noel expressed it, the “hazardous condition hadn't been identified. The ... area was glanced at and looked at, but it wasn't -- an inadequate berm wasn't identified.” *Id.*

The Court notes that before one can assess if an onshift exam was inadequate, it must first be determined that an onshift exam had occurred for the shift in issue. It was the inspector's claim that Phillip Lutgring had conducted an onshift examination that day. However, the inspector's response revealed a fundamental flaw with that claim, as he stated, “Well, in speaking with [Lutgring], I mean, he -- *the impression that I got from talking with him* [was] that he had been -- he had been through the area, he did say that, the day that I initially talked to him, and he didn't give me any reason to doubt that he hadn't not conducted the examination, but afterwards also through the conference process, *there was a document that said that he had conducted the onshift exam.*” *Id.* (emphasis added).

The Court inquired about that document and the Secretary's Counsel addressed it. Tr. 153. Gov. Ex. P 7, P 8. The Secretary tried to use the exhibit by eliciting testimony from the inspector that the exhibit reinforced the basis for his issuance of the citation. The Secretary believed that the exhibit, which is a letter from the Respondent requesting a conference on this citation, effectively admits that the onshift was done that day. Tr. 153-155. At least it was the inspector's *belief* that the Respondent had admitted doing an onshift on the day of the incident. Tr. 156. Exhibit 7, a letter from the Respondent requesting a safety conference with MSHA regarding the alleged *berm violation* does include a remark that the foreman observed the berm “in place on his onshift examination.” However, Ex. P 8, seeking a similar safety conference for the alleged *onshift exam*, notes that the inspector states that the foreman only glanced at the area. It is important to note that the words with Ex. P 8 do not represent Lutgring's claim, but rather the assertion of the mine's safety and health director, Troy Fields. Ultimately, Noel stated that his basis for concluding that an onshift had been done rested upon Lutgring's remark to him that an onshift had been done. Tr. 157.

Continuing with Order No. 9102705, involving the claim of an inadequate onshift exam, Noel issued that order because he determined that a hazardous condition had been allowed to exist at the gob dump. Tr. 158-159. The cited failure was not meeting the requirement “to conduct an onshift examination and adequately identify hazards and record them in a -- in an onshift book.” Tr. 159. Noel, based upon his conversations with the pit foreman, concluded that the foreman “knew that there was issues with these dumps and that, you know, he didn't closely examine it and closely look at it to identify any potential problems.” Tr. 160. As will be explained infra, apart from the competing versions of what words were actually exchanged between Lutgring and Noel, the Secretary's claim of an inadequate onshift fails as a matter of law for the simple reason that an onshift exam must occur *during the course of the work shift, not before the shift begins.*

Subsequently, as part of the continuation of his investigation, Noel met again with the truck driver, Standish. Tr. 179. In the course of that second meeting with him, which occurred at the employee's home, Standish examined some photos of the site of the accident. Tr. 182. Standish remarked about photo 90 that the "berm wasn't that high," by which he meant that the "berm that [the driver] was backing up to was about a foot lower." Tr. 182-183. The inspector had Standish mark on the photo depicting that the height of the berm was about a foot lower. Tr. 183-184.

Standish stated that the berm was lower in that area "[t]o allow mud below to the -- that was in the bed of the truck to flow out and go over the berm." Tr. 184. Standish also told the inspector that he did not feel the berm in the back of the truck. Rather, "all that he felt was the truck sink. He didn't feel the berm. He didn't feel -- he didn't -- anything, he just felt it sink." Tr. 184. This added to the inspector's conclusion that the berm was not of substantial construction, "because [Standish], you know, would've felt it. An adequate berm, you would feel. That's the -- the whole point of the berm is -- not the whole point, but it's a good piece of the puzzle, that you feel that berm when you -- when you hit it." Tr. 184. A second photo added to the inspector's conclusion that the berm was inadequate because Standish told him the color of the berm was "maybe even a little bit darker," informing Noel about the berm's muddy characteristic.<sup>7</sup> Tr. 185.

Upon cross-examination, Noel stated that in his prior experience when examining berms he would get out of his vehicle and walk the berms and not simply look at them from the vehicle. Tr. 192. In examining berms, he would look for cracks and things like that. *Id.* He informed there are signs one looks for. *Id.* He added that they "also maintained a machine up there, and we were constantly rebuilding the berms all the time. We would have a dozer or a compactor machine that would typically be up there with the trucks dumping, and usually would spot them as well." Tr. 192-193. Asked how Solar's practices were any different than when he examined berms, Noel informed, "[b]ecause we provided that, that constant attention. ... we had a dozer there, and every time, if the berm was found to be bad, we fixed it." Tr. 193. In contrast, Noel also informed, Lutgring told him the berms "hadn't been touched for a week." Tr. 194.

Turning to the onshift violation, Noel, was reminded that in his deposition, he had stated that he found no problem with the other exams, asserted that he had misspoke during his deposition and that his reconsidered view was that there were issues that should've been identified. Tr. 195. Noel agreed that he cited the onshift *done on the morning of the 29<sup>th</sup>* for that alleged violation. Tr. 195-196. Noel also agreed that, because the berm is literally sitting on the

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<sup>7</sup> One remark by Standish suggested to the inspector that the driver may have backed up to the berm at an angle. Standish "stated at one point [to the inspector] that he looked in one mirror and couldn't see it and that the other mirror -- couldn't see the berm. ... And then in the other mirror that he had seen it crumbling away, but, ...he never felt a berm, and he was clear of that." Tr. 185. That led Noel to consider that Standish "could've been in there at an angle. You know, if -- if you were at an angle to the berm, you know, one tire would've went through, and the other one was almost through and -- and he was done past -- over-traveled the berm at that point. Because if he hit it an angle, you know, one side of the truck would go through, and the other side would be on its way through." Tr. 186. None of this refutes that the berm was insubstantial.

base, one can't see what is below it. Tr. 196.

There was much back and forth between Respondent's Counsel and Noel on the issue of the rubber tire truck track identified by the inspector. Tr. 196- 197, Photo 90, Ex. P 6 and Respondent's Ex. R 15.<sup>8</sup> The dispute was whether the track was created by a truck tire or by a bulldozer, but the Court concludes that the correct identification of the track is not critical to determining the berm violation. That said, it was quite clear to the Court based on his testimony

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<sup>8</sup> Noel stated that the track was catching only the edge of the tire and therefore just grazing the berm. Tr. 198. Noel agreed the photo reflected the truck tire running up on the berm. *Id.* Referring to Ex. R 19, Respondent asked of Noel if the lines in that photo run at an angle or straight across. Noel responded that the photo makes it appear that they go straight across. Tr. 201. Noel believed that it shows a "tire spinning, and the -- there -- there's a berm, and it's just grazing that. It's not -- it's not actually driving on it. It's grazing that, and so it's just a continuous -- the mud squishing out of the tread pattern." Tr. 201. Noel was challenged about his tread pattern conclusions. Asked about R 19 to show a gap anywhere in that tread pattern that's in this berm, Noel responded that it was "down the right rear tire on A-76. If you see how the -- on the rear tire there, the tread pattern wraps around the outer edge of that tire." Tr. 202. Then asked about A 73, if the tire tread in A 76 goes partly onto the sidewall, Noel affirmed that was true, pointing to A 73. Tr. 203. The Court commented that it observed this in the photo as well. Noel continued that "as that tire is grazing the side of this berm here, it's just squishing the mud out is what it's doing. It's a -- that's a continuous line there. As the tire spins, it's just going to leave a continuous line of mud as it grazes the side of that berm." *Id.* While Respondent's Counsel tried to sum up Noel's view, stating that, by his testimony, "this wraps around the tire maybe four or five inches, and that leaves us this straight pattern that looks to be a foot-and-a-half, two feet wide on the ground," Noel added, "[a]s it's smearing across the berm." *Id.* By "smearing," the inspector meant "it's not hitting that berm directly straight on, it's grazing the side of it." Tr. 204. Noel confirmed that he believed the side of the tire made that mark, adding, referring to R 19, "[i]f you look on the ground, you know, there is -- it's only -- the only part you see left of the tread in this picture is the -- it would be the right-side outer -- outer edge of the tire, the outer tread pattern, not the left inner side." *Id.* The exchange continued, with Noel being asked if "all of this area that is to the right of the smooth part, you believe is the side of the tire making this mark." Noel explained further, "[n]ot the side. It's the outer edge of the tread. The -- the last little bit on the -- on the tread part of the tire and then the outer edge." *Id.* Asked if he took measurements of the treads to compare, Noel answered there was no need to do that as it was clearly a rubber tire mark. *Id.*

The questioning then moved to photo A 88 and R 6. Noel agreed the tracks in that photo are those of a dozer. Noel stated that in R 19, that is not an indentation, but rather a raised clump of mud. By comparison in A 88, he asserted, it shows an indentation into the ground from the tracks. Tracks, he advised, leave an indentation because they have cleats. Tr. 205. Rubber tires, on the other hand, don't leave indentations. They leave clumps of mud. Tr. 206. Noel agreed that there is a gap between cleats on a dozer. *Id.* The Court had the inspector mark on R 19 near the center of the photo on the left upper quadrant, the smooth area that was being disputed. Tr. 210. The Court concludes both that Noel held his own on the dozer/truck cleat dispute and that the issue is not determinative of the outcome in any event.

and work experience, that Noel was very knowledgeable on the subject of berms.

Turning to a different subject, the inspector was then asked about R's Ex 14, a photograph. Tr. 217. He agreed it showed the berm on the right side. As directed by Respondent's counsel, Noel marked his initials on the exhibit the areas he believed depicted rocks on the left side of the crack, adding the comment that the rocks were mixed with mud. Tr. 219-220. Noel agreed that the crack appeared to be a gap in the berm while including his explanation about the crack's origin, "[a]fter the truck traveled through the berm, you're placing an excess amount of weight on the outer edge of that -- that slope there, and when you place a -- that much weight on the slope, you're going to have cracks and things that appear, because it's where weight shouldn't be. It's -- it's -- you're beyond past where the berm was, and that -- you know, that's not where the weight's supposed to be. So the berm is supposed to keep you from going that far, and -- and that's where I believe that crack came from." Tr. 221-222.

Respondent's Counsel continued on the issue of the crack. He directed Noel to photo 95, within R 8 and to photo 99, within R 9. Tr. 225. Noel agreed that he saw surface cracks located on the bottom few inches of Photo 95. *Id.* For Photo 99, Noel again asserted it shows "a tire mark going through there." Tr. 226. Asked if, on JN 1, the flat area in that photo is "the original base that all these berms are built on," Noel agreed that was the ground and that to the right of the area he circled are tire prints. Tr. 227. Directed then to A100, Noel affirmed that wedge he circled on an earlier exhibit was caused by the bar that's ... in front of the rear wheels, as present on R10 as well as on A 100. Tr. 228. Noel also affirmed his opinion that regarding Exhibit P 6, photo number 75, that photo shows the bar he believed made the wedge, in front of the rear wheels. *Id.* Noel had previously marked the bar he was referring to on Ex. A 76 and that the bar is down by the wheels.

Upon the Court's inquiry about the significance of the tread origin dispute, Respondent's Counsel did reveal the purpose behind all those questions, asserting that the inspector "assigned, as part of this break through the berm, that this part here is the one that made this mark, but I'm asking how it could do it since the bar angles out..." Tr. 231. The Court then responded, "[l]et's assume that you're correct. That [the inspector] is wrong. That ... this bar didn't create that. Is that really -- is that going to cause the case to turn on that? Isn't my focus on the case more accurately focused or should be focused on not whether this mark or that mark is right, but whether the berm was substantially constructed and whether there was -- you know, the onshift exam, whenever it occurred, should or should not have recognized it?" Tr.231-232. The Court was therefore asking if this line of questioning would produce an "aha" moment. Tr. 232. Respondent's Counsel advised that the line of questioning would not be so momentous. *Id.*

Resuming his questioning of the inspector, and referring to the crack shown on Ex. R10, Noel was asked if that photo "g[a]ve [him] further indication that what has happened here is that the base has cracked away, taking the berm down the hill?" Tr. 232. Noel answered that he couldn't say at what point the base cracked. For instance, it could've happened four weeks earlier. Tr. 233.

The accident occurred during Standish's second load dump that morning. Tr. 233. Standish told the inspector that the berm looked okay up to that point. *Id.* Based on Standish's

recounting, Counsel for the Respondent asked the inspector if that didn't "indicate to [him] that that's when the base is collapsing and the berm is going with it?" Noel did not agree, responding that he

had explained that when we talked about that earlier, that if he [the truck driver] would've been in there at a[n] angle of any way, ... let's say he was at an angle to where the right rear tire contacted the berm first. So if he continues backing up, he didn't feel the berm, as indicated by ... what he had told me. That [ ] tire would proceed on through the berm and then the left tire would be then coming into contact with the berm second. So the right rear would touch first. The left rear would not be touching yet. As it progresses through, then the left rear would start touching the berm, so when he looked in his mirrors in -- at any time during that, he could've seen -- you know, if you're at an angle like that, you look in that mirror, he's already done potentially passed through the berm, and then he looks in this mirror. He's not quite through it yet, but he's on his way through it. At that point, the truck's starting to sink.

Tr. 234-235. Noel agreed that was his view, and that the driver did not admit to him that he went in at an angle. Tr. 235. Noel was not willing to agree that his view that the driver went in an angle was merely his "theory." Instead, he viewed it as a logical explanation of the event. Tr. 236.

The Respondent laid bare its own theory, namely that the driver backed up "and as soon as he gets near the berm the entire area collapses just as plausible? You got major cracks in these berms, as you pointed out." Tr. 236. However, Noel held to his view, responding, "Well, after traveling through the berm, it could've collapsed because of the excess weight that's placed on that part that's -- he's already done rode past. He shouldn't have been out that far. The berm is supposed to prevent you from over-traveling and placing excess weight on the outer edge." Tr. 237. Supporting his view, he added, was that the berm was missing, posing back his own question, "where'd the berm go?" *Id.* Noel also rejected the assertion that the berm simply collapsed as the driver got "right near it, and it goes away," noting that the driver saw the berm as he was driving into it. *Id.* Noel added, the dump was not collapsing "until the point he placed a loaded truck in that area, and once the -- the loaded truck, as you say, would've collapsed, I mean, he's done -- *the berm allowed him to go too far and placed excess weight on an area that shouldn't have been.* I mean, things don't fall down by themselves." Tr. 238 (emphasis added).

Turning to the issue of the alleged onshift violation, Noel was asked if he inquired of Phillip Lutgring about the time he drove past the area of the berm in issue. Tr. 245. Based on the inspector's notes, Lutgring informed that, although he does the onshift exam, he "hadn't made it to that area" yet. Tr. 246. Also, Noel's notes record that he drove by the area but did not get out of his vehicle but thought that it looked okay. Noel agreed that he took Lutgring's answers as *implying* that he had done his onshift. Tr. 247. Supporting his view, Noel added that Lutgring "was able to give me details of what he seen and what he looked at. He was able to tell me that the berm was at axle height. He was able to tell me that it -- that he thought it looked okay, and I mean, that's what things you look for in examination. So he looked at it that morning." Tr. 247.

During Noel's deposition there was discussion about what an onshift means. Noel was asked if in this instance the onshift was from 6 a.m. to 4:30 p.m. Instead, Noel tried to distinguish between what an onshift means for an hourly employee as compared to management. Tr. 249. That aside, Noel agreed that one has the entire span of the hours in the shift in which to complete the onshift. Tr. 250-251. Further, he agreed there is no preshift requirement at the mine, for Part 77, which applies to surface areas of coal mines. Tr. 251. Noel also conceded that there is no requirement to do an onshift *prior* to the shift beginning. Thus, he agreed that an onshift is done *during the shift*. Tr. 252. However, as just mentioned, Noel tried to thread the needle so to speak, distinguishing when the shift would start for a foreman, as opposed to a laborer. Tr. 253. Noel then added, that for the foreman, the onshift would be "[w]henever he feels like he is conducting his examination, that would be an onshift examination." Tr. 254. Asked if he "is driving a shuttle van to drop him off 15 minutes before the shift begins, and it's just -- it is 50, 100 feet away, how does that make it an onshift," Noel answered, "[t]hat's up to him to define. If he defines that he is doing his onshift examination at that time." *Id.* The Court, seeking clarification of Noel's position, asked, "is it fair to state that [Noel] believe[d] that such a person, this management person, ... has to at least say something about what his activities were related to the berm for you to conclude that an onshift was done." Noel answered, "[t]hat would be correct." Tr. 255. Again, Noel's conclusion that an onshift had been done was based on Lutgring's answer identifying that the berm was mid-axle and appeared to be okay. Tr. 256.

Noel was evasive however, when asked if a foreman signs in at 5:45 a.m., and starts doing an onshift, whether he would count that as an onshift, answering, "I don't know. I mean, I'd have to see the situation." Tr. 259. In contrast, during his deposition, when asked if one "could [ ] fill out the book in advance of the starting of the shift and whether [Noel] would count that as an onshift," he answered, "*No. That would be a preshift.*" Tr. 259 (emphasis added). Noel confirmed at the hearing that was his position. *Id.* Noel also tried to distinguish the act of filling out the onshift book from the act of conducting the onshift. When asked if was acceptable if "the foreman ... 15 minutes *before the work begins* [informs] ... I'm going to fill the book out at the end of the day, but I've already done my onshift. I've been to all the areas. I'm done. I'm not going to do any other exams during this shift. I'll sign it at the end of the day," Noel answered that was okay, if the foreman signs the book at the end of the day. Tr. 259-260 (emphasis added). Pressed whether it is acceptable to MSHA for the foreman to do the onshift before the shift begins, again Noel responded that it's acceptable "whenever [the foreman] considers he'd done his onshift." *Id.* The Court does not accept Noel's rationalization because it contradicts the plain meaning of an *onshift* exam.

Perplexed by the inspector's answers, the Court asked if Noel knew whether the foreman's drive-by occurred "when he drove by when the shift actually began or before that." Tr. 261. Noel responded that he did not know. *Id.* Noel also did not know, when Lutgring drove by the dump site, whether that occurred before the first load to the berm had been made. Tr. 262. In fact, during his deposition, when Noel was asked, "[s]o if he's driving people by at 5:40 or 5:45 to go to the shuttle, even if he drives by that area, that's *not* part of his onshift, is it, he responded, "[t]hat would be correct." *Id.* (emphasis added).

Counsel for the Secretary tried to make the same argument, that the onshift exam's start would begin when *the foreman's day started*, not the start of the workers' shift. Tr. 264. The

Court then advised that the Secretary had a problem, because onshift means “from the point in time that the shift begins. It doesn’t mean when the management person arrives.” *Id.* The Court noted that by the Secretary’s logic, “if you carry it to its extreme, the inspector – the management person comes -- he has insomnia, or he had an argument with his wife. Both things can happen. He arrives at the mine at 3:00, because he needs to get out of the house, and he drives by there and says, ‘Oh, the axle looks okay.’ That’s not an onshift. That’s not an onshift.” Tr. 265. In that regard, Counsel for the Respondent then noted again that Lutgring’s first told Noell that he, Lutgring, hadn’t made it to that dumping area yet. Tr. 267.

Returning to the unwarrantable failure finding made by Noel, and noting that the mine referenced that they were pushing berms or pushing dumps, in the reports, Respondent inquired how that squared with unwarrantability. Noel responded that no specific locations were identified in those reports, nor was any specific hazard identified. In short, the reports were quite vague. Tr. 268-269. Noel then repeated that his determination of unwarrantability was based on the obviousness of the conditions, reminding that, per his earlier testimony, the berm was saturated in mud. In addition, his conclusion was based on his speaking with Phillip Lutgring, and the evidence at the scene. Tr. 270. As the questioning about that determination continued, the inspector replied further “it’s unwarrantable because of the length of time that it existed, the obvious, the danger that it presented itself with, the onshift examination. You know, he told me that he had drove through the area and that he was able to identify the mid-axle height of the -- that the berm was, and that ... it appeared to be okay. So based on all of the evidence, not just -- it’s a -- it’s a piece of the puzzle.” Tr.270-271. Thus, Noel’s point was that his determination relied on more than one thing.<sup>9</sup> Tr.271. Respondent’s Counsel suggested that there needs to be evidence that a mine had previous berm violations for a matter to be unwarrantable. Tr. 278. The Court disagreed, expressing “if [the court] rob[bed] a bank and you show that I never robbed a bank before, I’m going to focus on whether -- probably, first, whether I robbed the bank, not whether I was attending church every Sunday in the decade before that.” Respondent agreed with the remark, but still believed there should be some evidence that the violation occurred before. Tr. 279.

The Secretary having rested, Respondent called Matthew Atkinson. Tr. 299. He is the Respondent’s Vice-President for mining and is responsible for the entire mining operations of Solar’s surface operations. Tr. 300. He has a degree in geology, and is a licensed and certified geologist in Indiana. Tr. 299-300. Atkinson described the events at the scene on the day of the accident. He related, “we were trying to come up with a plan, first of all, first priority was to make sure the area’s safe. The second priority is to make sure that we can continue dumping gob in the west part of the pit and -- and isolate these -- this -- isolate these operations so we can continue mining.” Tr. 306.

Atkinson also took photos at the time. Directed to Exhibits R 5 and 6, he described berm construction, stating that a berm is to be made of common material, shot rock over material,

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<sup>9</sup> The inspector *did not buy into* Respondent’s Counsel’s characterization that, *for both violations*, he applied the same factors in making his unwarrantable failure determinations, nor that chief factor he applied was that an onshift was done and it was inadequate. For example, Noel distinguished that the berm violation existed for more than one shift. Tr. 274.



“hailed in from the excavating material of the coal mine.” Tr. 310. Atkinson also described the dumping process, stating the driver is to “swing by and the observe the area ... [a]nd turn the vehicle so they can observe from the -- the cab is on the left-hand side of the vehicle, so if they approach from that side, from the left side, they can see the area. If they approach from the other direction, then they make a -- a u-turn, basically, or make a semi-circle so they can observe the dump area, and they pull out. And they do that observing, looking for cracks, making sure the berm is there, making sure there's no soft areas. They're -- they're trained to do that.” Tr. 311. He continued with his description of the process, stating “They'll -- they'll swing out and then pull up perpendicular to and then back up, and they're instructed to back up watching the mirrors until they touch the berm, the[y] call “feeling the berm.” It's barely just touching the berm. ...[and in this process they are backing] [v]ery, very slow. I mean, the -- the -- that berm's not a back stop. The berm's just there to let them know how far to come back before they start dumping.” Tr. 312.

The Court, upon hearing this description, is of the view that Atkinson's description of the practice may be the theory, but is unlikely in practice because, if applied, the driver would be performing a de facto on shift exam with each dump.

Atkinson's take on the cause of the berm collapse was very different from that of the inspector. He stated,

[t]he berm was not there when we got there, so we had to look at what was left on each side of the berm, and I looked to see if the berm -- the sides that were left, the exposed cross-section showed competent rock and shot rock, make sure there was a berm there, and on both sides, that was present. You also look down over this ledge at the truck, and you see the shot rock on top of the material is full there, berm was, that had to be the berm material itself that was left over. It's grey compared to the black if you saw the change. So I knew that the berm had been there. There's no way that rock could've been there, because the -- the truck could not haul that material, did not come from the wash plant, so the only place it could've come from is the berm.

Tr. 313.

Atkinson informed that there were cracks in this area, indicating a movement and failure of material. Tr. 313-314. By this movement, Atkinson was referring to movement of the base upon which the berm sits, which is distinct from the berm. Repeating his earlier assertion, he stated that “[t]he drivers are to be “looking for cracks around -- away from the berm to see if that's -- there's settlement behind the berm.” Tr. 314. By “settlement behind the berm,” Atkinson explained “[t]hat means that there's possible movement, and the slopes have become unstable on the backside of the berm.” Tr. 314. Atkinson acknowledged that there was some black material on top of the berm that's left on the left and right, which he stated was to be expected “because when the material's being dumped, it splashes all over the place.” Tr. 314.

When asked whether, in his experience, “a couple inches of slurry on top of a rock berm cause it to collapse,” Atkinson answered, “Theoretically, no. *I mean, it could – it could cause the*

*top to get soft*, but it's -- that's not what I saw when I was out there.” Tr. 315. (emphasis added). Instead, he stated that he saw, “the base was giving way and there's -- there -- you could see the propagation of cracks away from the where the slip occurred as it proceeded back, and this is typical of what we see from movement on the slope. We observe this all the time during an examination.” *Id.*

Atkinson’s conclusion was that the berm did not collapse because of slurry on it, but rather due to slope failure in the backside of the berm. *Id.* Tr. 315. He explained further that it was due to “the slope failing, the material that -- that the berm was sitting on, the whole thing gave away.” Tr. 316. By “backside” Atkinson meant “[t]he side opposite where the material's getting dumped. The side towards the pit,” with the “front side” referring to where the truck would back up to it. *Id.*

Atkinson commented on some of the photos that were taken at the accident scene. He described Ex. R 8 as the “apparent shot rock down the slope on top of the slurry, and that's ... the berm material itself, and it also shows the propagation cracks.” Tr. 319. He identified cracks in the lower right of that photo with one crack labeled in that photo as “number 1.” Tr. 319-320. Atkinson also identified other cracks in that photo, labeled as number 2. *Id.* Several cracks were also identified in photo R 18 and he marked those on that exhibit, drawing seven circles to indicate them. Tr. 322. He added that there was a crack “immediately on the berm adjacent to the base area.” Tr. 323-324, R 14. Atkinson summed up his assessment of the condition, stating “[t]he base material and the material on the pit side or backside of the slope has failed, and there's movement down the slope, and the cracks have propagated all the way through, all the way into the failing berm, because you can see -- the crack indicates that that space is moving down the slope, so that berm is failing going down the slope, because the slope is failing. And if you follow that crack, you can see it matches up where the failure was before, where the end dump went over.” Tr. 324. Thus, again, it was his view that “[t]he base of the berm had to give away to allow movement to the curve to create that space for that crack to grow.” Tr. 325.

However, in effect supporting the inspector’s assessment of the genesis of the problem, Atkinson identified, from R 14, “that's the shot rock interspersed *with the slurry that's been splashing on them.*” Tr. 327 (emphasis added). From photo R 15 and R 19, Atkinson identified the marks as dozer tracks where the dozer is pushing the berm, not from the rock truck’s rear tires. Tr. 328, 329. Atkinson stated that in the process of the bulldozer creating the berm, it is “pushing material ahead of it, it's lifting the blade up and letting material slide off the blade to deposit for the berm [and the curled part in the top of Ex R 19 is from] the curved part of the [dozer’s] track.” Tr. 331. Ex. R 23. The cracks Atkinson identified in R 9 were, he asserted, due to movement of material down the slope. Tr. 333.

The Court questioned Atkinson regarding photo R 17. He agreed that the bottom left quadrant of the photo shows tire tracks and in the left side about one-third of the way on the bottom left quadrant, and there are tire tracks and another set of tire tracks appear in the same photo as one moves from left to right. Tr. 335-336. The Court expressed that it appeared from that photo that the berm failure was much wider, almost double the size of the two tire tracks in it. Atkinson agreed, “[y]es, ... the crack on the far right upper corner that we looked at earlier, that shows that the failure was across that area you're talking about.” Tr. 337. However,

Atkinson did not agree that meant two dump trucks could've fit side-by-side within the scope of the berm failure, because the tracks in the photo reflected different times that trucks dumped at that location.

Thus, Atkinson did not agree with the Court's perception of the width of the berm failure. Tr. 338. Given his response, the Court had Atkinson mark on Ex. R 17 where the berm used to be located. *He also stated that just one dump truck would fit within that area.* Tr. 339-340. Ultimately, Atkinson's view was that it was the base, not the berm it sat on, which failed. Tr. 342.

Regarding the alleged onshift violation, Atkinson related that he spoke with the day shift foreman (Lutgring) that day, who informed that he drove by the berm that morning, observed that it was there, but that he did not inspect it at that time. Tr. 342. Asked for more detail about the time Lutgring drove by the berm that morning, Atkinson responded, the foreman "would be doing that approximately ten until 6:00, quarter until 6:00, adding that "[e]quipment starts up at 6:00 a.m. and [the foreman's] taking the personnel to the shovel so they can be ready to get started at 6:00 a.m." Tr. 343. The shift, Atkinson affirmed, begins at 6:00 a.m. Tr. 344.

Upon cross-examination Atkinson agreed that, when deposed, he admitted that the berm had slurry on top. Tr.358. He also recalled that, per some of the photos, there were tire tracks on one of the berms and that it appeared that someone had been up in the berm. Tr. 359. Atkinson also remembered that, during his deposition, and asked "when slurry comes down on the berm, what [e]ffect does it have on the berm," his answer was that "[i]t cools it, and then you just can't tell, you know, the original -- where the original berm is."<sup>10</sup> Tr. 359.

Atkinson repeated his opinion that the slope failed. Tr. 361. Asked what a mine operator can do "to address this process of slope failure prior to it fail[ing], he answered, "[w]e inspect the base ... for failure cracks. We look for the differences in height of the berm in relation to the other berm to show that the berm is starting to slope down the slope. ... Just comparing the berms and seeing if there's any anomalies in the berms as something to indicate as possible slope failure." Tr. 361-362. However, when asked if that what was done in this particular situation where the dump truck was dumping slurry into the pit, Atkinson's response was that he "can't -- I can't comment, because I wasn't there and didn't see -- didn't inspect it." Tr. 362.

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<sup>10</sup> However, Atkinson disputed the Secretary's characterization of his deposition answer as to why the berm failed, that he "believed that the slurry had gone through the spoiler and into the berm." Tr. 359. Atkinson countered that "[w]e were talking about the backside of the berm," [adding, during his hearing testimony] "[y]ou and I are going back and forth, and I think we were getting our signals crossed. But I had said that it's the slurry left on the backside of the berm, [that] yes, it can weaken it." Tr. 359-360. Atkinson also disputed part of the Secretary's recounting of his deposition explanation for the berm failure and the presence of cracks. Presented with his deposition answer that "[o]n the backside could be that, you know, the slurry rolling down through the spoil and stuff had weakened it. So it could be that they got up on the berm, laid those tire tracks, and they pushed it off. You know it's a slope, you know." Atkinson's response was that he only didn't recall saying "he pushed it off." Tr. 360.

Atkinson admitted that it was his deposition testimony that cracks on the base of the berm indicated slope failure caused by constant dumping of slurry, but added that the berm slid down due to slurry being dumped on the backside of it. Tr. 362. He was then asked whether slurry being dumped also weakens the berm itself, not just the backside. Atkinson admitted that was true, theoretically, but he stated he did not see evidence of that. Instead, he maintained that cracks in the base and a crack in the adjacent berm showed that there was slope failure behind the berm. *Id.* Such cracks, he stated, can happen over a period of time or very quickly, though he didn't know which scenario applied in this instance, as he was not present when the failure occurred. Tr. 363.

Atkinson did not maintain that he was an expert in slope failure. He distinguished his area of knowledge, noting that he is not an engineer, but rather is a certified geologist. Tr. 363. His view that the slope base, not the berm itself failed, stemmed from seeing cracks at the base. Tr. 364.

The Court concludes that, given the several changes in Atkinson's hearing testimony when compared with his deposition, this diminished his overall credibility.

Philip Lutgring, pit supervisor at the mine, testified. Tr. 381-382. As noted earlier, Lutgring is the person MSHA claims to have done an inadequate onshift exam, as reflected in its (d) Order, No. 9102705. His shift begins at 6:00 a.m. and ends at 4:30 p.m. Tr. 384. However his work day begins at 4:45 a.m. After dealing with paperwork and discussing with the night foreman what happened that night, he "head[s] down to the -- the pit and pick up the shovel men [i.e. the hydraulic excavator/backhoe operators] and deliver[s] them around to their machines and explain to them what they're going to do for the day." Tr. 384. Usually, he picks those men up around 5:30 and transporting them to their work location takes about 30 minutes to accomplish. Tr. 385.

Speaking to the onshift exam, Lutgring noted that it can be done during the whole shift. The Court notes that there is no dispute about this – the onshift exam can be done at any time during the shift and there is no preshift exam requirement under 30 C.F.R. Part 77. The shift starts at 6:00 a.m. Tr. 386. In the process of dropping off the shovel men, Lutgring does drive by the pit area, which is where the berm failure occurred. Tr. 386-387. Referring to a photo of the scene of the failure, Lutgring stated that, on the day of incident, when driving by that area on his way to drop off the shovel men, he was about 50 feet from the berm area and at that time it was still dark. Tr. 388-389. His truck headlights were sufficient for him to see that there was a berm present at the site, but he did not consider driving by the berm location to be an onshift exam. Tr. 389.

He then described what he does when performing his onshift exam, "in that particular area, I would have pulled in there in my pickup and looked at the height of the berm. And if I -- I usually get out and walk up to it, look over it, and make sure it's a substantial berm. You know, nothing has moved, you know, pushed away, or the height, you know, was [sic] been lowered or anything like that, something briefly shifted." Tr. 389. This process, the onshift exam, takes about five or ten minutes. Tr. 390.



Lutgring stated that an onshift means, “[f]rom the time the production with your equipment is running until the end of the day whenever they shut down.” Tr. 392. To the Court, this is the only definition that makes sense for that term as the underlying purpose is to inspect operations when production is underway. Consistent with that commonsense application, Lutgring also stated that he is not allowed to do an onshift before 6:00 a.m., and (obviously) he is not permitted to fill out his books regarding that exam until after that time. Tr. 392. When interviewed by Inspector Noel, Lutgring told him, upon being asked if he had looked at the berm site earlier that day, that he “had glanced over there that morning, you know, taking the shovel man down.” Tr. 394. Lutgring denied that he had ever told Noel that he had done his onshift exam that day. *Id.* In fact, he claimed that he told the inspector he had *not* done an onshift yet that day. Tr.395.

According to Lutgring, while at the hospital with the injured driver, Standish, the driver told him that it “was his second or third load of the day, and when he backed up there, everything seemed fine. Then, when he started to raise his bed, he felt the truck was sinking. And the longer he sat there, the more he felt the truck was going over the edge, so he decided to jump out of it.” Tr. 395.

In terms of determining just what caused the failure, the Court considers it of significance that Lutgring did agree with inspector Noel’s description that the “gob,” which refers to the material dumped at the berm site, is “more, like, just soupy mud that will slop out of the truck, if he stops suddenly, it will just slush over the side like water.” Tr. 392. He also admitted that berms need maintenance after they are constructed. Tr. 396. Further, he agreed that he told the inspector that “[b]erms are a constant problem with these dumps.” Tr. 397. Elaborating, he stated that they had to be maintained because of “what they’re hauling in their truck slops out. When them trucks come in there and turn their steering wheel to the right, the stuff will spill out of the bed on the ground, and that makes it slick. So you’ll take a dozer and scrape it up, and then carry it up over the existing berm area to get rid of it.” Tr. 397. As discussed further, *infra*, the Court concludes that Inspector Noel’s assessment of the cause of the failure, together with Lutgring’s concessions about the material being dumped, constitute the most reasonable explanation for the berm failure and this is the Court’s finding of fact on that issue.

Lutgring reaffirmed, upon cross-examination, that he arrived at the mine around 4:45 a.m. on the day of the accident and that his shift is from 6:00 a.m. to 4:30 p.m. Tr. 405. He is paid starting at 5:00 a.m. Tr. 406. On that morning, while customarily there are lighting devices, described as “light plants,” at the berm site, they were not turned on when he drove the men to their work locations. Tr. 407. He could not be sure if the lights were simply not on or whether they weren’t there that day. Tr. 407-408. Lutgring stated that, when he spoke to Inspector Noel later that day at the hospital, he told him both that he had “glanced” at the berm *and* that he “[h]adn’t made it to that area.” Tr. 408. Lutgring did not dispute that he told the inspector on that day that he thought the berm looked okay and that he thought it was mid-axle height. Tr. 409. Asked whether he noticed “any dark color to the berm,” he answered, “[n]o, couldn’t say. It was dark. And like I said, a light shined a little bit over there. It was just, you know, a dark shadow. And everything is black around there where they’re dumping. Because *that stuff splashes everywhere, and it’s black.*” Tr. 409-410 (emphasis added).

He also admitted that he told the inspector that berms are a constant problem on these jobs, and agreed that the purpose of the slurry pit berm at a dump site is to prevent the dump truck from over-traveling into the pit and that the idea is that the dump truck driver will feel the berm upon backing up and then dump the load. Tr. 410.

Lutgring did not retreat from his deposition testimony in which he expressed that the berm failed because the truck driver's back up and hit it hard upon backing up. Tr. 411. At the hearing it was his claim that the photos presented at the proceeding were clearer than those shown to him at his deposition, and therefore his opinion changed and he now believed that the tracks in the photos were from a bulldozer. *Id.* However, it is noted that his new view was not merely a nuanced change. When asked if he recalled that during his deposition and asked to look at a photo where there was a dark berm, and there were some tire tracks on the berm, he answered then was, “[i]t looks like the shale with gob dripped over it, and then I see spin marks, you know, like where the *tires*, you know, was sliding, because the grooves, just like the lugs on the *tires*, made the marks on that berm there.” Tr. 412. (emphasis added). Accordingly, he admitted that at his deposition, he believed that the marks on the berm were *tire* marks. *Id.* Despite that admission, Lutgring continued to assert that the better photos caused him to change his opinion. *Id.* Similarly, relying on the sharper photos, despite his answer at deposition, when he was asked, if he had any evidence ... or any reason to believe that Mr. Standish was hitting the berm really hard, and if he had “any reason to believe that Mr. Standish would have been hitting [the berm] really hard, he answered, “Well, I don't see no -- you know, other than that slide mark, you know.” Tr. 412.

It is fair to state that Lutgring's views about the cause of the failure and the role of the haul truck driver in that accident were subject to change. Perhaps his own words at the conclusion of his testimony best sum up his opinion, with his remark that he was “not sure why it failed, really.” Tr. 418.

Travis Kendall, Solar Services also employee, testified for the Respondent. He is the head equipment operator at the mine. At times he is also a backup foreman and he was acting in that backup capacity on the shift immediately *prior* to the date of the June 29<sup>th</sup> accident. Tr. 429-431. That prior shift ran from 6:00 p.m. until 4:30 a.m. *Id.* When acting as the backup foreman, he does the onshift. *Id.* Kendall stated that notation in the book that “berms were pushed” reflects the performance of maintenance and routine work. Tr. 433. If a hazard is detected which requires a berm to be pushed, it may or may not be recorded in the onshift book, depending upon if was taken care of or not. *Id.* Kendall described how he does an onshift exam of a berm, stating “before we start dumping in an area, I'll make sure the area is safe, and I'll go up, check the berms. If I can't get close enough to drive up to them, I'll get out and walk to them. And I'll look at the berm, I'll look on the other side of the berm, make sure I know where I've been to.” Tr. 435-436.

Focusing on the onshift he performed on the evening of June 28<sup>th</sup>, Kendall stated “[t]hat was a particularly easier one to check, because it's right there up the edge of the road and easy to see. So you know, obviously it looked like a good berm.” Tr. 436. He did not walk the berm; he drove by for his exam. *Id.* He stated that he saw no signs of cracks or any other problems for this onshift and saw no signs of the berm slumping, stating the berm was “uniform all the way

across.” Tr. 436-437. He could not recall if the berm was used for dumping that night nor if the light plants were used then. Tr. 437. Based on his testimony, and remembering that Kendall’s onshift was done during the evening, the Court finds that his onshift that night was, at best, a cursory exam of the berm.

Testimony returned to the subject of whether the exhibit photos displayed truck tire or dozer tread marks, with Kendall’s view being that the marks were made by a dozer. Tr. 439. At his deposition, he expressed that “when a truck bumps a berm it makes it tighter and it makes it better.” He also believed that if the dump truck driver had backed into the berm properly, the berm would not have failed. Tr. 444. However, he skirted naming Standish as engaging in aggressive driving, stating that “maybe it was someone else.” Tr. 445. His view that aggressive driving was the source of the problem stemmed from the fact that the berm failed. *Id.*

The driver of the truck involved with the berm failure, Shawn Standish, testified. On that day, June 29, 2016 he was operating a Caterpillar 775 haul truck, carrying slurry, that is to say, “gob,” back to the pit. Tr. 452. The accident occurred on his second trip to the dump that day. He described the dumping process he employed, stating that he “came to the dump, ...and passed the end dump berm. And [he] could visually see the berm in that dumping area. On the left side, if you hold up and just stay safely out of the way of any path that was about 150 foot to the south of you, you would back in at a 90.” Tr. 455. When backing up, he is looking out his driver’s side window. *Id.* Standish contended that the berm looked solid with nothing out of the ordinary. Tr. 455-456. Continuing with his description of the dumping process, he stated “you start backing up and make sure that you're square with the berm and then proceed on back, [at a speed that is] really slow ... very slow.” Tr. 456. In terms of the truck contacting the berm, Standish stated, “[s]ometimes it might go back to where you feel a little nudge ... [b]ut you're never going to ram all the way back. You can get wrote up for that.” *Id.* The “nudge” informs him that “you're definitely seated up against the berm, and your slurry is going to go all the way over the edge and not make a mess of the dump.” *Id.*

Standish maintained that he made sure he was completely square with the berm and that the berm looked normal. Tr. 458-459. Although he didn’t feel the “nudge” indicating contact with the berm, he “could tell [he] was close enough that [he] was going to be in the berm. And [he] sat [his] dump brakes. ... [a]nd then proceeded to grab the dump lever. When [he] did, before [he] even pulled up, [he] felt the truck kind of sink. And it scared [him] a little bit, so [he] looked to the right, and [he] didn't see the berm. [He] looked to the left, and [the berm] dropped out of sight. [He then] saw the top literally drop out of sight [and] kind of got -- got scared. And [he] put the truck back in low gear, and [was] thinking [he] need[ed] to pull forward, because it's -- material is going off. [He] just watched that berm drop. Something is definitely wrong. [He] tried putting the accelerator to the floor, and there were tire brakes on then, that's where our set brake and tried to release that, and when the truck – [he] was trying to pull forward a little bit. It needed something a little bit more. And then, [he] ... was very, very scared and thinking [he] need[ed] to get out of this truck, because behind [him], [he] looked down into the pit pretty much like a black gob. It's like a quicksand material, and [he] was worried that [he] would get stuck underneath that and suffocate, you know, [his] worst fear [was] this truck's going to end up landing, going over down into the pit.” Tr. 459-460.

Standish then “made a decision to set the blade back down, throw it in neutral, and grab [his] seat belt off at the same time and grabbed the door handle. [He] had a quick thought to jump off, but [he] knew [he] couldn’t – [he] didn’t think [he] could get off the chain, so [he] thought, no, [he] had to go off the front. And it’s a real quick thinking, -- so straight out the door. And then the seat belt kind of – [he] remember[ed] feeling it on [his] shoulder kind of catch. ... and then [he] ... ran completely off the end of the catwalk.” Tr. 460. Once he landed, he “turned [his] head and looked back, and then [ ] saw the front of the truck going on over down the pit,” and he saw it flip over as well. Tr. 461.

Subsequently, Standish was interviewed by MSHA about the accident and he admitted that he did get upset during that interview process. He explained that he was upset because the MSHA inspector seemed to think that he was dumping in an area where there was no berm at all. Tr. 464. Standish was adamant that there was a berm present that day, adding that dumping in an area with no berm is “definite no-no. You can lose your job or definitely get wrote up if something that you were not trained to do ever.” *Id.* Standish reaffirmed that on his left side he definitely saw the berm drop away. Tr. 464-465.

Cross-examination of Standish noted that he was previously deposed by the Secretary. Tr. 470. He agreed that when he met with Inspector Noel, he told him that he didn’t feel the truck hit the berm on that second load that day. Tr. 472. He also agreed that he felt the back of the truck start to sink and was trying to figure out what was going on, expressing to the inspector that perhaps he has hit a soft spot. Tr. 473.

Directed to photo exhibit P 5, Standish reluctantly agreed that he had drawn a line on the photo, indicating where the berm had been. Tr. 476. Asked if he told the inspector that the berm was approximately a foot lower than these side berms, Standish responded that he didn’t know if gave an increment but admitted stating that the berm had “rolled back.”<sup>11</sup> *Id.* Standish did not agree with the suggestion of some Solar Sources representatives who believed that he had been pushing on the berm, and thereby causing the slope to fail. Tr. 481-482.

Solar Source Mining safety director Steven Troy Fields testified. Included within his background, from 2006 to 2008, he was an MSHA inspector. Tr. 485-486. He was involved with the accident investigation for this matter but on the day of the accident he was not at the mine. Tr. 486. He arrived at the mine the day after the accident. Tr. 487. Directed to photographic Exhibits R 9 and R 14, he stated that the berms showed the presence of shot rock. Tr. 489. Fields stated he visualized shot rock in Exhibit R 14 as well and that this was consistent with what he saw the day after the accident. *Id.*

Asked his opinion for the cause of the berm failure, Fields answered, “[i]t appears that it got to the edge of that slope and gave away.” Tr. 490-491, Exhibit R 8. Regarding the cracks shown in Exhibit R 14, it was Fields’ view that it “[l]ook[ed] like the material below it has a giveaway” and that “the spoil had sloped off underneath.” Tr. 491-492.

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<sup>11</sup> In taking issue with some aspects of his July 7, 2016 interview with the inspector, Standish remarked that he was “very, very heavily medicated” at that time. Tr. 478.



On the subject of the time an onshift begins, Fields stated it is “[a]t whatever your designated times are. Like ours for production, it would be 6:00 a.m. to 4:30 p.m.” Asked from his experience as an inspector if one could “show up at 3:00 in the morning, drive all around the mine, fill out their book, and sign it,” Fields answered, “[n]o.” Tr. 492-493. Asked if one could call such an early exam on onshift, he replied, “[t]hey could, but they could get in trouble.” Tr. 493. This is so, he stated, because an onshift “is from the time the shift starts until the end of the shift.” *Id.* He added that the one has the entire shift in which to complete the onshift exam, a fact as noted earlier which is not in dispute. Tr. 493. Though already clear, Fields was asked, “if a foreman drives past an area 5:30, 5:00, pick a time, or dropping a crew member off at a shovel, is that legally an onshift examination.” He responded, “[n]o, it's not, ... [because] the MSHA requirement or law says it's -- the onshift is during the entire shift. Once a shift begins, then it's the -- you have the entire shift to complete that.” Tr. 494.

Fields was also asked about either violation being designated as an unwarrantable failure. He did not find any information indicating that the condition was obvious or extensive, nor that it had existed for a time period. Tr. 497-498. He also expressed that there had not been similar violations in the recent past, advising that, as best he could recall, there had been two previous such violations, one in 2008 and 2010. Tr. 498. He was also not aware of any agent of the operator knowing of the condition or allowing it to exist for a period of time. Referring to Ex. R 15, Fields informed that he told the Secretary's attorney during his deposition that he believed the tracks in that photo represented “tire tracks from the truck backing up.” Tr. 499. As with other witnesses for the Respondent, he changed his opinion. In his case, the change occurred after speaking with Travis Kendall, a person who had more experience in such matters, that the tracks were from a bulldozer. Tr. 500.

Fields maintained that he was not going to change his testimony as to why the berm failed, expressing, “I felt like after I had looked at the area that the -- the truck had backed -- you know, had pushed on the berm and it got -- got to that -- that soil edge there or spoil edge and then gave away.” Tr. 503. At the hearing he stated that, after considering all the information, including the depositions and photographs, that one “can look at the cracks, that that spoil edge did give away.” Tr. 503. Thus, Fields' view was that the spoil edge gave away underneath the berm. Tr. 504.

On cross-examination, Fields agreed that the purpose of a berm at the slurry pit dump site is to prevent dump trucks from over-traveling the dump site and that the assumption in the MSHA regulation is that the material the berm is made of will be strong enough to prevent such over-travel at the dumping location. Tr. 508. To that end, the purpose of the berm is for the dump truck driver to feel the berm before dumping its load and that for berms to be effective, they have to sit on solid material. *Id.* Fields agreed that if the area underneath that berm is weak or soft, it would defeat the purpose of having the berm, *but he added that the mine would not put a berm in such a location.* Tr. 509. Fields admitted that he didn't know what the material was at the top of the berm. Tr. 510.

Reminded of the position he took during his deposition, he affirmed his view that the haul truck operators had been pushing on the berm when they backed up and with that constant pressure on the berm it gave away. Tr. 512. Fields added that when he was talking about

pressure being created on the berm, and whether this would occur over one shift or over a period of time, he responded, “[i]t could be over a couple of shifts.” Tr. 512. However, despite that remark, because he wasn’t there, he couldn’t say that an examiner should have noted this problem. Tr. 513.

Fields did not have an answer when asked, “[i]f the berm is made out of a substantial material, why wouldn’t this dump truck have gone up over it as opposed to clearing the way as it did,” responding “I can’t answer that.” Tr. 515. He agreed that “the point of a substantial berm at that height is to stop the truck from going over. *Id.*”

Respondent’s Counsel took the position that the remedial measures the mine took after the incident should factor in the Court’s final penalty assessment as part of its good faith. Tr. 347-348. The Court does not agree. In fact the remedial measures, if considered, could work against the mine. Efforts at correcting a problem after an accident are generally not considered because if they were to be it could be an admission that the Respondent’s prior practices were inadequate. Further, while Respondent touted the efforts it made post the berm accident to make matters safer for dumping, Fields indicated that the mine *had* to do it per MSHA requiring it. Tr. 516-517.

### **The post-hearing briefs.<sup>12</sup>**

The Secretary contends that the “Respondent violated § 77.1605(l) when it failed to maintain the berm in a condition where it would restrain a vehicle from overtravel and falling into the pit.” Sec. Br. at 14.

The Secretary notes that “The test for determining whether a berm is sufficient to meet the requirements of 30 C.F.R. § 77.1605(l) is the reasonably prudent person standard [and that] the adequacy of an operator’s berms or guards should thus be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute.” Sec. Br. at 15, citing *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan.1983). Applying that standard, the Secretary asserts that the “Respondent was negligent when it failed to provide a berm capable of preventing Mr. Standish’s truck from going over the berm [and that the] Respondent’s berm maintenance was such that a reasonably prudent person should have known of the need to maintain its berm in a condition to prevent “overtravel and overturning” at its dump locations. *Id.* Solar Sources failed in that regard by not “[adding] new material to it to restrengthen the berm, or cut down the mud and get rid of the mud, and then add new berm material there.” *Id.* at 16, citing Tr. 92. The Court agrees and, as discussed above, finds as a fact that Solar Sources failed in that regard.

The Secretary also contends that the Respondent was highly negligent in its failure to maintain the condition of the berm, an assertion based on the claim that the mine knew or should have known about the violative condition or practice and for which no mitigating circumstances

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<sup>12</sup> The Court fully considered the parties’ initial and response briefs, but did not feel the need to expressly discuss points raised in the responses. The decision itself addresses matters from the responses.

were present. The Secretary asserts this amounts to an aggravated lack of care that is more than ordinary negligence, due to the berm's insufficient consistency and its failure to maintain the berm so that it would "deter a truck from overtravel or would redirect a truck or warn the driver of the likelihood of overtravel." *Id.* at 17. The Court agrees that the Respondent was highly negligent, noting that the inspector credibly testified that such conditions could not have developed overnight, that the wet slurry mix had a deleterious effect on the berm, and that Lutgring admitted to him that the berms needed constant attention.

Speaking to the significant and substantial claim, the Secretary essentially repeats the contentions it raised for the negligence issue, stating that the "inadequately maintained berm was hazardous, did not prevent overtravel, and resulted in a serious injury," and therefore was S&S. *Id.* at 18. Adding detail to that assertion, to the violation, the Secretary identifies the safety hazard was the "inadequate berm did not allow the truck to stop or to warn the driver of getting too close to the edge." *Id.* at 19. This failure "contributed to the hazard of serious injury due to the high likelihood any fall from that height into the slurry pit would cause fatal injuries of severe trauma and/or engulfment causing drowning." *Id.* As for the third prong of *Mathies*, the reasonable likelihood the hazard contributed to will result in an injury, the Secretary makes note that the muddy consistency of the berm deprived it of substantial material and such a condition was "not only highly likely to injure a miner and cause a fatality, but it actually did injure a miner and caused him to break both heels and an ankle." *Id.* at 19-20. Speaking to the fourth prong, the Secretary states that Solar's failure to maintain the berm to prevent overtravel and overturning was not only likely to result in fatal injuries, the event did occur and resulted in serious injuries to the driver. *Id.* at 20. Speaking more broadly to all the *Mathies* elements, the Secretary notes that an inspector's testimony is an important consideration in determining that a violation is S&S where such testimony is "reasonable, logical, and credible." *Id.* As discussed more fully *infra*, the Court agrees with the Secretary's S&S analysis.

Addressing the unwarrantable failure allegation, the Secretary notes that designation is to be measured "by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist." *Id.* at 22, citing *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 605 (Aug. 2006). Applying that test, the Secretary asserts that the duration of the inadequate berm was: "long enough for the hazard to have been identified and recorded in the onshift records;" of such extensiveness to cover the width of the slurry dumping area; without any efforts to address the hazardous berm's muddy consistency; and presented an obvious and dangerous hazard about which the Respondent should have known of its existence. *Id.* at 23-24. As stated before, and on the same bases, and as discussed further *infra*, the Court agrees that this was an unwarrantable failure.

Respondent notes that the burden of proof is on the Secretary and with that in mind asserts that the standard was not violated. R's Br. at 22. Respondent notes that "[n]othing in the standard addresses the base the berm is built on or what happens if the base collapses." *Id.* at 23. The Court notes that this is literally true, nothing in the standard expressly addresses the base, but that as explained *infra*, that is an incomplete and illogical ground to defeat the berm citation.

Respondent, continuing with its base, not the berm, failure contention, points to the truck driver in the accident and his testimony that the berm was of sufficient height, although he stated

that “the area where he dumped was lower than the berm on either side.” *Id.* 24. Respondent asserts that the MSHA inspector had no direct information about the berm’s condition prior to the accident, that there “was clear evidence of [a] crack in the base and in the left and right sides of the berm remaining,” and that the clear photographic evidence showed the shot rock, not slurry material, was used to build the berm *Id.*

Respondent also challenges the claim that there was high negligence involved. Looking to Part 100, the Respondent maintains that such a designation is appropriate only “if *no* mitigating factors exist.” *Id.* at 25. Assuming that a violation is found, Respondent contends there were “mitigating circumstances.” In using that term, Respondent looks to section 100.3(d) within Part 100, which provides that “[m]itigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards.” *Id.* at 27. It points to steps it has taken to prevent *another such accident* from happening, in that “Solar Sources completely redesigned how it dumped gob and slurry into the pit after this accident and submitted a modified ground control plan. There is now a chute with a berm and area just below it that is also “bermed off” [and that] [o]nce material accumulates, a dozer pushes the material into the pit. [ ] This keeps the truck operator behind two berms, some 20 feet away from the edge of the bank, and also leave a much larger and more stable base that will not collapse as occurred here.” *Id.* As noted, *supra*, Solar Sources’ witness Fields testified MSHA required the mine to take these steps.

The Court has considered the Respondent’s arguments. Although the Court finds that the Respondent’s post-incident action was laudable, and reflective of the serious attitude Respondent takes towards safety, there is evidence that MSHA required that action. In any event, it is not the type of action that is considered to be a mitigating circumstance. The Court remarks that the Respondent has misconstrued the mitigation element, as that factor looks to steps taken *before* the violation occurred, *not after*. The Court has determined that there were no cognizable mitigating factors.

In support of its contention that there was no unwarrantable failure, the Respondent asserts “[t]here is no evidence to support that the violation ... existed for any length of time.” *Id.* at 28. On this point it asserts that Inspector Noel “admitted that that he did not know when any problem developed,” and that those who did view the berm prior to the accident stated that it looked fine. *Id.*, citing the hearing testimony of Kendall and Fields. The Respondent also points out that the operator had not been placed on notice that greater efforts were necessary for compliance. In that regard, it notes that “[t]here is no evidence of any berm violations in this operator’s history, at least since 2010 or 2011 [and that] Inspector Noel admitted he found no other berm citations in the mine’s recent violation history.” *Id.* at 29. Respondent adds that “Inspector Noel also admitted that in his deposition he testified that he marked the berm citation an unwarrantable based on his belief there had not been a proper on-shift examination that morning, which was incorrect (and the citation alleging this was dismissed).” *Id.* at 30, parenthesis in brief.

The Respondent concludes its argument that no unwarrantable failure existed by contending that “the Secretary presented no evidence that the violation was obvious or posed a high degree of danger,” that “[t]here was no evidence or testimony that the operator knew of the

violative condition of the berm prior to the accident,” and that “there is no evidence that MSHA put Solar Sources on notice that greater efforts were needed for compliance.” *Id.* at 30-31.

Having considered the Respondent’s contentions, the Court concludes, based on the findings of fact and the discussion within, that the failure was unwarrantable.

## Discussion

### **The Court’s granting of the Respondent’s motion for a directed verdict regarding the alleged onshift violation, 30 C.F.R. §77.1713(a).**

At the conclusion of the testimony, Respondent renewed its motion for a directed verdict on the alleged inadequate onshift violation. Respondent pointed out that there was testimony that the alleged onshift exam occurred at 5:40 a.m. and that, as the work shift began at 6 a.m. whatever the nature of the exam, it was too early to qualify as an onshift exam. Respondent also contended that there is no evidence in the record that could support the notion that driving by the bermed dumping site 20 minutes before a shift begins can constitute an onshift and on that basis the Order must be vacated. Tr. 525-526. The Secretary responded that “there’s testimony that there was work that began prior to the official 6:00 a.m. shift. ... Mr. Fields made representations from the company that an onshift had been performed. ... [and] with [those] representations that it is reasonable to believe that MSHA would have understood that ... an onshift had occurred.” Tr. 526.

The Court then ruled, “to use that worn out phrase, if the shoe were on the other foot, MSHA would never be claiming that an onshift exam can occur before the shift began. [If there was a situation] ... where there’s a challenge to an onshift, and the only thing that the operator says is, ‘Well, 15 minutes, an hour before the shift, I did an exam,’ I can’t imagine MSHA would say, you know, ‘That’s close enough. We’ll take that. We’ll take that as proof that you did an onshift.’ ... [The Court remarked that it could never imagine that MSHA “would ever take such a lenient approach. [Instead MSHA] would be saying what the respondent has been [asserting here, that] [t]he shift begins at the time the shift begins. And therefore, the onshift is at some point after that shift begins, not before.” Tr. 528. On that basis the Court granted the Respondent’s motion for a directed verdict on Order No. 9102705. It is noted that the Secretary did not preserve an appeal on this ruling and its post-hearing brief makes no mention of the alleged onshift violation.

Accordingly because an onshift exam necessarily requires an exam made during the work shift, not at some time before or after that shift and because, rather obviously, the shift refers to the work shift, not some time before operations have started, **the directed verdict dismissing Order No. 9102705 is affirmed.**

### **The Section 104(d)(1) Citation berm violation.**

As noted at the outset of this decision, the cited standard provides that “[b]erms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations.” 30 C.F.R. §77.1605(l) (emphasis added). The Secretary also points out



that “berm” is a defined term, defined as “a pile or mound of material capable of restraining a vehicle.” Sec. Br. at 14, citing 30 C.F.R. § 77.2.

Preliminarily, it is observed that there is no dispute that this matter involved a dumping location and that a dumping truck overtraveled the berm at that location. The operator’s central contention is that it was *the base on which the berm sat that collapsed*, not the berm itself, which caused the accident to occur and therefore the standard was not violated. The Court does not agree. As discussed below, the Court finds that the berm itself collapsed, taking with it some of the base on which it sat. Independent of that finding, the Court also finds that the berm and its base work in synchrony and cannot be divorced from one another – thus, the berm must meet the requirements of the standard and the base must be capable of supporting the berm. To view the berm and the base as totally distinct would emasculate the berm standard, rather like asserting that a house was structurally sound but the foundation on which it was built was inadequate. Both must be sound and maintained as such under the standard. Further, the Respondent’s suggestion to the contrary would imply that there was nothing the mine could’ve done to prevent this accident. The credible evidence, chiefly, but not exclusively, from Inspector Noel, leads to a different conclusion.

Focusing on the berm itself, and noting that there were conflicting accounts about the condition of the berm, this decision necessarily involves some credibility determinations. As set forth in the findings of fact, above, the Court finds that Inspector Noel’s testimony and his explanation for the berm failure constitutes the more credible accounting of the cause of the failure. Too much of the testimony from the Respondent’s witnesses came across to the Court as rehearsed and displaying revisionism from their deposition testimony. More fundamentally, Lutgring agreed that the nature of the slurry being dumped was wet and, as Inspector Noel pointed out, this watery material would have the effect of diminishing, that is to say *weakening*, the integrity of the berm. The diminishment of the berm integrity, as the Inspector testified, could not have developed overnight; certainly more than a shift was involved for an accident of this magnitude to occur.

Further, as Respondent’s witness Atkinson acknowledged, there was some black material on top of the berm that’s left on the left and right, which he stated was to be expected “because when the material’s being dumped, it splashes all over the place.” Tr. 314. Atkinson conceded that slurry on top of a rock berm could cause it to collapse, although he contended that he did not see evidence of that at the site. Despite this attempt to deny that there was such a slurry related cause of the berm collapse, the Court finds that this admission by Atkinson supports the inspector’s explanation as to how a berm can deteriorate from the wet material being dumped upon it. Lutgring’s statement tacitly conceded this, with his remark that the berms needed constant attention.

As noted, the Court has concluded that the resolution of the alleged berm violation does not turn on whether the tracks displayed in several photos involve bulldozer or truck treads. Neither side has contended that determining the actual source of tracks controls the outcome of the decision for this matter. Accordingly, the Court concludes that the issue and debates over the source of the creation of the bar and the triangle wedge perceived in exhibit photos and whether the tracks in the photos were from a truck or a bulldozer are not essential determinations at all

and that they serve to unnecessarily distract from the central matters to be decided.

There is no question that the haul truck went through the berm and ended up going over the embankment, landing at the bottom of the slurry pit and that the haul truck driver, though receiving significant injuries from the accident, was fortunate to escape from his vehicle. Although the Respondent attempted to make the debate over whether the berm failed or, as the Respondent contends, the base on which the berm sat unexpectedly and without warning gave away, the failure need not be ascribed completely to one or the other. Both failed.<sup>13</sup> It is also worth noting that the issue is not whether the berm originally was made of shot rock; the Secretary agrees that, as originally constructed, it was likely substantial and made from shot rock. Rather, it's a question of whether it was properly maintained or allowed to deteriorate, with the Court finding that the latter occurred.

### **Unwarrantable Failure violations**

As the Commission has noted, "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, 2001 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct 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); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013), citing *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on*

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<sup>13</sup> As noted earlier there were some opinions presented suggesting that improper dump truck backing practices, while not the cause of the berm failure, could have contributed to it. That may be true, but it is noted that Lutgring was not critical about Standish's dumping practices when dumping loads into the pit, stating "[h]e always did a real good job, you know, following instructions," nor did he ever see Standish hitting berms hard or slamming into berms. Tr. 400. Further, the berm gave away and therefore the berm did not prevent overtravel, and in this instance overturning as well, at the dumping location. In addition, as noted earlier, while Fields, at the hearing and during his deposition, took the view that the haul truck operators had been pushing on the berm when they backed up and with that constant pressure on the berm it gave away, whether this could occur over one shift or over a period of time, he admitted, it could be over a couple of shifts. However, despite that concession, he was unable to say whether remark an examiner should have noted this problem. In the Court's view, Fields testimony supports the inspector's point about the importance of continued berm maintenance.



other grounds, 195 F.3d 42 (D.C. Cir. 1999); *see also Consol Buchanan Mining Co. v. Sec'y of Labor*, 841 F.3d 642, 654 (4th Cir. 2016). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSRHC 340, 353 (Mar. 2000).” *American Coal*, 39 FMSHRC 8, \*9, (Jan. 2017).

Related to that is the subject of negligence, the Commission has noted that it “evaluates the degree of negligence using ‘a traditional negligence analysis.’ *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citation omitted). Because the Commission is not bound by the Secretary’s regulations addressing the proposal of civil penalties set forth in 30 C.F.R. Part 100, the Commission and its Judges are not required to consider the negligence definitions in 30 C.F.R. § 100.3(d). *Id.* at 1263-64.” *Id.* at \*14.

In support of its claim that the violation was an unwarrantable failure, the Secretary named, among other factors, that “the condition existed for a period of time as evidenced by the muddy berm saturated with slurry material [and that the] Respondent had knowledge that berms were a constant problem requiring attention.” *Sec. Br.* at 14.

As detailed in the findings of fact, the Court considered all of the facts and circumstances of this case, and finds that the violation was an unwarrantable failure.

#### **“Significant and substantial” violations**

As the Commission has stated, “[a] violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained: 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 *Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). *Consol Pennsylvania Coal Co.*, 39 FMSHRC 1893, \*1899 (Oct. 2017). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The Court finds the Commission’s analyses in *Black Beauty*, 34 FMSHRC 1733 (Aug. 2012) useful.<sup>14</sup> There, the Commission determined that under the second *Mathies* element, “the

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<sup>14</sup> *Black Beauty* involved a related berm standard, 30 C.F.R. §77.1605(k), which provides “[b]erms or guards shall be provided on the outer bank of elevated roadways.” However, §77.1605(l) was also involved, as the judge allowed the Secretary to plead that standard in the alternative and the Commission did not take issue with that ruling. The berm standard at issue in this case, §77.1605(l), is even more precise in setting forth the berm requirements for dumping



judge accurately articulated the relevant hazard as “the danger of a vehicle veering off the elevated roadway and rolling, or falling, down the spoil incline.” *Id.* at 1741. That hazard clearly was present here and rather obviously, also under the second *Mathies* element, the Court finds substantial evidence that the lack of berms contributed to the hazard in this case.

In addition, the Commission upheld the judge’s conclusion that if a truck were to veer off the edge of the road, it is reasonably likely that the driver would receive an injury, and there noted that the relevant inquiry “is whether the hazard in question - a vehicle veering off the road because of a lack of berms - would be reasonably likely to cause injury.” It added that in *Musser Engineering, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, (Oct. 2010) (“*PBS*”), it stated “[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., the danger of breakthrough and resulting inundation, will cause injury.” We specifically instructed that the ‘Secretary need not prove a reasonable likelihood that the violation itself will cause injury.’” *Id.* at 1742. The Commission concluded in *Black Beauty* that “substantial evidence supports the judge’s conclusion that if a vehicle veered off the road, it is reasonably likely to result in injury. The evidence clearly shows that the road was steeply inclined and that a truck overtraveling the side of the road would fall 50 feet.” *Id.* at 1743.

This Court has observed that the *Mathies*’ S&S formulation is, at its heart, a tool of prognostication. In the infrequent occasions where the injury occurs, as happened here, it makes little sense to speak exclusively about applying such a forecast. Put another way, if the weather records show that it rained on a Tuesday, and it is now Wednesday, need we inquire whether, on that Monday, there was a reasonable likelihood of rain occurring on Tuesday? And even if the answer is yes, is it reasonable to ignore what occurred?

#### **Determination of an appropriate penalty where there has been a special assessment.**

Respondent notes that special assessments are governed by 30 C.F.R. §100.5, but that as the section does not does not state the “conditions warranting a special assessment ... the decision to issue a special assessment rather than a regular penalty is wholly within MSHA’s discretion. R’s Br. at 32. From that observation, Respondent, citing *The American Coal Company*, 38 FMSHRC 1987, 1993 (August 2016), then notes that when a matter is before the Commission, penalties for violations are to be assessed upon consideration of the six statutory factors under Section 110(i) of the Mine Act. *Id.* Respondent notes that in that decision the Commission expressed that “the Secretary’s proposal is not a baseline from which the Judge’s consideration of the appropriate penalty must start,” rather, “[t]he Judge’s assessment is made independently and, regardless of the Secretary’s proposal, the Judge must support the assessment based on the penalty criteria and the record.” *Id.* at 33, citing *American Coal* at 1995.

To support its contention that the use of a special assessment was inappropriate, Respondent returns to its argument that the violation did not reflect a high degree of negligence, that it was not unwarrantable and that there was no “extraordinarily high gravity or other unique aggravating circumstances on the part of the mine operator [nor was there an] excessive history of violations or repeated noncompliance with the cited standard.” *Id.* at 34. Respondent then

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locations. Therefore, the Commission’s analysis is fully applicable here.

adds that the Secretary's theory for the increased assessment was not supported, as it was not established that "the berm was made of gob material, that it was 26 inches high and that there was an improper on-shift inspection of the berm prior to the accident." *Id.* For those reasons, Respondent contends that, if a violation is found, any penalty should be based on low negligence and under a regular assessment only. *Id.* at 35.

The Secretary, in support of MSHA's determination to apply a special assessment, points to the narrative in that assessment that it was "based on the high negligence, the serious gravity, and the fact Respondent knew or should have known the berm construction was inadequate, yet it made no efforts to correct the hazardous condition." Sec. Br. at 27. Though not a Commissioners' level decision, and therefore not binding on the Court, the Secretary cites to an administrative law judge's rationale that inquired whether the "Secretary's special assessment rationale, as contained in the narrative findings, is consistent with the record and the evidence introduced at hearing." *Id.* at 28, citing *Rock N Roll Coal Company*, 38 FMSHRC 2831, 2865 (ALJ McCarthy, Nov. 2016). The Court is of the view that the judge's rationale makes sense and applies the same test here, finding that the special assessment in this matter is consistent with the record and the evidence introduced at hearing. To be clear, the Court's penalty determination has been determined by evaluation of the six statutory criteria.

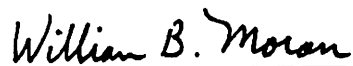
## Summary

Having found that the violation identified in Citation No. 9102704 was established and that the Inspector's evaluation of the gravity and negligence and his finding of unwarrantable failure and significant and substantial were demonstrated and that no cognizable mitigation was advanced, the Court therefore finds, that upon application of the statutory criteria, the penalty proposed by the Secretary should be applied.<sup>15</sup>

## ORDER

It is hereby **ORDERED** that the Citation No. 9102704 in this decision is **AFFIRMED** as written. Respondent is **ORDERED** to pay the civil penalty in the total amount of \$68,300.00 within 30 days of this decision.

Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390. St. Louis, MO 63179-0390.

  
William B. Moran  
Administrative Law Judge

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<sup>15</sup> The other statutory factors were duly considered. From the parties' stipulations, it is noted that the factors of good faith and ability to continue in business did not impact the penalty determination. Regarding production, Atkinson informed that the mine produces about 1.6 million (tons). Tr. 301. This means the Shamrock Mine is a large mine. The violation history is reflected in Exhibit P 2. The Secretary is required to prove all elements of the alleged violations by a preponderance of the evidence, which requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (internal citations omitted). The Secretary met this burden.

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